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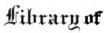
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The nomination by the president of Rufus W. Peckham of New York, to be Associate Justice of the Supreme Court of the United States, made vacant by the death of Mr. Justice Jackson, has given very general satisfaction. Judge Peckham has since 1886 been one of the judges of the New York Court of Appeals, prior thereto having been on the Supreme bench of that State, in which positions he has attained a reputation as a jurist of marked ability. The respect and regard to which he is entitled is best evidenced by the universal expression of regret on the part of the New York bar that his acceptance of this higher honor will remove him from the position which he has filled so long to his credit and that of his native State.

The Supreme Court of Ohio, in the recent case of Pittsburgh, Ft. W. & C. Ry. Co. v. Martin, has rebuked a favorite method adopted by legislatures of evading the constitutional provision requiring the enactment of general laws relating to cities or forbidding the passage of special enactments applicable to only one city. To override this the legislatures in many States frequently enact laws relating to cities having a population of over a certain number and less than a certain other number, and this is taken as a general law, although there may be only one city having a number of inhabitants between those designated in the act. A late Ohio legislature passed an act providing for the redistricting of "every city of the fourth grade of the second class which had at the last federal census a population not less than 5,550 and not greater than 5,560, or which at any subsequent federal census may have a population of not less than 5,550 and not greater than This was making a finer distinction than in the laws usually adopted. The Supreme Court of that State, in the case first mentioned, disposes of this attempt to pass a special law under a false guise in a short opinion containing this sentence: "We discover no reason why cities of the fourth grade of the second class, because at the federal Vol. 42-No. 1.

census they had a population of not less than 5,550 and not greater than 5,560, should require exclusive legislation; and the classification of such cities in themselves upon such a basis is, in our judgment, too restrictive, uncertain and illusory, to relieve the act from the constitutional infirmity of not being uniform in its operation throughout the State, but local and special in its character."

We called attention in a recent issue (41 Cent. L. J. 223), to the case of State v. Julow, wherein the Supreme Court of Missouri, declared void a piece of labor legislation, which assumed to prohibit employers from coercing or influencing their servants against membership in labor unions. The opinion in that case maintained the constitutional right of liberty of contract of employment, in like manner as liberty of contract on other subjects.

A more recent Georgia case, Wallace v. Georgia, etc., Ry. Co., 22 S. E. Rep. 579, also in effect upholds liberty of contract of employment. A statute of that State enacted in 1891, required incorporated railroad, express and telegraph companies to give to discharged employees or agents the causes of their removal or discharge, when discharged or removed. The act further provided an arbitrary penalty in the event of a refusal to comply with such law, to be sued for by the party aggrieved. The suit in question was brought by a perchief car inspector son who had been of the defendant company, and, upon his discharge, requested a statement of the reasons therefor, which request was not complied with. He demanded judgment for the amount of such penalty. In affirming the action of the trial court dismissing the action, the Supreme Court pronounced the statute void and the penalty unenforceable. opinion was written, but the Supreme Court held, as appears by an official syllabus of the case, that "the public whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employees and their late employers, designed, not for public, but for private information as to the reasons for discharges, and as to the import and authorship of all complaints or communications which produced

or suggested them. A statute which undertakes to make it the duty of incorporated railroad, express and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this State by all persons, natural or artificial. from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law."

NOTES OF RECENT DECISIONS.

GIFTS-NOTES - DEATH OF MAKER. - The Supreme Court of Pennsylvania decides in In re Kern's Estate, that where plaintiff gave her accommodation note to deceased, and was obliged to pay it, the fact that she paid it out of the proceeds of property which deceased had given her absolutely does not affect her right to recover against his estate on a note given her as security, and that a note not under seal, and without consideration, given by one to his child, is not enforceable against his estate, the gift being revoked by his death. An effort was made to sustain the case on the ground of natural love and affection of the maker of the note for his granddaughter; but the court said that "the argument falls into confusion from the indiscriminate use of the terms 'moral obligation' and 'moral consideration.' They are not convertible terms, even if there is any such thing as a moral consideration. Natural love and affection are a good consideration for an executed contract or gift, and in this State a moral obligation is a good consideration for an express promise; but natural love and affection are not a moral obligation in such

sense as will support even an express promise to make a gift. 'Natural affection is not a sufficient consideration to support a simple contract.' Byles, Bills (8th Am. Ed.) p. 'A consideration founded on mere love and affection is not sufficient to sustain a suit on a bill or note.' Daniel, Neg. Inst. § 179. It is the nature of a gift to be revocable until executed by delivery, and the authorities are uniform that the delivery of a promissory note or check is not an executed gift of the money, but remains revocable, and will be revoked by the death of the promisor before actual payment. 8 Am. & Eng. Enc. Law, 1820; Daniel, Neg. Inst. §§ 179, 180; Chit. Bills, p. 85; Byles, Bills (15th ed. 1891), p. 144; Wood's Byles, Bills (8th Am. ed. 1891), p. 213."

APPEAL-NOTICE-EVIDENCE OF SERVICE. -In Ward v. Springfield Fire & Marine Ins. Co., it is decided by the Supreme Court of Washington that extrinsic evidence cannot be received by the Supreme Court to show that the notice of appeal which appears from the record to have been served too late, was in fact served within the statutory time. The court cites Elliott on Appellate Pro. § 186, which says that "appeals are tried by the record. The transcript is the source from which appellate tribunals obtain their knowledge of the facts involved in the controversy between the parties before them, as well as the source from which they derive their knowledge of the questions upon which it is their duty to pronounce judgment. The record as embodied in a properly prepared and duly authenticated transcript imports absolute verity, and cannot be aided, varied, or contradicted by extrinsic evidence." See, also, Haynes, New Trials & App. § 283; McDonald v. Bowman (Neb.), 58 N. W. Rep. 704; Carey v. Brown, 58 Cal. 180; In re Fifteenth Ave. Extension, 54 Cal. 179; Boyd v. Burrell, 60 Cal. 280. In the lastmentioned case, which is directly in point, the court said: "In denying a rehearing in this cause, we think it proper to say that the transcript shows that the notice of appeal was served on the 18th of December, 1879, and filed on the 30th of January, 1880. attempt is made to show by affidavit before this court that it was filed at an earlier day, and within the time allowed by law. This cannot be allowed. It was so held in Boston

v. Haynes, 31 Cal. 107. The record of the court below cannot be altered or amended by proof made in this court. If it is incorrect, that must be made to appear by proper evidence to the court below, which has power to alter it so as to make it speak the truth. It would be a departure from all principle to allow a record sent to this court to be assailed by evidence of less dignity than a record. See Smith v. Brannan, 13 Cal. 107; Bonds v. Hickman, 29 Cal. 460; Satterlee v. Bliss, 36 Cal. 521. The party must seek relief in the court from which his appeal was prosecuted."

TELEGRAPH COMPANY—LIABILITY FOR AL-TERED MESSAGE.—In Shingleur v. Union Tel. Co., 18 South. Rep. 425, the Supreme Court of Mississippi considers some interesting questions in the law as to telegraph companies holding that a telegraph company is liable to either the sender or the sendee for damage sustained by reason of the delivery of an altered message; to the sender in contract or tort, and to the sendee in tort, and that where plaintiffs telegraphed their correspondents to sell certain cotton at 8 1-2 cents per pound, and the message as delivered read 85-16 cents per pound, and the cotton was sold at the latter price by said correspondents, acting for plaintiffs as undisclosed principals, and immediately thereafter advised plaintiffs of the sale, and plaintiffs paid the difference to their correspondents to protect their credit, there being no contract that plaintiffs would deliver cotton when there was a mistake in the telegram, the telegraph company is not liable to plaintiffs for the loss sustained. Cooper, C. J., dissented. The court says:

The first contention of appellee is that the sender does not make the telegraph company his agent in such sense that it renders him liable to the sendee in case an altered message is delivered to the sendee. The negative of this proposition is maintained by the English courts, which hold that the liability of the telegraph company arises out of the contract, and hence that the sendee, not being in privity with the company, can never sue the company. Playford v. Telegraph Co., Allen, Tel. Cas. 437; Henkel v. Pape, Id. 567. This view is also urged with great clearness and power in Gray Commun. Tel. \$5 68, 104, et seq., and in Bigelow, Torts, pp. 621-626, but the strongest reasoning in support of this view which we have found in any case, English or American, is in Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. Rep. 783, decided in A. D. 1889. This case contains an exhaustive review of the authorities, and holds that the minds of the parties in case of an altered message have never

met, and that neither can be bound to the other unless the telegraph company is the agent of the sendee, and this is repudiated on principle and authority. English view, in so far as it predicates the right of the sendee to sue on contract alone, leads to one very manifestly unjust result, to-wit, that since the sendee cannot sue the company (as held in Playford's Case, supra), nor the sender (as held in Henkel's Case, supra), he is remediless. According to what is called the "American Doctrine" (Gray, Commun. Tel. § 104, note 3; Thomp. Elect. § 426), the affirmative of the proposition under discussion is maintained; representative among the cases so holding being Rose's Case, Allen, Tel. Cas. 337, in which case the principal was disclosed, and the agent not bound. In De Rutte v. Telegraph Co., 30 How. Prac. 403, it was held that the party interested in the dispatch, whether sender or sendee, was the one who really contracted with the company, and that such person could sue in contract. In Dryburg's Case, 35 Pa. St. 298, the Supreme Court held that the company was the agent of both sender and sendee (upon very unsatisfactory reasoning), and hence either could sue in contract.

Turning from this view of the right of the sendee to sue the company in contract, and putting the right to sue on the ground that, in case of delivery of an altered message, upon which the sendee has acted to his damage, the sendee's right to sue is in tort for the injury to him, the wrong and the consequent damages, we find this view clearly and universally upheld by the American authorities. Gray, Commun. Tel. \$ 78; Thomp. Elec. §§ 427, 428, 430, 448; Dryburg's Case, 35 Pa. St. 298; Sherwood's opinion; Rose's Case, Allen, Tel. Cas. p. 840; Bigelow, Torts, p. 614 et seq.; Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. Rep. 783. Rose's Case, in so far as it held that the sendee could not sue in that case because the principal was the injured party, and could himself alone sue, is said by Mr. Gray (section 78) to be open to criticism, and is held unsound on that ground by other authorities. Mr. Thompson suggests in section 424 an additional reason why the sendee should be allowed to sue, and in section 427 puts the matter on the true ground. He says: "The true view which seems to sustain the right of action in the receiver of the message, or in the person addressed, where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs,-upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender or his principal, where he is agent, or the receiver or his principal, where he is agent." This is the doctrine of this court in Allen's Case, 66 Miss. 549, 6 South. Rep. 461. This review of the authorities will sufficiently indicate how the courts, in dealing with this purely modern agency, have been groping their way in their search for the true ground of liability, uselessly conjuring up analogies that do not exist, and misled by the apparent applicability of the doctrine of agency as existing between private individuals. This view last above given discards absolutely the doctrine of agency, as applicable between private individuals, as suiting the case of the liability of the telegraph company to sendee or to sender. It treats the telegraph company as an institution sui generis, a system unto itself, an independent transmitter of intelligence, an independent contractor, or (as Mr. Bigelow and Judge Sherwood most simply and best put it) as an independent principal. It is liable to the sendee in tort alone, as principal. It is liable to the sendee in contract or in tort, as principal. It is not liable to either as agent in any proper sense. Telegraph Co. v. Brown (Ind. Sup.), 8 N. E. Rep. 171; Telegraph Co. v. Hope, 11 Ill. App. at page 289, and authorities cited. "Whether the agency is special or general, the authority delegated governs all questions arising between the principal and his agent, out of the agency. Whether the agency is general or special, a principal is responsible to a third person dealing bona fide with his agent, where the agent acts within the scope of the authority actually conferred upon him by the principal, or where the agent acts within the scope of the authority which he has been held out by the principal as possessing. But whether the agency is general or special, a principal is not responsible to a third person dealing with his agent, where that agent acts beyond the scope of both these authorities. · · · It is clear that a telegraph company is actually authorized by its employer to communicate a certain message only. It is also clear that it is not held out by him as possessing an authority to communicate any, as distinguished from a certain message." Gray, Commun. Tel. § 105. The delivery, therefore, of an altered message, is the delivery of a message which the company, neither as general or special agent, had. or was held out as having, any authority to deliver; and the liability to the sender is that of an independent principal. It is perfectly obvious that the company is not the servant of the sender; the sender has no authority to control the company, as to the manner in which it does the act. Gray, Commun. Tel. 5 104 et seq. The steady growth of this view is shown by the statutes of all the States imposing upon the company the duty of receiving and sending messages for all persons, with the various regulating provisions embraced in these statutes; thus making what had been, prior to such statutes, merely the duty imposed by the law from the peculiar nature of the business of telegraphy, after such statutes a stat-utable public duty. And now we have gone the further and completer step indicated in section 195 of the constitution of 1890; all which enforces the justness of the declaration in Telegraph Co. v. Allen, 66 Miss. 555, 6 South. Rep. 461: "The courts then (in the early history of the English law, dealing with common carriers) as now, conscious of the needs of the public, expounded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public."

It is also true that the sender may sue the company in tort as well as in contract, in the case of an altered message. Mr. Cooley says: "In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party, on the same state of facts." Cooley, Torts, pp. 103, 104. So Mr. Bigelow says: "The fact that a contract existed, and was broken at the same time and by the same act or omission by which the plaintiff's cause of action arose, is only one of the accidents of the situation. The defendant owed, in respect of the same thing, two distinct duties; one of a special character to the party with whom he contracted, and one of a general character to others. • • • The duty, therefore, does not grow out of the contract, but exists before, and independently of it." Again: "What does it mean when it is said that even this contractee (appellant here answering to the contractee) may sue in tort or in contract for his damages? Certainly nothing, unless the original duty, which the defendant before the contract owed to all alike, still survives, even towards his contractee." And without prolonging this opin-

ion on this point, it is sufficient to refer to Bigelow, Tort, pp. 586, 587, 614, and to the elaborate discussion in Rich v. Railroad Co., 87 N. Y. 382. But, whether looked at in the light of contract or of tort, plaintiff's case comes inevitably to this: That plaintiff, at a time when he knew fully of the mistake in the tele gram, and when he could have delivered or refused to deliver the cotton, and when the minds of plaintiff and of Appleton, Dickson & Co. never having met, and there being, as to this sale, no contract made between them, plaintiff was, therefore, under no legal liability to deliver the cotton, nevertheless, acting on the "sentiment" that he would himself protect his agent (already fully protected by the liability in tort of the company to such agent), and maintain his business credit, did not deliver the cotton anyhow, and, having done so, now seeks to hold the company,—can the action be maintained? The only case holding that the action can be maintained, so far as our research has gone, is Telegraph Co. v. Shotter, 71 Ga. 767, 768. The facts in this case are identical with those in Pepper v. Telegraph Co., supra, where the court, after an elaborate review of the American authorities, say: "As already stated, Mr. Gray not only shows that upon principle the English holding is correct, but, while listing the cases above cited, as indicating a contrary view, states that most of them are dicta. There is but one case referred to by him which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of Telegraph Co. v. Shotter, 71 Ga. 760. With great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued, nor the conclusion reached. The learned judge places his conclusion in part on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant or business man would lose all credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message as delivered. We cannot see how the fact of governmental charge of the telegraphic system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government. Nor can we see how the commercial standing of the sender who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message can be affected." So the case of Harrison & Co. v. Telegraph Co., 10 Am. & Eng. Corp. Cas. 600, is a case directly in point, and stronger in its facts for plaintiff than this case. There plaintiffs, in Texas, wired Latham, Alexander & Co., in New York, to purchase 100 bales of cotton. As delivered, the telegram directed them to sell 100 bales. Latham, Alexander & Co. sold, without plaintiff's knowing anything of the error, and a loss resulted of \$129.50, which later, on settlement with Latham, Alexander & Co., plaintiffs paid, claiming they were compelled to pay. The court say: "The mistake which occasioned the loss was a mistake of the telegraph company, and not of the plaintiffs, and they (plaintiffs) were not bound to pay, or make good said loss to Latham, Alexander & Co.; and, if they made such payment, were not responsible or liable therefor. They could not hold the company liable over to them for repayment." This, too, in a case where the loss had been sustained without knowledge on plaintiff's part of the error. To the same effect are Henkel v. Pape, Allen, Tel. Cas. 567, and Verdin v. Robertson, Id. 697. It is not necessary to go so far, and we



express no opinion as to what would be the law had plaintiff here not known, before he acted, all about the mistake. In Pepper's Case and Shotter's Case the goods had been shipped to the place of residence of the sendee, and loss to some extent was inevitable to the sendee. As held in Pepper's Case, it was the plaintiff's duty, in view of all the circumstances, to make the loss as small as possible, and that he could then recover for such loss, as being himself to that extent-a loss thus legally sustained - the injured party. Mr. Gray correctly remarks (Commun. Tel. p. 185, note 11) that Shotter's Case put the liability upon a "moral, and not a legal ground." Here appellant had shipped no goods, had incurred no legal liability, had merely to refuse to comply with the terms of a contract he had never made, and remit Appleton, Dickson & Co. to their adequate remedy against the company. His payment was voluntarily and gratuitous, and cannot, on any sound or just principle, create for him a cause of action where none existed prior to such voluntary payment.

IS A CAUSE OF ACTION FOR A STAT-UTORY PENALTY ASSIGNABLE?

§ 1. Qui Tam and Penal Actions .- Many statutes which prescribe a penalty for particular offenses, or for the omission of some public duty, go further and provide that the penalty, or some portion of it, shall be recovered in a civil action by the informer or the person aggrieved. Such provisions are usually directed against common carriers, telegraph and telephone companies, and such instrumentalities for the performance of duties to the general public, and such actions are so frequent in our courts that it becomes of some importance to know whether or not the cause of action of the informer or person aggrieved, in such cases is assignable. Or, in other words, will it survive to his personal representative in case of his death? While no case has been found precisely in point, I think the question must, on principle and authority, be answered in the negative. Such a right of action clearly arises ex delicto; it is the result of a tort or public wrong; there is no element of contract in it. Now, while the rule of the common law that actions ex delicto do not survive, has been considerably modified by later statutes and decisions, the relaxation has never extended to such cases as these. Moreover, such assignments would seem to be within the policy of the law as expressed in the rule against champerty and maintenance. The general principles on these subjects, both at law and in equity, are well settled.

§ 2. Rule as to Survivals at Common Law. -At common law the rule is plain. A right of action ex contractu upon the death of either party survives to or against the personal representative of the party deceased. But where the action is ex delicto the rule is otherwise, and the maxim actio personalis moritur cum persona applies. At common law no action for a tort survived the death either of him who inflicted, or of him who suffered it. "No action," said Lord Mansfield, where the form of action must be quare vi et armis et contra pacem, or where the plea must be that the testator was not guilty, could lie against the executor; upon the face of the record the cause of action arises ex delicto, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."1 So an action would not lie for the personal representative. Executors and administrators are the representatives of the temporal property; that is, the debts and goods of the deceased, but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate.2

§ 3. Rule as to Assignments.—Moreover, in equity and law an assignment which violates the policy of the law against champerty or maintenance, as operating merely to procure and promote litigation, will be held void as against public policy, even though it may not strictly amount to the criminal offense of champerty or maintenance.8 Said the Supreme Court of Michigan: "The general doctrine, both in law and in equity, has always been that nothing is assignable that does not directly or indirectly involve a right of property. It has been held repeatedly in this State that equity will not enforce the demands of an assignee of a right to sue for fraud when the cause of action is confined to that.''4 Again, as stated by the English Court of Equity: "The right to complain of a fraud is not a marketable commodity."5

§ 4. Common Law Rule Applied to Ac-

¹ Cowp. 375.

² Chamberlain v. Williamson, 2 Maule & S. , cited with approval in Ward v. Blackwood, 41 Ark. 298.

³ Pomeroy Eq. Jur., §11276; 2 Story Eq. Jur., § 1040h; 1 Am. & Eng. Ency., p. §33, tit. "Assignments."

⁴ Dayton v. Fargo, 45 Mich. 153. See to the same effect Illinois Land & L. Co. v. Speyer (Ill.), 27 N. E. Rep. 931; Bailor v. Dailey, 7 Mackey, 175.

⁵ De Hoghton v. Money, L. R. 2 Ch. 169. See also Milwaukee, etc. R. Co. v. Milwaukee & Western R. Co., 20 Wis. 183; Smith v. Thompson, 54 N. W. Rep. 168, 94 Mich. 381.

tions for Statutory Penalties .- It is well established that, at common law, actions on penal statutes do not survive.6 The federal courts, when in the exercise of their common law jurisdiction, that is, in cases where the penalty or for forfeiture is imposed by an act of congress rather than by a State statute, have enforced this rule of the common law. Thus in Schreiber v. Sharpless⁷ the suit was for certain penalties and forfeitures, under a statute⁸ for the infringement of a copyright. The defendant died before issue was joined. The plaintiff sought by writ of scire facias to bring in the executor of defendant's will, claiming the right to do so under a State statute. The court held that the question of survival is not a question of procedure, but depends upon the substance of the cause of action; that, as the suit was not for the damages which plaintiff had sustained by the infringement, but for penalties and forfeitures recoverable under the act of congress for a violation of the copyright law, the question of survival is not affected by the State law, but is governed by the common law in the absence of a federal statute, and the court held that the action did not survive. It may be noted that of the penalties imposed by that statute,9 one-half went to the proprietor of the copyright and one-half to the use of the United States. In United States v. De Goer, 10 the District Court for the Southern District of New York (Brown, J.), in an action for the forfeiture of the value of an importation of gloves for fraudulent undervaluation, held that the act,11 though partly remedial, was mainly punitive and in that case highly penal, because the loss is out of all proportion to the pecuniary loss incurred by the government; that the action for forfeiture, not being divisible as respects the actual pecuniary loss to the government, was subject to the general rule and abated by the defendant's death.

§ 5. Is the Common Law Rule Affected by Statute.—Such being the common law rule as to the survival of causes of action ex contractu and ex delicto respectively, and such the application of the rule, at common law,

to actions to recover statutory penalties, it remains to be considered how far, in such cases, the common law has been modified by the statute as to the survival of actions. In many of the States statutes have been passed enlarging the common law rule as to the survival of actions. Thus, in Arkansas, it is provided that an "action for wrongs done to the person or property of another," may be maintained by or against the executor or administrator of either party respectively.12 Will such a statute authorize the survival of an action to recover a statutory penalty? As we have said, the point is not precisely decided. The Arkansas court, however, has held that the section does not apply to actions for malicious prosecution. In Ward v. Blackwood,18 the court says: "The language of the statute includes every action, the substantial character of which is a bodily injury, a damage of physical character, but does not extend to torts which do not directly affect the person but only the feelings or reputation, such as malicious prosecution."14 In Davis v. Railway Co.,15 the same court said of this statute, that the action preserved thereby is "for the loss sustained by the estate, and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of decedent's creditors if there are anv." In another case, it was held that an action for death by a wrongful act survives the death of the wrongdoer, but the action for the benefit of the widow or next of kin abates on the wrongdoer's death. The court says that the statute does not purport to create a new cause of action or liability, but to devolve an existing common law right or liability on the administrator; that to that extent it abolished the common law; that the injury to the person mentioned in the provision must be construed to mean a bodily injury of a physical character and no other,16 while the injury to the property mentioned in the section so far as it relates to personal property, is such only as was contemplated by the statute of 4 Edward III., ch. 7, on the same subject. 17

⁶ B. 15, Comyn's Dig. tit. Administration.

^{7 110} U. S. 76.

⁸ Rev. Stat. U. S., § 4965.

⁹ Rev. Stat. U. S., § 4965.

^{10 88} Fed. Rep. 80.

¹¹ Act of 1779, 1 Stat. L. 677.

¹² Sand. & H. Dig., § 5908; Mansf. Dig., § 5223.

¹⁸ 41 Ark. 298.

¹⁴ Citing Smith v. Sherman, 4 Cush. 408; Nettleton v. Dinehart, 5 Cush. 543; Norton v. Sewall, 106 Mass. 143.

^{15 53} Ark. 126.

¹⁶ Citing Ward v. Blackwood, 41 Ark. 295.

¹⁷ Davis v. Nichols, 54 Ark. 858, citing and relying

The language of this old statute shows clearly that the actions which were by it preserved to the personal representative, were limited to those arising out of wrongs to the property of the decedent. It is as follows: "Whereas, in times past executors have not had actions for a trespass done to their testators as of goods and chattels of the same testators carried away in their life, and, so, such trespasses have hitherto remained unpunished, it is enacted that the executors in such cases shall have an action against the trespassers and recover their damages in like manner, as they, whose executors they be, should have had if they were in life." Clearly this statute cannot be held to provide for the survival of the right of action for a statutory penalty.

§ 6. Such Penalties not Liquidated Damages.—There is no element of property in the right to sue for a statutory penalty, nor can the action be regarded as ex contractu in any Such enactments are not intended to fix liquidated damages, as a compensation to the person wronged, but rather to prescribe a punishment of the wrongdoer that may have the effect of deterring others from like offenses. The Arkansas court, in discussing cumulation of penalties for overcharges on the part of carrier of passengers, said that "the act was not intended to provide a compensation for the injured passenger; but to deter the railroad companies from taking excessive fares by punishing every such act. Each overcharge is a violation of law, and every payment of it is a legal wrong to the party making it, who is thereby aggrieved within the meaning of the act, and by its express terms entitled to sue." Again, in Baltimore, etc. Tel. Co. v. Lovejoy, 19 where the suit was against a telegraph company to recover the statutory penalty for the nondelivery of the message,20 it was held that the action was for a statutory penalty and not ex contractu, and was not within the jurisdiction of a justice of the peace; that though the suit in such cases be in the form of an action of debt, yet "debt for a statutory penalty, while it was in form ex contractu, was in reality

founded upon a tort." A like interpretation upon Russel v. Sunbury, 87 Ohio St. 372; Witters v. Foster, 26 Fed. Rep. 737.

has been put upon similar statutes in other States. Thus, in Virginia, in West. Union Tel. Co. v. Bright, 22 a suit to recover a penalty of \$100 for failure to deliver a telegram is distinguished from "any action on contract" as being a proceeding founded, not upon contract but upon tort, i. e., a wrongful violation of a public duty. It is true an action of debt lies for a statutory penalty, but this is because the sum demanded is certain, and not because the cause of action arises ex contractu.28 Again, in Western Union Tel. Co. v. Pettyjohn,24 the same court, under a provision of the Code,25 limiting the jurisdiction of a justice of the peace to any claim for a fine, if the amount thereof does not exceed \$20, and to other claims where the amount does not exceed \$100, it was held that a justice has no jurisdiction to enforce the \$100 penalty imposed by the above quoted statute upon telegraph companies for failure to deliver a dispatch, since such penalty is a fine within the meaning of the statute. In Indiana, there is a statute imposing a penalty of \$100 on telegraph companies for failure to transmit messages with impartiality and good faith, and in the order in which they are received, to be recovered by the person whose dispatch is postponed or neglected. It has been repeatedly held that this is a penal statute, and does not award liquidated damages. Said Elliott, J., in Western Union Tel. Co. v. Pendleton: "No question of the right to damage is involved; the single question is as to the right to recover a statutory penalty. Counsel are in error in asserting that there is a conflict in our cases upon this subject; from first to last it has been steadily held that the statute is a penal one awarding not liquidated damages but a penalty. It is also decided by these cases that the foundation of the right is the contract with the corporation, but in none of them is it intimated that the recovery is for damages for a breach of contract; on the contrary, all our decisions affirm that the recovery is for a penalty given by statute to a private individual." Again, it

Railroad Co. v. Gill, 54 Ark. 106.48 Ark. 801.

³⁰ Mansf. Dig., § 6410.

²¹ See also Bagley v. Shoppach, 43 Ark. 375.

^{22 20} S. E. Rep. 147.

²⁸ Chaffee v. United States, 18 Wall. 516.

^{*4 88} Va. 296, 13 S. E. Rep. 451.

²⁵ Code Va., § 2989.

^{26 95} Ind. 12.

²⁷ See also Carnahan v. West. Union Tel. Co., 89 Ind. 527; West. Union Tel. Co. v. Adams, 87 Ind. 598; West. Union Tel. Co. v. Gongar, 84 Ind. 176; West. Union Tel. Co. v. Hamilton, 57 Ind. 181: West. Union Tel. Co. v. Buchanan, 35 Ind. 436.

is said: "The statute is a highly penal one, and we cannot extend its operation by a liberal construction."28 In California a statute similar to that of Indiana, except that the penalty is \$500 instead of \$100 to be recovered by the sender, was construed in Thurn v. Alta Tel. Co.,29 and it was said: "The sum to be recovered is a penalty for this breach of duty (i. e., the failure to transmit the message), and the act in this section is a penal law, and is to be strictly construed."30 The legal characteristics of a penal statute are admirably stated by the "A penal stat-California court as follows: ute is one that imposes a penalty or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong that concerns the good of the public, and is commanded or prohibited by law. The law generally first prescribes what shall or what shall not be done, and then declares the penalty. Its primary object is punishment and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action.81

§ 7. Conclusion.—Finally, it would seem to be clear, beyond question, that a statute prescribing a penalty for the commission of some offense, or the omission of some duty, is a penal statute, notwithstanding a provision that a portion or all of the penalty may be recovered in a suit, civil in form, by the informer, or "person aggrieved;" that such penalty is a punishment for a public tort, and not liquidated damages in compensation of a private injury; that, therefore, the cause of action given by such a statute arises ex delicto and not ex contractu, though the wrong which constitutes the gravamen of the offense is in itself a breach of contract; that being ex delicto, such cause of action is not assignable, and does not survive under the principles of the common law; and that since it does not arise from injuries either to the person or property of the plaintiff, it is not within the statutes on the survival of causes of action. WILLIAM L. MURFREE, JR.

28 Rogers v. West. Union Tel. Co., 78 Ind. 169, citing West. Union Tel. Co. v. Axtell, 69 Ind. 199.

29 15 Cal. 472.
 30 Citing Russell v. Lby., 13 Ala. 131; Batchelder v.

CONDITIONS SUBSEQUENT — SUPPORT — OC-CUPANCY OF LAND.

RINGROSE V. RINGROSE.

Supreme Court of Pennsylvania, October 7, 1895.

A deed, wherein the consideration is the support and maintenance of the grantor on the land conveyed, inasmuch as it provides for an occupancy of the land, contains a condition subsequent, which may be enforced against any one into whose ownership the land may pass.

GREEN, J.: The deed from Roger Ringrose and his wife, the present plaintiff, to Michael Ringrose, dated March 28, 1874, was for three tracts of land, one of which, known as the "Homestead Farm," containing 100 acres, is the subject of the present action of ejectment. A nominal consideration of \$3,000, which was never paid, or intended to be paid, was recited in the deed; but in the body of the deed, and immediately following the description of the lands, appears the following recital: "The above-described land and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother, Roger Ringrose and Mary Ringrose, his wife, to do well and sufficiently maintain, support, and keep the said Roger and Mary Ringrose, his father and mother, during their natural lives, or the survivor of them, with good and sufficient meat, drink, apparel, washing, and lodging, use and occupancy of the dwelling where they now reside, and medical attendance in sickness and in health, and the funeral expenses of either of them, with the use of horses and carriages to take them to and from church at any time, and all times, and elsewhere at all times, as they may wish to go, and to furnish to each and either of them the sum of \$25 per year during their natural lives, and also to pay to Mary O'Neil \$250, and to Bridget Ringrose \$250, at the death of the said Roger Ringrose and Mary Ringrose, his wife, and not before." It is apparent at once that the true and only consideration of the conveyance was the performance by Michael Ringrose of the stipulations expressed in the foregoing recital. The expression of the obligation of the grantee is peculiar, but perfectly clear: "The above-described land and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother," etc.; that is, the land is conveyed because of, or in consideration of, the agreement of the grantee to do the several things next expressed. Of course, the performance is to take place in the future. The question arising in this case is whether the provision in favor of the grantors is a charge upon the land which will follow it into the hands of subsequent purchasers, whether at judicial or private sales. Being embodied in the deed, it is notice to all purchasers claiming by subsequent conveyances. If the agreement for support and maintenance was a mere personal covenant of the grantee, unaccompanied by any provision for the permanent occupancy by the

Kelly, 10 N. H. 436.

31 Citing Reed v. Northfield, 13 Pick. 94; Suffolk Bk. v. Worcester Bk., 5 Pick. 106; Frohock v. Pattee, 38 Me. 103; Bayard v. Smith, 17 Wend. 88; Sedg. Stat. & Const. L. 333 et seq.

grantors of any part of the land conveyed, it would not be a charge upon the land. This was the case in Krebs v. Stroub, 116 Pa. St. 405, 9 Atl. Rep. 469, where the contract, while it contemplated the event of a residence on the land at the mere will of the grantors, made no provision for it, conferred no such right upon the grantors, and it was not reserved by them, expressly or otherwise. The deed was absolute to the grantee, who executed a bond independently of the deed, the condition of which alone expressed the things he was to do. But in this case the deed itself provides in favor of the grantors for the "lodging, use, and occupancy of the dwelling where they now reside," and it was to continue during their natural lives. As all the services which were to be rendered to the grantors were personal to them, they were necessarily to be rendered to them as occupants of the house on the homestead where they then, and for many years before, had resided. In the case of Rohn v. Odenwelder, 162 Pa. St. 346, 29 Atl. Rep. 899, where a similar provision was contained in the deed, we held that it created a charge on the land as to all the provisions. We said: "Immediately after the provision for the widow is a direction that both husband and wife, grantors in the deed, shall have the right and privilege to occupy three rooms of the house during their joint lives and the life of the survivor. As this is a palpable charge upon the title, into whosesoever hands it might fall, it is entirely consistent with the idea that the grantors intended to have the security of the land for all the reservations in the deed in their favor." It is true that the words of the grant in that case contained at the beginning the expression, "under and subject, nevertheless to the payment of the sum," etc., and those words were held to create a charge on the land, although they were annexed simply to a direction to pay money. But the provision for the occupancy of part of the house also created such a charge, and it carried with it all the provisions in favor of the grantors.

In the case of Wusthoff v. Dracourt, 3 Watts, 240, we held that a devise of a house to one Henrietta Miller for life, with remainder in fee to her children, "reserving, however, two of the rooms of said house for the use and during the life of the widow, Mary Wusthoff, mother of said Henrietta Miller, and wife of Julian Dracourt. I desire by this fourth article that the widow Wusthoff may have the choice of those two rooms which shall the best suit her, because I desire that the said widow, Mary Wusthoff, should be sure of a shelter, home, during the time she may have to live,"—created an estate for life in the widow Wusthoff in the two rooms, of which she might make any disposition, and that it did not create a mere easement for her personal use. The widow Wusthoff selected the two most valuable rooms in the house, and, instead of occupying them herself, leased them to a stranger for a money rent, which she received and retained for ber own use. We held that she was at liberty to

do this, although her daughter, the devisee of the whole house for life, was obliged to pay the taxes and ground rent, because the widow's interest was an estate for life in the two rooms. In the present case it is not necessary to go so far. Here the right to lodge, and the use and occupancy of the whole house, was preserved to the grantor and his wife during their joint lives and the life of the survivor. As a matter of course, this right could not be enjoyed without having and exercising possession of the house, and the interest of the grantors in the house was beyond all question a life estate in both. Said Rogers, J., in Wusthoff v. Dracourt, "The devise of the use of a thing is a devise of the thing itself."

In the case of Bear v. Whisler, 7 Watts, 144, the grantor, Philip Hartman, made an agreement with Jacob Angney, by which he sold and conveyed to Anguey a certain tract of land containing 125 acres, "for and in consideration of the said Jacob Angney, his heirs, executors, administrators, or assigns, or either of them, faithfully discharging the following covenants and agreements, to-wit: The said Jacob Angney shall pay six certain obligations of \$80 each;" and, further, that "said Jacob Angney shall and will grant and provide for said Philip Hartman and Elizabeth, his wife, during their natural lives, the privilege to occupy that part of the dwelling house which they now live in, and provide" them with flour, firewood, a cow, hay, and pasture, two pigs, etc. An ordinary deed in fee simple was afterwards made, conveying the title to Angney, with a recital at the end of the attesting clause that it was made subject to the conditions and obligations of the agreement. The grantee not having performed all the terms of the agreement, and the land being sold away from him at a sheriff's sale, an action of ejectment was brought by the heirs of Hartman, the grantor, against an alienee of the purchaser at sheriff's sale to enforce the payment of the money obligations mentioned in the agreement. We held that the terms of the agreement could be enforced as by the grant of an estate upon conditions, and upon that subject we said (Rogers, J.): "Whether this was an estate on condition depends on the intention of the parties indicated by the agreement and the deed, which must be taken as one instrument. The principal object of the contracting parties was to provide a comfortable provision for the grantor and his family. If the intention is clear, and is expressed by apt words, why should the vendor be restrained to the remedy by the action of covenant? If the vendee had altogether failed in the performance of his agreement as to the vendor, would it have been an adequate remedy to the vendor to give him an action of covenant? It is manifest it would not. Would he not have been entitled to recover the possession of the premises, in such a case, by action of ejectment? But if the vendor would himself have been entitled to this remedy, I cannot perceive why the present plaintiffs are debarred from it, particu-

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larly as the object is merely, in this form of action, to enforce the performance of the agreement in good faith. The provisions of the deed equally apply to the recipients of the money as to the vendor himself. But, furthermore, it is apparent from the face of the deed that something remains yet to be done by the vendee before his title is perfect, and that so far he may be viewed in the light of a trustee in equity for the vendor, notwithstanding the legal title has been conveyed. Of this the purchaser at the sheriff's sale had notice, because it is spread upon the face of the title under which he claims. We must look to the substance of the agreement, and not to the form. * * * So a purchaser at sheriff's sale takes the land subject to the payment of purchase money, which appears on the face of the deed to remain unpaid, and of which he has notice." The whole of this reasoning is directly applicable to the facts of the present case. In Bear v. Whisler the conveyance was absolute without any condition on its face, but by a brief reference to the agreement subject to which the conveyance was made all the stipulations of the agreement were imported into the deed with the same effect as if they had been written in the deed. The word "subject" merely gave notice of the conditions and obligations of the agreement, but the agreement itself did not contain that word, or any other equivalent word or expression operating as a condition or restraint upon the effective words of the conveyance, except as such a consequence was derived from the terms of the agreement itself; hence the whole force of the reasoning of the opinion of this court was based upon the inquiry, what was the intention of the parties? In the present case the words of the agreement of the parties are incorporated into the deed, and are a part of it; and they need no words of reference or condition in another instrument to bring them within the operation of the deed. Being in the deed in this case, they have the same operative effect as was given to them in Bear v. Whisler after they were brought into the deed by the subjecting and conditional reference in the deed. The question, then, what was the intention of the parties as to the estate? being upon condition, the solution is perfectly simple. The deed expressly declares that the lands are conveyed to the grantee "by his agreeing to support his father and mother," etc.; that is, because he agrees to support them, for that reason, and upon that consideration, they have made the conveyance. The cause and reason of the conveyance are more effectively and directly expressed in these words than by the words "under and subject," or "upon condition;" for the obligatory words immediately follow the words of conveyance and description, and the connecting words, "by his agreeing to support his father and mother." In other words, A conveys land to B. B thereby agrees to support the grantor, and B takes his title clogged with this expression of the purpose of the conveyance to him. It is conceded that if the deed had con-

tained the words "subject to the support," etc., or "on condition of the support," etc., those words would have created a condition which would have fastened on the title. Why? Manifestly because such was the intention of the parties. But such intention is not specifically declared by such words. It is inferred, because the purpose of support is implied from the words "subject to," or "on condition of" support. But that purpose is more directly expressed when the deed declares that "the above-described land, and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother." It is true, more words are used, but they are more expressive of the very purpose and intent of the conveyance.

There are, however, other reasons quite as forcible as the above, establishing the same intent. The "use and occupancy of the building where they now reside" necessarily imports the retention of the possession of part of the premises granted for the purpose of receiving the support and maintenance provided for, and these words, as we have seen, create an estate in the land which belongs to the grantors. If it belongs to the grantors, it never passed to the grantee, and hence affects his title through all its subsequent movements. The other stipulations are also such as to indicate clearly that they were to be performed on the land. Thus the grantors are to be supplied, while occupying a house on the land, with "good and sufficient meat, drink, apparel, washing, and lodging," also "medical attendance in sickness and in health, and the funeral expenses of either of them, with the use of horses and carriages to take them to and from church at any time, and all times, and elsewhere at all times as they may wish to go." It is simply incredible that it ever entered into the minds of either of the parties that such services as these were to be rendered at any other place than on the land itself. At any other place they would be an intolerable and costly burden, which would practically destroy the value of the grant.

In the case of Ogden v. Brown, 33 Pa. St. 247, the words of the instrument were a present grant of title to the grantee "in the consideration that the said Stephen Wilcox deliver unto me, the said Amy Cranmer, one-third of all the produce of all kinds whatsoever,—grain to be delivered in the half bushel, and hay in the barn,-during my natural life; then the said Stephen to have free and peaceable possession, clear of all incumbrances except the lord of the soil." We held this to be an executory contract, under which the fee passed to Stephen Wilcox on the death of his mother, although there were no words of inheritance in the deed, simply because such was the intention of the parties. In the opinion by Strong, J., he said: "The purpose of the instrument was so evidently to make provision for Mrs. Cranmer, while she should live, that it can hardly be presumed her intention was to part with her interest irrevocably, without effectuating her pur-

pose." We cite the case as an illustrative instance in which the legal effect of the instrument was made to depend upon an interpretation of the intent of the parties, and that intent was chiefly worked out by the consideration that the grantor meant to have support during her life as a result of the grant. We think the same line of reasoning affects the interpretation of the instrument we are considering. It is entirely conclusive that Roger and Mary Ringrose intended to have their support from their son, Michael, during the whole of the remainder of their lives, as a result and as the reason for their conveyance of the title. The consideration could never be paid until the death of both of them, and an actual residence on the land during the entire period was specifically provided as a part of the consideration of the conveyance.

In construing a similar instrument in Shirley v. Shirley, 59 Pa. St. 267, Thompson, C. J., said: "Courts, in my opinion, should be slow to give the effect of absolute conveyances to instruments for provisions made between parents and children of the kind of which we are speaking, unless the intention be very clear. Such agreements are usually fruitful sources of strife, litigation, and very often of great wrong to aged and feeble parents; and, when held to be absolute conveyances, it puts them entirely at the mercy, sometimes of unwilling, and often unkind, offspring." There could be no more forcible or pointed illustration than is afforded by the facts of the present case of the justice and humanity of the foregoing comments. The venerable plaintiff is now almost 90 years of age, entirely helpless to earn any present support, and dependent upon the provision in her deed to her son for the very means of existence. Her son is dead. Her husband died before him, and she is left alone to maintain a struggle for her life with her own daughter-inlaw, who has obtained the title to the land through proceedings in the orphans' court. It is matter of much satisfaction that we are not obliged to hold that the conveyance by which she granted the land in question to her son was an absolute deed, free of all conditions or restraints, and that we are at liberty to decide, as we do, that the land and its owners must perform the service, and render the tribute, because and on account of which the plaintiff, still maintaining by a legally reserved right an actual residence on the land, was induced to and did part with all the rest of her title. The condition upon which she granted the title has not yet been fully performed, and cannot be until her death; and until it has been fully performed the title of the grantee and his successors has not become complete.

The case of Driesbach v. Serfass, 126 Pa. St. 32, 17 Atl. Rep. 513, affords another instance in which the foregoing considerations were applied and enforced in the construction of an instrument quite similar to the present. There the grantor, over 70 years of age, and childless, conveyed by a deed the fee-simple title to a tract of 50 acres of

land to his niece, who was a married woman. The consideration recited in the deed was one dollar, and "other good and valid considerations in law hereinafter mentioned, and to be strictly kept by the said Sally Ann Serfass." These considerations appeared in a clause following the description of the land, thus: "Excepting, nevertheless, the residence of the said Peter Berger, the grantor hereof, of the first part, in the house and on the premises, during his natural life, until the death and burial of the said Peter Berger; and I, the said Sally Ann Serfass, the grantee in the aforesaid premises, do hereby bind myself, my heirs, etc., to find good house room and sleeping and lodging apartments for the convenience of the said Peter Berger during his life, and to find good and sufficient board, lodging, meat, drink, clothing, and nursing, medical attendance, and all other necessaries for him during his life, and a decent burial for him, etc.; all of which is to be and remain a lien upon the premises aforesaid until the whole of the duties aforesaid are performed," etc. Sally Ann Serfass and her husband entered upon the premises, and performed the services until she died. Then her husband engaged one Driesbach to go into possession and take care of the grantor, Berger, until his death, and surrendered the possession to Driesbach. Afterwards Berger made an absolute deed of the premises to Driesbach for five dollars, and, later, died. After his death, Driesbach refused to surrender the possession to Serfass, who thereupon brought ejectment to recover the land. We held that the deed to Sally Ann Serfass was not in the nature of a will, nor yet an absolute deed, but merely an executory contract vesting an equitable estate in the grantee; the legal title remaining in the grantor during his lifetime. We held also that there could be no recovery in ejectment by the heirs of the original grantee in the absence of evidence that the covenants in the deed on the part of the grantee had been performed by the grantee or her representatives. There was no reservation of any part of the premises, but the right of residence in the house and on the land was excepted, and it was also declared that the grantor's right to the services of the grantee should be a lien on the land. The determination of the case was not upon the fact of the exception as to residence, nor upon the language declaring the grantor's rights under the deed to be a lien, but upon the intention and meaning of the parties. Thus our Brother Williams, delivering the opinion, said: "We have seen that the object of the transaction was to secure the continued performance of such services as his age and condition might render necessary. It is important to remember also that this was an arrangement between near relatives, and that the services of the niece are stated to be the consideration which she pays and is to pay for the property of her uncle. He is to have the right to live in the house, to remain in possession; and she is also to take possession, and live in the same

house, in order to fulfill her agreement. * * * It is equally clear that the exceptions and covenants were intended to protect the grantor against the words importing a present grant. That such words do not necessarily pass a present fee has been repeatedly held. The whole instrument, and the nature and object of the transaction, must be considered. In Williams v. Bentley, 27 Pa. St. 294, it was held that the strongest words of conveyance in the present tense will not pass an estate if from other parts of the instrument the intention appears to be otherwise. * * * The right of Serfass to recover possession in this action depended upon whether the consideration agreed upon had been paid. * * * It would be contrary to the original intentions of the parties, as well as against good conscience, to permit the vendee to recover the possession of the land from his vendor, or one holding his title, without rendering, or offering to render, the equivalent contracted for." Every word of these comments is directly applicable to this case. That it was the intention of these parties that the services were to be rendered in consideration of the conveyance is too plain for argument. That it would be a gross injustice to permit the grantee, or one claiming under him, to retain the land without performing the service, is equally clear. And, no matter how strong the words of present grant in the deed are, if the intention was that the title should not pass entirely except upon the complete performance of the service stipulated for in the deed, then it does not pass. Such are all these authorities, and by them this case is governed. We are clearly of opinion that the plaintiff was entitled to an unqualified affirmance of her first, second, and third points, and we therefore sustain the first three assignments of error. We sustain the fifth assignment, and think the instruction should have been to find for the plaintiff. We think, if Michael Ringrose accepted the deed of February 8, 1881, it was evidence to show the construction given to the deed of March 28, 1874, by all the parties, and should therefore have been received in evidence, and we therefore sustain the sixth assignment. For the purpose of showing the knowledge of the second deed by the defendant, we think that deed should have been received in evidence, with the other facts offered under the seventh assignment, and we therefore sustain that assignment. For a similar reason we sustain the tenth assignment. We do not sustain the fourth, eighth, and ninth assignments. Judgment reversed, and new venire

NOTE.—In construing a deed the court seeks to give effect to the real intention of the parties as such intention may be gathered from the language of the whole instrument by following out the object and spirit of the deed. Goodpaster v. Leathers, 123 Ind. 121; Studdard v. Wells, 120 Mo. 25; Richter v. Richter, 111 Ind. 456. It is not necessary to use any particular set of technical words in a deed. Bank of Sulsun v. Stark, 106 Cal. 202.

Conditions subsequent are not favored in law, be-

cause they have the effect in case of a breach, to defeat vested estates. Studdard v. Wells, supra. It is a universal rule, that a deed creating a forfeiture will be strictly construed. Ritchie v. Kansas, etc. R. R. (Kan. Mar. 1895), 39 Pac. Rep. 718. Courts will construe clauses in deeds as covenants rather than conditions, if they can reasonably do so, and require forfeitures to be created in express terms or by clear implication. Studdard v. Wells, supra. Yet they are not at liberty to ignore the settled legal significance of the language used. Adams v. Valentine, 33 Fed. Rep. 1. It is not necessary that the condition be found; fully expressed in one deed, for the rule prevails here as in other matters, that deeds or contracts executed at one time, relating to the same subject, are construed together as one deed. Stanton v. Allen, 32 S. C. 587; Richter v. Richter, 111 Ind. 456; Ritchie v. Kansas, etc. R. R., supra; Norton v. Perkins (Vt. Dec. 1894), 31 Atl. Rep. 148. Where A conveyed his land to his son, providing for his own support by his son, it was held, that if it appeared the intention was that the estate should be held and enjoyed by the son on condition, that he performed the acts specified, then the estate is held upon condition subsequent. Especially is this the rule, when the grantee has reserved no other effectual remedy for the enforcement of performance on the part of the grantee. In such a case a condition subsequent arises by clear implica-tion. Richter v. Richter, 111 Ind. 456. Estates have frequently been conveyed on condition that the grantee should maintain the grantor during his natural life, and such deeds have been sustained as estates on condition subsequent, and liable to forfeiture for breach of contract, as: a deed conveying land in consideration of the grantee's agreement to support the grantor, reserving a right to live on the land and a vendor's lien to secure performance of the agreement, the land to become the property of the grantee upon the faithful performance of his agreement: Alford v. Alford, 1 Tex. Civ. App. 245: a conveyance of his homestead by a father to the son on condition that the former should have his support and a home as long as he lived; Martin v. Martin, 44 Kan. 295; a mortgage back by the grantee to secure fulfillment of consideration expressed in the conveyance by the grantor of an agreement to support the grantor; Richter v. Richter, supra; a deed reserving a right to live on the land till grantor's death, reserving support and providing for certain payments to minor children, and after due performance thereof vesting the estate in the grantee. Bank of Suisun v. Stark, 106 Cal. 202, Where A conveyed land to B for a mentioned valuable consideration, and the deed also stated, that it was a gift from A to B, that A was to remain in possession during his natural life, that B. was to pay the taxes and support A, and then the land was to be B's; the court held, that there was a covenant by B, but no condition, because there were no appropriate words to create a forfeiture and no provision for a re-entry or a reverter. Studdard v. Wells, supra. Where the conditions mentioned are merely nominal, and evince no intention of actual or substantial benefit to the party, to whom or in whose favor they are to be performed, they may, by special statute of Minnesota, be disregarded. Sioux City, etc. R. R. v. Singer, 49 Minn.

Where estates are conveyed on conditions subsequent, such conditions become charges on the lands in whosesoever hands they may be. Rohn v. Odenwelder, 162 Pa. St. 346; McClure v. Cook, 39 W. Va. 579; Goodpaster v. Leathers, supra. When a right of way is conveyed with a reservation of an annual pay-

ment to the grantor, a subsequent purchaser of the land may sue for such payments. Raby v. Reeves, 112 N. C. 688. Where the deed makes the condition therein binding on the grantee, his heirs and assigns, and makes it perpetually binding upon the owners of the land, the apparent intention is to bind the grantee only while he owns the land. Hickey v. Lake Shore, etc. R. R., 51 Ohio, 40.

Breach of Condition Subsequent.-When land is conveyed, and there is a condition subsequent contained in the deed, the fee is in the grantee, until there is a breach of the condition by the grantee and are-entry by the grantor or his heirs. Vail v. Long Island, etc. R. R., 106 N. Y. 288. The grantor may waive the forfeiture. O'Brien v. Wagner, 97 Mo. 94. It has been said there must be an actual re-entry; Missouri H. Soc. v. Academy of S., 94 Mo. 459; but the better opinion is that the necessity for an actual re-entry has ceased with the disappearance of the fictions and devices resorted to, upon which to found the action of ejectment. Sioux City, etc. R. R. v. Singer, 49 Minn. 301. The breach of the condition creates a forfeiture of the estate, and the grantor may sue at law to obtain possession of the property; Alford v. Alford, 1 Tex. Civ. App. 245; Rohn v. Odenwelder, 162 Pa. St. 346; or in equity to rescind the contract; Martin v. Martin, 44 Kan. 295. If the grantor is already in possession of the property when the breach of condition occurs, he can sue to quiet his title. Richter v. Richter, supra. He will be presumed to hold under the forfeiture, but as this is only a presumption of law, it may be overcome by evidence to the contrary. O'Brien v. Wagner, 94 Mo. 98. Where a defendant claims an acquiescence in, and waiver of, a breach of a condition subsequent, he must allege and prove such a lapse of time since the breach as would authorize a court to presume an acquiescence and a waiver. Kinney v. Shelbyville [Ky. Sept. 1886], 1 S. W. Rep. 472.

S. S. MERRILL.

BOOKS RECEIVED.

American Negligence Cases (Cited Am. Neg. Cas.) A
Complete Collection of all Reported Negligence
Cases decided in the United States Supreme
Court, the United States Circuit Courts of Appeals,
all the United States Circuit and District Courts,
and the Courts of Last Resort of all the States and
Territories, from the Earliest Times, with Selections from the Intermediate Courts. Topically
Arranged with notes of English Cases and Annotations. Prepared and Edited by T. F. Hamilton, of the New York Bar. Vol. 1. New York.
Remick, Schilling & Co. 1895.

WEEKLY DIGEST

et ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Fail or Commented upon in our Notes of Recont Decisions.

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- 1. ADMINISTRATION—Accounting by Administrator.—An administrator, in settling his accounts, presented a voucher signed by deceased's widow for payments alleged to have been made her in pursuance of an order granting her a certain amount as a family allowance: Held, that a creditor of the estate could not object to the allowance of the voucher as a credit on the ground that the amount covered by it had not been actually paid the widow.—IN RE FISHER'S ESTATE, Pal., 42 Pac. Rep. 237.
- 2. ADVERSE POSSESSION.—Rev. St. art. 8198, requires that adverse possession be commenced and continued under a claim of right inconsistent with the claim of another: Held, that one who enters upon lands under the erroneous belief that it is part of the public domain, does not hold adversely to the true owner thereof, nor will it be presumed that he holds adversely to all save him who he erroneously supposed was the true owner.—LEON & H. BLUM LAND CO. v. ROGERS, Tex., 32 8. W. Rep. 714.
- 3. Animals—Offspring.—As a general rule the owner of the mother is the owner of the offspring born during such ownership. This ownership would continue until divested by some contract, express or implied, between the owner and some other person. A person paying service fees and taxes, and rearing the stock, with the consent or knowledge of the owner, does not thereby become vested with the title to the colts, or any part thereof.—MORSE v. PATTERSON, Kan., 42 Pac. Rep. 255.
- 4. APPEAL Acceptance of Benefits.—Where a creditor, suing to set aside a deed with preferences, accepts his proportionate share of the proceeds remaining after the preferred claims have been satisfied according to the judgment in the action, he cannot appeal, at least where he is a non-resident, and has not filed a bond other than for costs.—Dunham v. Randall & Chambers Co., Tex., 32 S. W. Rep. 720.
- 5. APPMAL—Record.—Under Rev. St. 1894, § 662 (Rev. St. 1881, § 650), requiring collateral motions, together with rulings of the court thereon and exceptions thereto, to be made a part of the record by bill of exceptions or special order, an order reciting that the court, "having heard said motion, overrules the same, to which ruling of the court the defendant at the time excepts, and the same is now ordered to be made a part of the record," is, on account of its indefiniteness, insufficient to make the motion, the ruling, or exception a part of the record.—Russ v. Russ, Ind., 41 N. E. Rep. 941.
- 6. Assumpsit Joint Purchase Agency.—Where plaintiffs and defendants jointly purchased property for a price which defendants represented was the lowest for which the land could be obtained, plaintiffs are entitled to recover from defendants a proportionate part of the commission paid by the vendor pursuant to a prior agreement for effecting a sale of the land, plaintiffs being ignorant of the payment until after the sale.—Seehorn v. Hall, Mo., 82 S. W. Rep. 643.
- 7. ATTACHMENT Affidavit Bond.—An affidavit for attachment which corresponds with the petition as to

the names of the parties, the amount sued for, and the nature of the suit, and is indorsed with the file number of the suit, filed with the papers in the cause, and acted upon by the clerk in issuing the writ, sufficiently identifies the suit, though not filed on the same day as the petition.—EILERS v. FORBES, Tex., 32 S. W. Rep. 709.

- 8. AWARD Building Contract.—Where a contract with a railroad company for construction of a building provides that all allowances and differences not agreed on before work has begun shall be referred to its chief engineer for settlement, his decision will, in the absence of fraud or clear injustice, be conclusive on the parties.—EAST TENNESSEE, V. & G. RY. CO. V. CENTRAL LUMBER MANUF'G CO., Tenn., 32 S. W. Rep. 635.
- 9. Banks Insolvency Trusts.—On the insolvency of a bank which has collected notes sent to it for collection, and failed to remit the proceeds, a trust will be imposed on the assets of the bank in favor of the person sending them, as against the general creditors of the bank, if it is proven that the moneys collected were deposited in the bank and commingled with other funds of the bank, or if they went into property represented by the assets in the hands of the assignee of the bank.—WINDSTANDLEY V. SECOND NAT. BANK OF LOUIS-VILLE, Ind., 41 N. E. Rep. 956.
- 10. Banks Insolvent Bank Collection of Note.— Where plaintiff sent a note and mortgage to a bank, with directions to collect the same, and "forward draft" for the amount less its collection fee, the money received by the bank in payment thereof was not impressed with a trust in plaintiff's favor, so as to entitle her to recover the whole amount as a preferred claim from a receiver appointed for the bank after the collection was made, though said bank was insolvent at the time it received said note and mortgage.—SAYLES v. Cox, Tenn., 32 S. W. Rep. 626.
- 11. BOUNDARIES Adverse Possession.—That one, from the time of receiving a deed of a farm, occupies it up to an existing fence, which is beyond the true boundary line, is not enough to show that his possession of the intervening strip is adverse.—FULLER v. WORTH, Wis., 64 N. W. Rep. 995.
- 12. BUILDING AND LOAN ASSOCIATION Alteration of Contract.-Where a building association loaned money which was to be paid at the maturity of certain shares of its stock owned by and pledged to it by defendant, which stock was to be paid for in installments, and was to be credited with the earnings derived from the loan of the installments so paid, and said association subsequently changed its by laws so as to authorize it to cease making assessments on stock of non-borrowing members, and fix a different time for the maturity of the debts of borrowing members, said association thereby rendered itself powerless to perform its contract with defendant, and defendant was entitled to be credited with the amount he had already paid in, and, having paid more than the original debt, he should be discharged.-International Building & Loan Ass'n v. Braden, Tex., 32 S. W. Rep. 704.
- 13. Carriers—Live Stock Shipment.—In an action to recover for breach of a carrier's contract to furnish cars for a shipment of live stock, the measure of damages is the difference between the market price of the stock as they were shipped on the date at which it was agreed they should be delivered and the market price in the same market on the date the stock should have been delivered, leaving at the time they did.—SAN ANTONIO & A. P. RY. Co. v. PRATT, Tex., 32 S. W. Rep. 705.
- 14. Carriers Reasonableness of Regulation.— A regulation of the defendant, intended to secure the orderly and certain collection of fares or tickets from all passengers on its suburban railway train, considered, and held to be a reasonable one, which its conductor was legally justified in enforcing against the plaintiff, although ne had no previous notice of it.—FABER v. Chicago G. W. Ry. Co., Minn., 64 N. W. Rep. 918.

- 15. Constitutional Law—Descent of Homestead.—Under the law in force prior to 1889, the homestead of the debtor, upon his decease, became assets for the payment of his debts, subject only to the homestead rights of his widow and minor children, if any. The Probate Code of 1889 provided that the homestead of the deceased shall descend to his heirs generally, in the order of descent, "free from all debts or claims upon the estate of the deceased:" Held, that this provision is invalid as respects contracts made before its enactment, for the reason that it impairs their obligation by so materially affecting the subsisting remedy as to substantially lessen their value. DUNN V. STEVENS, Minn., 64 N. W. Rep. 924.
- 16. CONSTITUTIONAL LAW—Drawing of Jurors.—Act April 1, 1891, providing a method for the selection of jurors in counties containing a city of a certain population, different from the general jury law, does not violate Const. art. 4, § 53, prohibiting the passage of special laws regulating the affairs of counties, or the summoning or impaneling of jurors, though, when enacted, it applies to but one county in the State, and the basis of classification is the "last preceding national census," as it may apply to other counties when some future national census shows a sufficient population.— DUNNE V. KANSAS CITY CABLE RY. CO., Mo., 32 S. W. Rep. 641.
- 17. CONSTITUTIONAL LAW—Supreme Court—Jurisdiction.—An action to effect the reinstatement of mortgage liens which has been released of record is not within Const. 1875, art. 6, § 12, conferring appellate jurisdiction on the Supreme Court in actions involving the title to real estate.—LEMMON V. LINCOLN, Mo., 32 S. W. Rep. 662.
- 18. Constitutional Law-Taxation.—Rev. St. 1889, § 7654 (Act March 8, 1879), requiring, as a condition to the levy of taxes for certain purposes, an order of the Circuit Court therefor, is not violative of the obligation of contracts, in the case of taxes for payment of bonds issued after the enactment of such law, under a contract thereafter made, though they are issued in lieu of bonds issued before its enactment.—STATE V. ST. LOUIS, K. & N. W. R. Co., Mo., 32 S. W. Rep. 664.
- 19. CONTEMPT.—A contempt, though punishable by criminal prosecution, is also punishable in contempt proceedings.—STATE v. FAULDS, Mont., 42 Pac. Rep. 285.
- 20. CONTEMPT—Appeal.—A judgment imposing a fine and imprisonment for contempt of court under section 13, ch. 110, Laws 1890, may be reviewed by writ of error, and upon such review this court will consider (1) whether or not the alleged act of contempt was in law a contempt of court; (2) whether or not there is any evidence tending to establish the commission of the act; and (3) whether or not the court had jurisdiction to pronounce the judgment.—STATE v. MARKUSON, N. Dak., 64 N. W. Rep. 284.
- 21. CONTRACT—Architect.—Where a building contract provides that payment shall only be made on the architect's certificate, it is not a sufficient excuse for failure to procure such certificate that the contractor feared to apply for it because he believed the architect to be fraudulently prejudiced against him.—GILMORB V. COURTNEY, Ill., 41 N. E. Rep. 1023.
- 22. Contracts Employment of Teachers.—A contract by a school district for the employment of a teacher from a certain time did not specify the duration of the contract, but provision was made for the closing of the school under certain circumstances: Held, that the contract continued for the school year, and the teacher was entitled to teach for that period, subject to the contingencies specified in the contract.—BUTCHER V. CHARLES, Tenn., 22 S. W. Rep. 631.
- 23. CONTRACTS—Public Policy.—The public policy of a State or nation must be determined by its constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to what the interest of the public demands. A party who seeks to put a restraint upon the freedom of contract in any

case must make it plainly and obviously clear that the contract in question is against public policy.—HART-FORD FIRE INS. CO. v. CHICAGO, M. & ST. P. EY. CO., U. S. C. C. of App., 70 Fed. Rep. 201.

- 24. Contract Subscription.—An instrument reciting that the undersigned acknowledge themselves indebted to a certain railroad company in a certain sum, for the payment of which they bind themselves, the conditions of the obligation being that, whereas the company proposes the construction of a certain line, on such conditions as to time of construction as are provided by the laws of the State, if the obligors secure to it a right of way without cost to it the obligation to be void, is a proposition from the signers, requiring acceptance within a reasonable time to make it bind lug, and does not allow acceptance at any time within the period allowed by the laws of the State for completion of the work.—FT. WORTH & R. G. Ry. Co. v. Lindsey, Tex., 32 8. W. Rep. 714.
- 25. CORPORATION Expiration of Charter. After a corporation's period of existence has expired by force of a general statute (1 Rev. St. 1855, p. 369, § 1), it cannot execute a valid conveyance; and defendant, claiming by adverse possession, and not being party or privy to the deed, is not precluded from questioning the validity of such deed as a link in plaintiff's chain of title, as it is not the act of a corporation de facto.—BRADLEI V. REPPELL, Mo., 32 S. W. Rep. 645.
- 26. CORPORATIONS-Powers in Foreign States .- In the absence of statutes in other jurisdictions modifying them, the grants and limitations of the franchises of a corporation, and of the powers of its officer and agents, contained in the general laws of the State under which it is incorporated, constitute the law of its existence, and go with it into every jurisdiction in which it is permitted to act, and there govern and limit those franchises and powers to the same extent as in the place of its creation. Accordingly, held: that where the officers and agents of an insolvent corporation had been enjoined, pursuant to the laws of the State of its creation, from exercising any of its powers or franchises, or using its name, for any purpose, by a court having jurisdiction of the corporation and its property, which had appointed a receiver of the corporation, such officers and agents could not lawfully enter an appearance for such corporation in an action brought against it in another jurisdiction, so as to authorize a judgment against it. - Bust v. United WATERWORKS CO., U. S. C. C. of App., 70 Fed. Rep.
- 27. CORPORATIONS—Stock Subscriptions—Payment.—A purchaser of stock in a Missouri business corporation may pay therefor in real estate, subject always to the scrutiny of the courts into its honesty, as to the valuation placed on the real estate. If this valuation be fixed in good faith, although it should subsequently transpire to have been greatly excessive, the courts will not disturb the arrangements.—NORTHWESTERN MUT. LIFE INS. CO. V. COTTON EXCHANGE REAL ESTATE CO., U. S. C. C. (Mo.), 70 Fed. Rep. 155.
- 28. CORPORATION—Stockholders—Payment of Stock.—Subscriptions for stock of a corporation may be paid in money, or in property such as is within the power of a corporation to acquire and hold, or in labor for the corporation in the proper furtherance of its purposes and business. Where payment of subscriptions for stock is made in property or labor, it must be of such value as to be the money's worth; if property, of the value of the amount of the par value of the stock, and if labor, it must be reasonably of the face value of the stock.—GILKIE & ANSON CO. V. DAWSON TOWN & GAS CO., Neb., & N. W. Rep. 978.
- 29. COUNTERCLAIM When Allowable. Where the lease authorizes the lessor to take the furniture of the lessee, and sell the same to satisfy unpaid rent, and also requires the lessor to keep the building in repair, in replevin by the lessor to recover possession of the furniture a counterclaim by the lessee for damages arising from failure of the lessor to keep the premises

- in repair is one arising out of the contract which is the foundation of the lessor's claim (Rev. St. § 2656, subd. 1), and is therefore properly allowed. COLLINS v. MORRISON, Wis., 64 N. W. Rep. 1000.
- 80. COUNTIES—Liability for Torts.—Const. 1879, art. 1, § 14, which provides that "private property shall not be taken or damaged for public use without just compensation," renders a county liable for damages to plaintiff's property consequent on the construction of a bridge in such a manner that its abutments turn the current of the stream in such a way as to cut into his land.—TYLER V. TSHAMA COUNTY, Oal., 42 Pac. Rep. 240.
- 31. COUNTY WARRANTS—Cancellation and Reissue.—In proceeding by a county for the cancellation and reissuance of warrants, the failure of the order for publication of notice to holders of warrants to present the same, the return of the sherff thereon, and the final order to show that one of the newspapers in which the publication was made was published in the county where the proceedings were had, as required by Act Feb. 15, 1875, § 1 (Acts 1874-75, p. 152), renders the proceedings void, though the return and final order recite that the notice was given as required by law.—CRUDUP V. RICHARDSON, Ark., 53 S. W. Rep. 684.
- 82. COVENANT.—Where G is the owner of nine lots, and conveys seven of them to P, who assumes and agrees to pay a mortgage upon the nine lots, and afterwards conveys the remaining two lots to F by deed of general warranty, and such conveyance to F is made during the pendency of a foreclosure of the mortgage assumed by P, the covenant to pay such in cumbrance becomes a chose in action upon which F cannot maintain a cause of action.—Pearson v. Ford, Kan., 42 Pac. Rep. 257.
- 33. CREDITOR'S BILL.—A bill by judgment creditors on behalf of themselves and certain other judgment creditors, against the debtor and various persons to whom he transferred distinct parts of his property, the sole purpose of which is to impound all the assets of the debtor to pay his debts, is not multifarious.—HULBERT v. DETROIT CYCLE Co., Mich., 64 N. W. Rep. 950.
- 34. ORIMINAL LAW—Accomplices.—A mature person of ordinary intelligence, who knowingly offers as a bribe to a juror money given her for that purpose, becomes an accomplice.—STATE V. CARR, Oreg., 42 Pac. Rep. 215.
- 85. CRIMINAL LAW—Arguments of Counsel.—A verdict will not be reversed because of improper remarks by the prosecuting attorney, unless defendant requested the court to instruct the jury to disregard such remarks, after first reprimanding counsel.—HINES V. STATE, Tex., 32 S. W. Rep. 701.
- 36. CRIMINAL LAW—Assault with Intent to Murder.—On a trial for assault with intent to murder, the court need not define express or implied malice, but it is sufficient if it defines malice aforethought.—ULUN v. STATE, Tex., 33 S. W. Rep. 699.
- 37. ORIMINAL LAW—Burglary Evidence. H was awakened at night by a noise in the chamber near the door leading to her store, and discovered defendant lying on the floor, as if asleep. The latter immediately arose, escaped through the store door, which H had locked on retiring, leaving the key therein: Held sufficient to warrant a conviction of burglary with intent to steal.—MULLINS v. STATE, Tex., 32 S. W. Rep. 691.
- 38. CRIMINAL LAW-Embezziement.— That the relation of debtor and creditor exists between a principal and his agent, and that, on a balancing the account, the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezziing or converting to his own use the property of his principal.—HAMILTON V. STATE, Neb., 64 N. W. Rep. 365.
- 89. CRIMINAL LAW-Insanity as Defense—Evidence.— Testimony by witnesses that they had known defendant for many years, and that they did not think that



he was capable of distinguishing between right and wrong to such an extent as to be able to know that it was wrong to commit burglary, is not a sufficient foundation to render admissible their opinions as to whether "he would have sufficient mental power to keep from committing a crime" if he knew that it was wrong.—SHAEFFER V. STATE, Ark., 32 S. W. Rep. 679.

- 40. CRIMINAL LAW-Killing Escaping Felon.—A sheriff or other police officer, in arresting or preventing the escape of a felon, may use such force as is reasonably necessary, even to the taking of life; but if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of, at least manslaughter.— LAMME V. STATE, Neb., 64 N. W. Rep. 956.
- 41. CRIMINAL LAW-Swindling—Confidence Game.—
 1 Stair & C. St. p. 782, ch. 38, par. 143, § 98, which provides a punishment for "every person who shall obtain or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus check, or by any other means, instrument or devise, commonly called the confidence game," applies to all cases of swindling in which advantage is taken of the confidence reposed by the victim in the swindler, even though no false or bogus checks or other commercial paper are used.—MAX-WELL V. PEOPLE, Ill., 41 N. E. Rep. 995.
- 42. ORIMINAL LIBEL—Indictment.— 2 Comp. Laws, § 3246, provides that it is not necessary to allege extrinsic facts for the purpose of showing the application of the defamatory matter to the party libeled, but that it is sufficient to state generally that the same was published or spoken concerning him, and such fact may be proved on the trial: Held that, without alleging the inducement in the indictment, it was proper to show that by using the name of a fictitious corporation defendant intended to refer to the manager thereof, and that certain words used in the publication were spoken of said manager.— PEOPLE V. RITCHIE, Utah, 42 Pac. Rep. 209.
- 43. CRIMINAL TRIAL Homicide Competency of Jurors.—On the trial of a saloon keeper for murder a juror is not disqualified by the fact that he has a prejudice against the business of saloon keeping, the matter at issue having no reference to such business.—Thiede v. People of Territory of Utah, U. S. S. C., 16 S. C. Rep. 62.
- 44. DEED—Delivery.—A man executed a deed conveying land to his children, and gave it to one of them, telling her to keep it, and that, if he never called for it, she must put it on record at his death. He remained in possession of the land till his death, mortgaged it, offered it for sale, and exercised other acts of ownership over it. The deed remained in the daughter's hands, and was not recorded till after his death: Held, that there was no effectual delivery of the deed.—WILSON v. WILSON, Ill., 41 N. E. Rep. 1007.
- 45. DESCENT AND DISTRIBUTION—Adoption of Illegitimate Child.—Mill. & V. Code, § 4890, confers on a child legally adopted the capacity to succeed to and inherit the real and personal estate of the adopting father. Id. § 3273, provides that the property of an illegitimate child dying intestate without issue, or husband or wife, shall go to the mother, and then equally to brothers and sisters: Held, that where an illegitimate child is adopted by his father, but not legitimated, property inherited by him from his father will on his death without issue or wife living descend under the latter statute.—MURPHY v. PORTRUM, Tenn., 32 S. W. Rep. 633.
- 46. EJECTMENT—Receiver for Growing Crops.—2 Rev. St. 1894, § 1076 (Rev. St. 1881, § 1064), provides for a new trial in ejectment on the applicant giving an undertaking that he will pay all costs and damages which shall be recovered against him in the action: Held, that if plaintiff in ejectment is entitled to the crops sown by defendant after the first trial, which terminated in plaintiff's favor, plaintiff has his remedy on the bond for defendant's conversion thereof, and

- therefore a receiver to take charge of said crops should not be appointed.—Stephens v. Kago, Ind., 41 N. E. Rep. 930.
- 47. EJECTMENT—Statute of Limitations.—The burden of proof is on the party pleading coverture in ejectment, to defeat the statute of limitations, to show that the adverse possession began after her marriage.—GROSS V. DISNEY, Tenn., 32 S. W. Rep. 632.
- 48. ELECTION—Marking Ballots.—3 Starr & C. St. p. 570, ch. 28, § 23, which says that the voter shall prepare his ballot by making in the appropriate margin or place a cross opposite the name of the candidate of his choice, is merely directory, and does not render invalid ballots which show on their face that the voters attempted to make a cross in the proper place, but did not fully succeed in doing so.—Parker v. Orr, Iil., 41 N. E. Rep. 1002.
- 49. ELECTION Constitutional Women.—The Utah enabling act (section 2) provides that male citizens, over 21 years of age, may vote for delegates to the constitutional convention, and that "persons possessing the qualifications for electors of delegates" may vote for or against the constitution. Section 4 allows the convention to provide for submitting the constitution to the people at an election at which "the qualified voters of said proposed State shall vote directly for or against the proposed constitution." The proposed constitution confers the elective franchise on women: Held, that women are not entitled to vote on the ratification or rejection of such constitution.—Anderson v. Tyree, Utah, 42 Pac. Rep. 201.
- 50. ELECTIONS Local Option—Contest.—Sand. & H. Dig. \$5 4868, 4869, directing that the returns of an election to determine the question of granting or refusing liquor licenses "shall be sealed up and forwarded to the clerk of the proper county, and by him laid before the county court," and if the majority of the votes be for license it shall be lawful for the county court to grant a license, but if the majority be not for license it shall be unlawful, confer on the county court power in a proper proceeding, to inquire whether the vote has been fairly taken, and, if fraud be shown, the right to declare it illegal.—FREEMAN V. LAZARUS, Ark., \$2 8. W. Rep. 680.
- 51. EMINENT DOMAIN—Award—Payment into Court.—Under Const. art. 2, \$21, and Rev. \$4. 1889, \$2736, providing that in condemnation proceedings the landowner's property shall not be disturbed till the award of commissioners is paid to him, or into court for him, where the railroad company, for whom the condemnation proceedings are had, pays the award into court, and takes possession of the land, the landowner has the right to immediately withdraw the money, and therefore is not entitled to interest thereon, pending the determination of the railroad company's exceptions to the commissioner's report.—CHICAGO, S. F. & C. RI. CO. V. EUBANKS, Mo., \$2.8. W. Rep. 658.
- 52. EQUITY—Asserting Title to Land.—A complainant who has only an equitable title to land cannot maintain a suit in chancery to recover possession of the land from an adverse occupant, unless such occupant holds the legal title and the complainant seeks to obtain it, or unless the adverse occupant acquired possession of the land under the alleged equitable title, or is so connected therewith that it may be asserted against him. Accordingly, held, that a complainant asserting an equitable title to land could not maintain a suit in chancery to enforce it and to recover possession from occupants who alleged in the bill to be without any title, legal or equitable, to the land, and therefore occupied the position of mere trespassers. CHURCH OF CHRIST AT INDEPENDENCE, MO. V. REOR-GANIZED CHURCH OF JESUS CHRIST OF LATTER-DAY-SAINTS, U. S. C. C. of App., 70 Fed. Rep. 179.
- 53. EQUITY—Parties—Quieting Title.—A purchaser of land had a deed made to a third person for his benefit. Discovering that there was an error in the deed, he had a correct deed made to another grantee, also in trust for him, and caused suit to be brought by such second

grantee against the first grantee to quiet title: Held, that the suit could not be maintained, since the second grantee was not the real owner of the property.—WHIPPLE V. GIBSON, Ill., 41 N. E. Rep. 1017.

- M. EXECUTION SALE Setting Aside.—A sale under execution of land of a judgment debtor will be set aside where the land so sold had been allotted the debtor as a homestead on a prior levy by another judgment creditor.—CALDWELL V. TAYLOR, Ky., 32 S. W. Rep. 578.
- 55. FEDERAL COURTS Judge—Appointment for Another District.—A district judge acting in another district, in which the office of judge is vacant, by virtue of an appointment, regular on its face, made by a circuit judge, is an officer de facto, and his orders continuing the term in such district from day to day cannot be questioned on the ground that the circuit judge has no power of appointment in the case of a vacancy in the office of district judge.—McDowell v. United States, U. S. S. C., 16 S. C. Rep. 111.
- 56. FEDERAL COURTS Jurisdiction.—Where the appellate jurisdiction is described in general terms in a statute, so as to comprehend the particular case in question, no presumption can be indulged of an intention to oust or restrict such jurisdiction. Any statute claiming to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve, and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that its literal meaning would extend to cases which the legislature never intended to include in it.—United States v. American Bell Tel. Co., U. S. S. C., 16 S. C. Rep. 69.
- 67. FEDERAL COURTS-Federal Question. Where a decision of the State Supreme Court, that the lessee of a railroad is not liable to pay as rent the amount paid by it to the State as taxes upon the earnings of the road, is put upon the grounds that it was the duty of the lessor to pay such taxes, and, the lessee having been compelled by law to make the payments, the law implied a promise by the lessor to repay; that the lessee was under no duty to incur the expense and dangers of testing by litigation the constitutionality of the statute under which the taxes were imposed; and that the lessor, as between it and the lessee, was guilty of laches,—the fact that the decision was also based on the ground that the statute did not impair the obligation of any contract does not confer appellate jurisdiction upon the United States Supreme Court.—RUTLAND R. Co. v. CENTRAL VERMONT R. Co., U. S. S. O., 16 S. C. Rep. 113.
- 58. Highways—Vacation.—Proceedings of commissioners of highways attempting to lay out a highway 60 feet wide on land of which half the width lies in an incorporated city whose charter gives it power to open, alter, and abolish streets, are void for want of jurisdiction so far as the half in the city is concerned, since the grant of power to the city is exclusive.—Shields v. Ross, Ill., 41 N. E. Rep. 985.
- 59. Homestead.—Where the wife owns the undivided one half of an hotel, in which she resides with her family and it is the only home her family has, it is her homestead, and her motion to discharge an attachment upon said hotel, in an action against her husband, is properly sustained, and the attaching creditor cannot inquire into the good faith of said husband in deeding said homestead to her.—Merchants' Nat. Bank of Kanaas City v. Kopplin, Kan., 42 Pac. Rep. 263.
- 60. Homestead—Rights of Widow and Children.— Under the homestead act of 1885, on the death of the husband, the fee of the homestead vests in the widow, subject only to the possessory rights of infant children during minority, and, on her death, descends to her heirs.—Linville v. Hartley, Mo., 32 S. W. Rep. 632.
- 61. Injunction— Irrigation Contract.— A complaint against an irrigation company to compel defendant to furnish water according to the terms of its contract

- with plaintiff alleged failure of defendant to deliver the water called for by it, and that it was impossible to secure water from any other source, and that without water valuable crops growing on the farms for which the water was to be supplied would be lost: Held that, as the complaint failed to show insolvency of defendant, no jurisdiction in equity was shown.— Fulton Irrigating Ditch Co. v. Twombly, Colo., 42 Pac. Rep. 253.
- 62. Injunction—Regulation of Weights by City.—Injunction will lie to restrain the enforcement of a municipal ordinance making it a misdemeanor to buy or sell certain articles except in the manner therein described, if such ordinance is invalid, though its validity was not determined in a prosecution or an action of a legal character.—Sylvester Coal Co. v. City of St. Louis, Mo., 22 S. W. Red. 649.
- 63. INSURANCE—Conditions.—The existence of a lien on property is not a breach of a condition in a fire policy requiring "unconditional and sole ownership" in the assured.—ALAMO FIRE INS. Co. v. BROOKS, Tex., 82 S. W. Rep. 714.
- 64. INTOXICATINE LIQUORS Defendant, having a license to retail intoxicating liquors, which did not indicate the house in which the liquor should be sold, as required by law, set up a bar in his "grocery" building, and also one in an adjacent building designated as his "saloon," where he sold liquor by the drink, and posted his license: Held, that these facts were insufficient to support an indictment for selling liquor without a license.—PEARCE v. STATE, Tex., 52 S. W. Rep. 697.
- 65. JOINT TORT FEASORS Contribution. While an action in which judgment is rendered against two defendants for an injury resulting from the negligence of one only does not, in the absence of cross pleadings, determine the rights of defendants as between themselves, the fact of the liability of each to plaintiff is adjudicated, both as between them and him, and as between defendants themselves. WESTFIELD GAS & MILLING CO. v. NOBLESVILLE & E. GRAVEL ROAD CO., Ind., 41 N. E. Rep. 955.
- 68. JUDGMENT Foreign Judgment Res Judicata. A judgment of a court of another State in administration proceedings, disposing of the decedent's property in that State to his father, sister, and brother, as his heirs, there being no adjudication of any claim to such property by his wife and child, does not operate as an estoppel against persons claiming, through such wife and child, the lands of the decedent in this State,—CLAPP'S EX'RS V. BRANCH, Tex., 82 S. W. Rep. 735.
- 67. LIBEL.—A publication which charges the plaintiff with being "a dangerous, able, and seditious agitator" is a libel, and actionable per se.—WILKES V. SHIELDS, Minn., 64 N. W. Rep. 921.
- 68. LIBEL.—To entitle a party to claim that an alleged libelous publication is privileged it must appear that it was made in the discharge of a public or private duty, or for the protection of his private interests, and that it was relevant and proper in that connection, and based upon a reasonable and probable necessity in the premises.—TRAYNOR v. SEILOFF, Minn., 64 N. W. Rep. 915.
- 69. LIMITATIONS County Bridges. Where obstructions are wrongfully put into a stream causing the current to be turned against the pier of a bridge, the statute begins to run against an action by the owner of the bridge, not from the time of the wrongful act, but from the time actual damages result therefrom to the bridge.—HOWARD COUNTY V. CHICAGO & A. R. CO., Mo., 83 S. W. Rep. 651.
- 70. LIMITATION OF ACTION Statute. Rev. St. art. 8218, providing that on the death of a person against whom there may be "cause of action" limitations shall cease to run for a year, or until the qualification of an executor or administrator for the deceased, applies to actions for the recovery of land.—WYNNE V. PARKE, Tex., 32 S. W. Rep. 726.

- 71. MARITIME LIENS Watercrafts. Steam dredges, to be used solely for digging under water, and not for navigation or the transportation even of the material which they bring up from the lake or river beds, are not watercrafts, within the meaning of the act (2 How. Ann. 8t. ch. 285, § 2) providing that "every watercraft of above five tons burthen, used or intended to be used in navigating the waters of this State, shall be subject to a lien thereon," etc.—Bartlett v. Steam Dredge No. 14, Mich., 64 N. W. Rep. 950.
- 73. MASTER AND SERVANT—Rule of Safe Place.—It is a positive duty which the owner of a mine owes to his servants, after the mine is opened and timbered, to use reasonable care and diligence to see that the timbers are properly set, and to keep them in proper condition and repair, and for this purpose to provide a competent mining boss or foreman, to make timely inspections of the timbers, walls, and roof of the mine.—WESTERN COAL & MINING CO. V. INGRAHAM, U. S. C. C. of App., 70 Fed. Rep. 319.
- 78. MECHANICS' LIBNS Priority over Mortgages.—Where mechanics' liens attach to property between the recording of two mortgages, the former of which is made subject to the latter, the last mortgage will be a first lien to the amount of the first mortgage, the mechanics' liens a second lien, the first mortgage a third lien, and the balance due on the last mortgage a fourth lien, on the land.—THORPE BLOCK SAVING & LOAN ASS'N Y. JAMES, Ind., 41 N. E. Rep. 978.
- N. MINES AND MINING-Extent of Claim.-Rev. St. U. 8. § 3322, provides that locators shall have exclusive right to any vein or lode whose apex lies within the lines of the location, throughout its entire depth, though such vein or lode, in its downward course or dip, extends beyond the side lines of the location, but that the right to the portion outside such lines shall be confined to the portion lying between the points of intersection of the vein or lode with verticle planes dropped from the end lines of the location, or with the continuation of such planes: Held, that where the apex of a vein crosses the east end line of a location, and extends to and crosses its south side line, and thence passes into another location, and the dip is from the apex of the vein in the former location southward crossing the verticle plane of the south side line, such south side line will not be considered as an end line, but the owners of the former location have the right to all ore found on the dip south of their south acte line, between the intersection of the vein with the verticle plane of their east and line and a parallel plane droped from the point where the apex crosses their south side Luc.-Fitzgerald V. Clark, Mont., 42 Pac. Rep. 272.
- To Montolable Parechouse Judgment.— A number of persons purchased land, and caused the Lite to be taken in the name of one of the number, who gave his secses, secured by mortgage on the land, for the deferred parehase money. These mones were signed, "A B, Trainee," but neither the mones were signed, "A B, Trainee," but neither the mones nor the mortgage dischard the nature of the train or the names of the coming pur brainer. Heat, that on forechouse of the mortgage the holder was out thed to a deficiency judg meets against the trainee, but not the coming pur brained.—Fannel T, Ehler Neb., in N. W. Esp. 589.
- W. MORTHAGE TO SHOWER BYSHAMS STREET.—A mortgage of the storegraph property of the sto. Accounted by her policy of the sto. Accounted by her policy of grown is grown to her tendency, so necess the participate here, and also the grands "which we have purchassed," at secure moves given her the greats and acknowledge he that the grands of the greats and acknowledge in this mode, and her if y enthings, and him the wife store the integrape was provided from the wife and in ways of the greats so the hadden along set and no ways of the greats so the hadden along with had no anthomy or not for his wife.—Chile with had no anthomy or not for his wife.—Chile is the mode, but a \$\int \text{Dept. Six.}
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- sioners in passing on a petition of a city council for annexation of territory to the city, which must give the reasons why, in the opinion of the council, annexation should take place, and which must be on notice to parties interested, is judicial, and therefore courts are properly given jurisdiction of an appeal therefrom.—FORSYTH v. HAMMOND, Ind., 41 N. E. Rep. 950.
- 78. MUNICIPAL CORPORATION—Assessment—Payment.

 —The failure of the city treasurer, when payment of a special assessment is made to him to enter the proper credits on the assessment rolls, and to give the property owner a voucher for his payment, as required by statute, does not affect the validity of the payment.—INDIANA BOND CO. v. BRUCE, Ind., 41 N. E. Bep. 958.
- 79. MUNICIPAL CORPORATION—Exemptions—Salaries.

 —The rule exempting fees or salary due municipal officers or employees from the claims of their creditors may be invoked by the employee as well as by the municipality, and neither can waive the exemption so as to bind the other.—BAIRD V. ROGERS, Tenn., 53 S. W. Rep. 630.
- 80. MUNICIPAL CORPORATION Segregated Territory.—Under St. 1889, p. 356, authorizing the segregation of territory from cities, but providing that such territory should not be relieved in any manner whatsoever from any liability contracted by the city prior to such exclusion, the territory segregated from the city of San Diego was liable for the payment of its proportionate part of the bonds of said city after separation as well as before, though no part of the money realized from said bonds was expended on said territory.—JOHESON V. CITY OF SAN DIEGO, Cal., 42 Pac. Rep. 249.
- 81. MUNICIPAL CORPORATION—Streets—Acceptance.—A well-known and much-traveled thoroughfare, used as a public street for many years, in a portion of the city compactly built up, relative to which an ordinance was passed, fixing its grade, and extending it over other lands, is a public street, so as to make the city liable for failure to keep it in a reasonably safe condition, without proof of dedication.—MEINERS V. CITY OF ST. LOUIS, MO., 22 S. W. Eep. 687.
- 82. NEGLIGENCE—Contributory Negligence Pleading.—In actions for personal injuries, brought in the federal courts, plaintiff is not required to plead or prove freedom from contributory negligence. Such negligence is matter of defense to be averred and proved by defendant.—RERRY V. LAKE ERIE & W. R. Co., U. S. C. C. (Ind.), W Fed. Rep. 236.
- 63. NEGLIGERCE—Degree of Care of Child.—A child of n.ne years of age is not guilty of negligence if he exercises that degree of care which under like circumstances would reasonably be expected from one of his years and intelligence. Whether he used such care in a particular case is a question for the jury. And even though the petition might, if the plaintiff were at adult, be construed as disclosing contributory negligence, an averagent that the plaintiff was at the time a child of nine years of age, and of immenture experience and judgment, is sufficient to rebut the presumption of contributory negligence.—Lake Buth & W. E. Co. v. Macket, Otio, & N. E. Bep. 80.
- is. Necessaries Designative—Been Fide Purchaser—Accommodation Paper.—Here notice that a note is accommodation Paper will not prevent an indorses for value in the ecclusive course of business from being a lone side purchaser, nor impose upon him the day of motion as bothe particular purpose for which it was executed. In the absence of notice to the contrary, he has a right to assume that it was executed for the purpose of being sold or discounted by the payor is the usual course of turnous.—Tourismon v. Edward in N. W. Bep. Sik.
- M. VERSTLEMS INSTRUMENT— Commercial Paper.—
 LE INSTRUMENT MARK IN EXAMPLE CONTINUES a promise to
 pure to L. or order for value received, M. 100, five years
 after date, with interest at 5 per cont... payable semiand in. 7 according to the tensor of interest compone
 anabased repetitor with an agreement that the instrument absolut be generated by the laws of Emmas, where

it was made payable; that the "note" and coupons should draw 12 per cent. interest after maturity, and should all mature upon default on any coupon; and a recital that the instrument was secured by mortgage on real estate: Held, that this was a negotiable commercial instrument.—DE HASS V. DIBERT, U. S. C. C. of App., 70 Fed. Rep. 227.

85. NEGOTIABLE INSTRUMENT—Notes—Joint and Several Indorsers.—Under Mill. & V. Code, § 3486, making all joint obligations joint and several, an indorser on a note, who has notice of non-payment and protest, is not discharged because such notice is not given other indorsers.—JARNIGEN V. STRATTON, Tenn., 32 S. W. Rep. 625.

- 87. OFFICE AND OFFICER Estoppel to Question Creation.—One who has accepted an appointment by a city council to an office which the council had power to create, is estopped from showing that the council did not follow the prescribed mode of creating the office.—BUCK V. CITY OF EUREKA, Cal., 42 Pac. Rep. 243.
- 88. Partnership—Assets Firm and Private Oreditors.—Where one owning the entire assets of a business transfers the legal title thereto to another, and allows him to conduct the business as his partner, such assets will in equity be considered partnership property, as between those who trusted the two as partners and the individual creditors of either.—Thayer v. Humphrey, Wis., 64 N. W. Rep. 1007.
- 89. PARTNERSHIP Firm Debts.—One G, upon forming a partnership with M, borrowed from K the amount of his contribution to the firm capital, giving therefor his note, with his wife and a third party as sureties. After such note had been several times renewed in the same form, K sued the firm for the amount due, and induced G to give him a note of the firm for such amount, and to secure it by a chattel mortgage on the firm property: Held, that such acts of G could not, without the consent of his partner, change his individual debt to K into a firm debt, and that M was entitled to have the mortgage set aside.—Kirby v. McDonald, U. S. C. C. of App., 70 Fed. Rep. 139.
- 90. PLEADING Negligence Verdict.—In an action for personal injuries, allegations in the declaration that the accident took place in the night; that plaintiff had no notice of the danger; that he was injured while in the performance of his duties; and that he was then in the place where his duty required him to be,—constitute, after verdict, a sufficient averment of due care by plaintiff.—GERKE V. FANCHER, Ill., 41 N. E. Rep. 889
- 91. Public Lands Homestead Timber.—A settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuilding, and fences, and perhaps may exchange such timber for lumber, to be devoted to the same purposes but he has no right to sell timber for money except so far as the same may have been cut for the purpose of cultivation.—Shiver v. United States, U. S. S. C., 16 S. C. Rep. 54.
- 92. Public Lands—Pre-emption Right.—The fact that the local land officers wrongfully refused an application to pre-empt certain land does not prevent the attaching of the pre-emption right to the land from the date of the application, so as to except it from a railroad grant subsequently located; and the fact that the applicant finally obtains title by means of an act of congress passed for his relief is immaterial.—Weeks v. Bridgeman, U. S. S. C., 16 S. C. Rep. 72.
- 98. RAILROAD COMPANIES—Accidents at Crossings.—Where the decisration alleges that the accident occurred at a certain public crossing, and the court of its own motion instructs the jury that plaintiff cannot recover unless it did occur at that place, it is proper to refuse as unnecessary instructions as to the law governing accidents at places other than crossings.—BALTIMORE & O. R. CO. V. STANLEY, Ill., 41 N. E. Rep. 1012.
- 94. RAILROAD COMPANY—Fire from Locomotive. Where, in an action for the burning of land, the evi-

- dence of damages relied on all tends to show its depreciation in value as meadow land, it is not error to charge the jury to find such sum as will compensate for the injury done the turf and roots, taking into consideration the purposes to which the land was appropriated or adapted, instead of declaring the damages to be the difference in the market value of the land immediately before and after the injury.—GULF, C. & S. F. RY. CO. V. JAGOE, Tex., 32 S. W. Rep. 717.
- 95. RAILROAD COMPANIES—Registering Trains.—Rev. St. 1894, § 5186, requiring every railroad company at any station at which "there is a telegraph office" to register, on a blackboard kept in a conspicuous place for that purpose, 20 minutes before a passenger train is due by schedule time, whether it is on time, and, if late, how late, does not require the registering of night trains at passenger stations where its telegraph office is kept open only during the day-time.—Terre Haute & I. R. Co. v. State, Ind., 41 N. E. Rep. 952.
- 96. RAILROAD RIGHT OF WAY.—A grant of a strip of land to a railroad company, "for right of way and for operating its railway only," gave to the grantee a mere easement in such strip.—BLAKELY V. CHICAGO, K. & N. R. CO., Neb., 64 N. W. Rep. 972.
- 97. RELEASE—Consideration—Burden of Proof.—In an action to recover for delay in furnishing cars the burden of proving want of consideration in a release set up by defendant is upon plaintiff.—Missouri, K. & T. Ry. Co. v. Pennington, Tex., 32 S. W. Rep. 706.
- 98. REPLEVIN—Right to Possession.—Where a vendee of a bill of sale given as security allows the vendor to keep possession of the property under a lease, the vendee cannot maintain replevin against one seizing the property.—SCHWEITZER V. HANNA, Wis., 64 N. W. Rep. 997.
- 99. RES JUDICATA—Decree of State Court.—The conclusiveness of a decree in regard to the title to land, based on a disclaimer filed in the case, cannot be affected by an unsworn-statement made by one of the parties thereto in a bill subsequently filed by him, though not signed by him, that the attorney making the disclaimer acted without authority.—DUNHAM v. JONES, U. S. S. C., 16 S. C. Rep. 108.
- 100. SALE-Defenses.—An order for nursery stock of a certain kind or quality, the price for the whole being stated in the order in a lump sum, is not severable, but entire; and the maker of the order is not obliged to receive the stock if, in whole or in a substantial or material portion, it is not of the kind or quality ordered.—BRYANT V. THESING, Neb., 64 N. W. Rep. 967.
- 101. SALE—Delivery to Carrier—Title.—Where defendants ordered goods from samples at plaintiff's store in another State, and directed shipment to Michigan, where defendants were to have the privilege of examining them, and, if found to be like samples, they were to be paid for, title to the goods passed on delivery of the same to the carrier, there being no evidence of an agreement that the title should not pass until the goods were examined. KUPPENHEIMER v. WERTHEIMER, Mich., 64 N. W. Rep. 952.
- 102. SALE—Rescission for Fraud.—A statement made to a commercial agency by a partnership of its assets and liabilities, "as a basis for credit," in which a space for "loans from friends or relatives or any other obligations" is left blank, when in reality each of the partners had borrowed on his individual note from his wife money which had been put into the firm business, is not sufficient evidence of fraud to authorize the rescission of his contract by one who, in reliance on such statement, had sold and shipped goods to the partnership in the regular course of business.—Vermont Marble Co. v. Smith, Ind., 41 N. E. Rep. 973.
- 103. SCHOOL DISTRICTS Appointment County Superintendent.—Where the act of the county superintendent of schools in drawing an order apportioning school funds is ministerial only, the county treasurer is not precluded from questioning the right of such county superintendent to issue the order.—SCHOOL

DIST. NO. 2 OF MULTNOMAH CO. V. LAMBERT, Oreg., 42 Pac. Rep. 221.

104. SPECIFIC PERFORMANCE — Defenses.—One who receives the benefits of the substantial performance of a contract, and retains them, after a technical default in the performance by the other party, until it is impossible to put the latter in the situation he occupied when the contract was made, and when the default occurred, cannot entirely defeat a suit for specific performance, on the ground that the complainant has failed to completely perform the contract on his part.—German Savings Inst. v. De La Vergne Refriger ating Mach. Co., U. S. C. C. of App., 70 Fed. Rep. 146.

105. SUBROGATION—Payment by Widow of Husband's Debts.—One who furnishes money to her husband's administrator to pay decedent's debts is entitled to recover, on the doctrine of subrogation, though the evidence does not affirmatively show that when she furnished it she had any intention of requiring it to be repaid, where it does not appear that she made a gift of it.—TYLER'S ESTATE v. TYLER, Ind., 41 N. E. Rep. 965.

106. TELEGRAPH COMPANY — Damages.—A telegraph company failing to deliver a telegram is liable for the loss of prospective profits, where it appeared that, if plaintiffs had received the telegram containing an offer to purchase cotton, they would have accepted it, and would have bought and shipped the cotton at a less price than that offered.—Western Union Tel. Co. v. Nagle, Tex., 32 S. W. Rep. 707.

107. TENANTS IN COMMON—Purchase of Outstanding Title.—The general rule that a tenant in common may not acquire an outstanding title as against his cotenant rests upon considerations of mutual trust, and does not, therefore, apply where the original interests of such cotenants were acquired under different instruments, from different sources, and at different times.—STEVENS V. REYNOLDS, Ind., 41 N. E. Rep. 961.

108. TRUSTS-Accounting by Trustee.-On foreclosure of a railroad mortgage, the bondholders agreed that a trustee might bid in the property for the amount of costs and expenses; that each bondholder should deliver his bonds to the trustee, and pay his proportionate share of the costs and expenses, and should share proportionately in the proceeds of any resale by the trustee. The trustee bid in the property, had the sale confirmed, and resold the property: Held, that bondholders who had delivered their bonds to the trustee, and had paid their share of the costs and expenses, had an equitable right to share in the proceeds of the resale, even though a majority of the bondholders had failed to deliver their bonds or pay their share of the costs and expenses .- Indiana, I. & I. R. Co. v. Swan-NELL, Ill., 41 N. E. Rep. 989.

109. TRUSTS—Charities. —A deed conveyed land in trust for the "widows and home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers," an unincorporated association, and directed that the grantee should hold the land "for said widows and orphans of the members" of said brotherhood, under regulations made by it, "provided that the brotherhood may use the property or dispose of it for any charitable purpose, for the use of said widows and orphans:" Held, that the trust thereby created, being a charitable one, was not void for uncertainty.—Guilffoll v. Arthur, Ili., 41 N. E. Rep. 1009.

110. VENDOR AND VENDEE—Sale of Land.—Where a contract for the purchase of land provides that, on performance of the contract by the vendee, the vendor will, on request and "surrender of the contract," execute a deed, an assignee of a mortgage given on the land by the vendee allowing the mortgagee at maturity to pay all liens on the land is entitled to a deed from the vendor on tender of any balance due on the price, without offering to surrender the contract.—CENTRAL PAC. R. CO. V. DEETZ, Oal, 42 Pac. Rep. 285.

111. VENDOR AND VENDEE—Sale of Land—Erroneous Boundaries.—Where a vendee of land has relied on

the representations of the vendor as to the location of the boundaries of the tract, and such boundaries prove incorrect, and to inclose more land than is conveyed, the measure of damages available to the vendee in an action against him for the unpaid purchase money is the difference between the value of the land actually conveyed and of that inclosed by the boundaries pointed out by the vendor, without reference to the contract price.—KING v. BRESSIE, Tex., 32 8. W. Rep. 779.

112. VENUE—Change — Disqualification of Judge.—Code Civ. Proc. § 896, requiring a judge who is disqualified from acting in a cause to transfer it, if pending before him, to some other court, is not satisfied by calling to the court of the disqualified judge a judge who is not disqualified.—REMY v. OLDS, Cal., 42 Pac. Rep. 289.

118. WILL—Action for Construction.—The court will not construe the clause of a will devising certain real estate, in a suit brought for that purpose by an heir and devisee of the testatrix against the executor, as such, where it appears the latter has no interest whatever in the adjudication of the matter by the court, and that a judicial interpretation of the will could be of no aid or assistance to the executor in administering the estate.—KENNEDY V. MERRICK, Neb., 64 N. W. Rep. 960.

114. WILLS—Devise of Homestead.—A widow claiming the homestead under her husband's will with reference to debts takes as by purchase, and not under the statute.—NICHOLS v. LANCASTER, Ky., 32 S. W. Rep. 676.

115. WILL-Eule in Shelley's Case.—A testator devised land to his two daughters, "to be equally divided, share and share alike, and to their lawful heirs; but, in the event of their death without issue, then in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of either [daughter] the surviving one to inherit the portion of the deceased sister, if she dies without issue:" Held, that under the rule in Shelley's Case the two daughters took an estate in fee.—Silva v. Hopkinson, Ill., 41 N. E. Rep. 1013.

116. WITNESS.—Under Rev. St. 1893, ch. 51, par. 5, § 5, which forbids husbands and wives to testify for or against each other, except in certain cases, when they "may testify for or against each other in the same manner as other parties may," a husband cannot testify for his wife, even in one of the specified cases, if they are both parties and there are adverse parties defending as representatives of a decedent; since in such case he could not testify even though his wife were not a party.—PYLE v. PYLE, Ill., 41 N. N. E. Rep. 999.

117. WITNESS — Payment to Deceased Administrator.
—Section 5280, Comp. Laws, does not prohibit a party
to an action from testifying in his own behalf to a personal transaction (in this case, payment) had with a
deceased administrator, as against the successor of
such deceased administrator, who sues to enforce, as
part of the assets of the estate of the intestate, the
claim which the party testifies he paid to the deceased
administrator as administrator of the estate of such
intestate.—St. John v. Lofland, N. Dak., 64 N. W.
Rep. 380.

118. WITNESS — Transactions with Decedent.—Under Rev. St. § 8918, declaring that, in actions where one of the original parties to the "contract or cause of action in issue and on trial" is dead, the other party thereto cannot testify in his own favor, or that of any party to the action claiming under him, while a party to an action by heirs for partition cannot testify that money received by him from deceased was a gift, and not an advancement, he can testify to this effect in the case of money received by another party; these questions being separate issues, and independent of the general questions involved.—Gunn v. Thurston, Mo., 32 S. W. Rep. 654.

Central Law Journal.

ST. LOUIS, MO., JANUARY 10, 1896.

Within recent years there has sprung up in the law a new form of contention, founded upon a violation of what is termed "the right of privacy." The action to secure such right is, as yet, infrequent and unusual and depends for its support upon an application of certain principles which are themselves not very well defined or their boundaries very well recognized or plainly laid down.

The Court of Appeals of New York recently passed upon a question of this character in the case of Schuyler v. Curtis, 42 N. E. Rep. 24. The alleged violation of the right of privacy, in that case, consisted of an attempt on the part of certain reputable women, without the sanction of plaintiff or other immediate members of the family, to do honor to the memory of a woman who was the aunt of the plaintiff, and who, at the time of the commencement of this action, had been dead for 14 years. A statue of a most costly and meritorious kind, to be made out of appropriate material and by an artist of the first rank, was contemplated as the means of doing this honor to the memory of the deceased relative of the plaintiff. It may, perhaps, be somewhat difficult for the ordinary mind to perceive any reason for the plaintiff's distress arising out of this contemplated action by women of respectability, who are desirous of honoring the memory of a woman whom they regarded in life as a friend and benefactor of their sex.

Objection was, however, made by the relatives of the deceased woman to the carrying out of the project. The grounds of their objections were: (1) The persons concerned in getting up the proposed statue were not the friends of the plaintiff's deceased aunt, and, as plaintiff alleged, did not know her. (2) They were proceeding with their plan without consulting with the plaintiff or other immediate members of the family, and without their consent to the making of any statue. (3) The circulars issued by or in behalf of the defendants contained a statement that Mrs. Schuyler was the founder of, or the first woman in, the enterprise for Vol. 42—No. 2.

securing the home of Washington, and that this statement was inaccurate, because a prominent woman in South Carolina was in fact such founder, and justly entitled to the honor arising therefrom. This mistake, it was asserted, had caused adverse comment in the newspapers as to the attitude of the family of the plaintiff in permitting such a claim to be made when they must have known it was without foundation. (4) It was disagreeable to the plaintiff because the making of such a statue would have been disagreeable and obnoxious to his aunt, were she living. had, as plaintiff said, a great dislike to have her name brought into public notoriety of any kind, as she was a singularly sensitive woman and of a very retiring nature, anxious to keep her name from the public prints or newspapers. (5) That plaintiff's aunt had not been personally acquainted with Susan B. Anthony, a statue of whom was also to be made and exhibited, and he was quite sure she had not sympathized with or approved the position taken by Miss Anthony upon the question of the proper sphere of woman and her treatment by the law, and it was disagreeable and annoying to have the memory of Mrs. Schuyler joined with principles of which she did not approve.

The court disposed of most of these objections with few words, only the fourth being considered worthy of lengthy consideration, and this was overruled. While recognizing what is known as the "right of privacy," and conceding that an individual may properly call upon a court of equity to enjoin the doing of an act, which is a violation of his right of privacy, and which causes mental distress and injury, the court held that such right does not descend to a relative or legal "It is not a question," says representative. Judge Peckham, who delivered the opinion, "of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us of all rights, in the legal sense of that term; and when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living

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which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character or memory of the deceased. A woman like Mrs. Schuyler may very well, in her lifetime, have been most strongly averse to any public notice, even if it were of a most flattering nature, regarding her own works or position. She may have been (and the evidence tends most strongly to show that she was) of so modest and retiring a nature that any publicity, during her life, would have been to her most extremely disagreeable and obnoxious. All these feelings died with her. It is wholly incredible that any individual could dwell with feelings of distress or anguish upon the thought that, after his death, those whose welfare he had toiled for in life would inaugurate a project to erect a statue in token of their appreciation of his efforts, and in honor of his memory."

It is quite clear, upon a study of this decision, that the fact that the purpose of the defendants was to do honor to the memory of the deceased and that purpose was to be carried out in an appropriate manner, by reputable individuals and for worthy ends, was the controlling factor in the determination of the case. Had the fact been otherwise, the right of privacy of the living relatives, as recognized by the court, would have been invaded.

Gray, J., dissented from the conclusions of the court, filing an opinion arguing strongly for the general right of privacy. As the representative of Mrs. Schuyler's immediate living relatives, he contended that it was competent for him to maintain an action to preserve them from becoming public property, as would be the case if a statue were erected by strangers for public exhibition under such classification, with respect to the characteristic virtues of the deceased, as they judged befitting. "I cannot see," he says, "why the right of privacy is not a form of property,

as much as is the right of complete immunity of one's person. If it is a property right with reference to the publication of a catalogue of private etchings, and entitled to be protected against invasion, as Lord Cottenham held in Prince Albert v. Strange, 1 Macn. & G. 25, 47, why is it not such with reference to name and reputation? We have some illustrations of the exercise by courts of equity of their peculiar powers in cases which have been cited, in principle not unlike this, where the publication of one's letters and the sale of photographic portraits have been enjoined, besides the case of the publication of the catalogue referred to. See Gee v. Pritchard, 2 Swanst. 402; Prince Albert v. Strange, 2 De Gex & S. 652; Pollard v. Photographic Co., 40 Ch. Div. 345; and Woolsey v. Judd, 4 Duer, 379. These decisions are authority for the doctrine that equity will interfere to prevent what are deemed to be violations of personal legal rights, and the only limitation upon the application is that the legal right which is to be protected shall be one cognizable as property. It seems to me clear that the jurisdiction of equity is not made to depend upon the existence of corporeal property, and that it is exercised whenever the complainant establishes his claim to the possession of exclusive personal rights, and their violation in definite ways, for which an action at law cannot afford plain and adequate redress. That is the case here."

NOTES OF RECENT DECISIONS.

MALICIOUS INTERFERENCE WITH CONTRACT. -In Morgan v. Andrews (Mich.), 64 N. W. Rep. 869, it appeared that plaintiff, an inventor and machinist, entered into a contract with a firm to design and construct for them a machine which would produce certain results. Defendant was employed by the firm as their manager at their factory, and the tests to be made of the machine, in order to discover whether or not it satisfied the requirements of the contract, were to be made under his supervision. Maliciously, and without good cause, he persuaded the firm to reject the machine, which they would have accepted but for his conduct. It was held that defendant was liable. The court said that the case of Chipley v. Atkinson, 23 Fla. 206, 1 South.

Rep. 934, is directly in point. The plaintiff there was a superintendent in a brick manufactory, and alleged that his discharge was procured by the malicious interference of the defendant. It was held that, although no action lay against the employer for his discharge, yet plaintiff might recover against a third person who had maliciously procured his discharge. It was said by the court: "Merely to persuade a person to break his contract may not be wrongful in law; still, if the persuasion be used for an indirect purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff, it is a malicious act, which, in law and fact, is wrongful, and therefore actionable." See, also, Rice v. Manley, 66 N. Y. 82; Benton v. Pratt, 2 Wend. 385. In Rice v. Manley, one Stebbins agreed verbally to sell to Rice a large quantity of cheese. The contract was not enforceable, because within the statute of frauds. Manley induced Stebbins to believe that Rice did not want the cheese, and himself purchased it from Stebbins, who would otherwise have delivered it to Rice, as agreed. It was held that Manley was liable in damages to Rice for his frauduleut interference with the contract, notwithstanding Stebbins was not in any wise liable to Rice. So in Benton v. Pratt, the contract was void under the statute of frauds; yet the court held that a recovery could be had against a third person who maliciously interfered with the contract for his own gain or profit. Of course, this rule would not prevail where the party sought to be charged in damages was acting in lawful exercise of some distinct right, for the quo animo constitutes a large part of the gist of the action; but here the declaration charges both malice and fraud, and, as expressed by Pollock in his work on Torts, "there must be a wrongful intent to do harm to the plaintiff before the right of action for procuring the breach of the contract can be established."

FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP — CORPORATION OF SEVERAL STATES.—In Missouri Pac. Ry. Co. v. Meeh, 69 Fed. Rep. 753, decided by the United States Circuit Court of Appeals, Eighth Circuit, it was held that a corporation formed by the consolidation of corporations of three different States, pursuant to the laws thereof, is, within each of such States, a corporation

of that State; and the Federal courts there held have no jurisdiction of a suit against it by a citizen of the State, on the ground of diverse citizenship. The court said in part:

Assuming, then, that there are three distinct legal entities known as the Missouri Pacific Railway Company-one a corporation of Missouri, another a corporation of Kansas, and another a corporation of Nebraska- we turn to consider whether, on the state of facts disclosed by this record, the Circuit Court of the United States for the District of Kansas had jurisdiction of the case at bar. We think that this question was practically decided in the cases heretofore cited. Thus, in Railway Co. v. Whitton, 13 Wall. 270, 283 the plaintiff, who was a citizen of Illinois, sued the railway company, which had been incorporated by the States of Wisconsin and Illinois, in the courts of Wisconsin, for a negligent act committed in Wisconsin. Subsequently the plaintiff removed the case to the Circuit Court of the United States for the District of Wisconsin, and the question arose whether the latter court had jurisdiction. It will be noticed that in the paragraph of the opinion above quoted Mr. Justice Field said: "The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that State. It is not there a corporation or a citizen of any other State. Being there sued, it can only be brought in o court as a citizen of that State, whatever its status or citizenship may be elsewhere."

So, in the case of Railroad Co. v. Wheeler, 1 Black, 286, the plaintiff company described itself as a corporation created and existing under the laws of the States of Indiana and Ohio, having its principal office in Cincinnati, Ohio. It sued Wheeler, describing him as a citizen of Indiana, in the Circuit Court of the United States for the District of Indiana; but the Supreme Court held that the action could not be maintained, saying in substance that in the character in which the company had sued, as a corporation of Indiana and Ohio, it could not maintain a suit against a citizen of Ohio or Indiana in a Circuit Court of the United States. The decisions in Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U.S. 856, 365, 10 Sup. Ct. Rep. 1004, and in Muller v. Dows, 94 U. S. 444, 447, do not conflict with the prior decisions of the Supreme Court of the United States, for in the former of these cases the New Hampshire corporation, the Nashua Railroad, which had been created a corporation of the State of Massachusetts, sued the Massachusetts corporation in the Circuit Court of the United States for the District of Massachusetts, to adjust certain differences that had arisen, growing out of a contract in which the two companies had dealt with each other as separate legal entities; and it was held that the suit could be be maintained. So, in Muller v. Dows, 94 U.S. 444, two citizens of New York and a citizen of Misseuri united in bringing a sult against two railroad corporations in the District of Iowa. Both of the defendant corporations were incorporated under the laws of Iowa, but one of them, by consolidation proceedings, had also become a corporation of the State of Missouri. This fact was supposed to destroy the jurisdiction of the court. But the Supreme Court held otherwise, saying that the consolidated company "in the State of Iowa [where sued] · · · was an Iowa corporation existing under the laws of that State alone." The rule, we think, that may fairly be extracted from these cases, is this. That whenever a corporation of one State, by legislative sanction, becomes also a corporation of another State, either by the process of consoli-

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dation or otherwise, whatever acts it subsequently does or performs in the latter State it does and performs as a domestic, and not as a foreign corporation. It derives all of its powers to act as a corporation in the State of its adoption from local laws. If it is there sued for an act done within the State, it is sued and must answer as a domestic, and not as a foreign, corporation. The same thought was expressed by Mr. Justice Breese in the passage quoted from Quincy Bridge Co. v. Adams Co., 85 Ill. 615, when he said: "The only possible status of a company acting under charters from two States is that it is an association incorporated in and by each of the States; and, when acting as a corporation in either of the States, it acts under the authority of the charter of the State in which it is then acting, and that only, the legislation of the other State having no operation beyond its territorial limits.

FEDERAL COURTS-UNITED STATES SUPREME COURT-APPEAL FROM STATE COURT-CONSTI-TUTIONAL LAW .- The Supreme Court of the United States decides in Central Land Co. v. Laidley that the appellate jurisdiction of the Supreme Court can be invoked upon writ of error to a State court, on the ground that the obligation of a contract has been impaired, only when an act of the legislature alleged to be repugnant to a constitutional provision has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court; and that when the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court does not deprive the unsuccessful party of his property without due process of law, within the meaning of Const. U. S. Amendment 14.

Mr. Justice Gray says:

The questions upon the merits of this case, discussed at length by counsel, were whether the Supreme Court of Appeals of West Virginia rightly construed the provision of the Code of that State of 1868, which was, and was admitted to be, in all material respects, a re-enactment of the corresponding provision of the Code of Virginia of 1860, prescribing the form of acknowledgment by a married woman of a deed of real estate; and where the court below gave a construction of that provision less favorable to the validity of such a deed than had been given to it by its own earlier decisions, and by the highest court of Virginia before the creation of the State of West Virginia. Those questions are not free from difficulty; and this court, before undertaking to pass upon them, must be satisfied that it has jurisdiction to do so.

The grounds relied on for invoking the appellate jurisdiction of this court are, in substance, that by the decision of the Supreme Court of Appeals of West Virginia, without any legislative action, the obligation of the contract contained in the deed from Mr. and Mrs. Pennybacker to Huntington, the grantor of the plaintiff in error has been impaired, and the plaintiff in error has been deprived of its property without due process of law.

Assuming, without deciding, that these grounds were sufficiently and seasonably taken in the courts of West Virginia, we are of opinion that they present no federal question.

In order to come within the provisions of the constitution of the United States which declares that no State shall pass any law impairing the obligation of contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only.

The appellate jurisdiction of this court, upon writ of error to a State court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the State court to be valid, and not when an act admitted to be valid, has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the State court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the State has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case, as long ago as 1847: "It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary." Bank v. Buckingham's Ex'rs, 5 How. 317, 343; Lawler v. Walker, 14 How. 149, 154.

It was said by Mr. Justice Miller, in delivering a later judgment of this court: "We are not authorized by the judiciary act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." Knox v. Bank, 12 Wall. 379, 383.

The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: "The State court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by State legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the State constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." Water Co. v. Easton, 121 U. S. 388, 392, 7 Sup. Ct. 916.

Many other decisions of this court to the same effect

are cited in that case. See, also, New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 30, 8 Sup. Ct. 741; St. Paul, M. & M. Ry. Co. v. Todd Co., 142 U. S. 282, 12 Sup. Ct. Rep. 281; Brown v. Smart, 145 U. S. 464, 12 Sup. Ct. Rep. 958; Wood v. Brady, 150 U. S. 18, 14 Sup. Ct. Rep. 6.

The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a State court, which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in Louisiana v. Pilsbury, 105 U. S. 278, in Insurance Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. Rep. 681, and in Mobile & Ohio Railroad v. Tennessee, 158 U. S. 486; or else the writ of error was to a Circuit Court of the United States. bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest courts of the State, as in Gelpcke v. City of Dubuque, 1 Wall. 175, 206, Olcott v. Supervisors, 16 Wall, 678, 690, Douglass v. Pike County, 101 U. S. 677, 686, Anderson v. Santa Anna Tp., 116 U. S. 356, 361, 6 Sup. Ct. Rep. 413, and other cases cited in Louisiana v. Pilsbury, 105 U. S. 278, 295.

The distinction, as to the authority of this court. between writs of error to a court of the United States and writs of error to the highest court of a State, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the State, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the State court, was reviewed on the merits, and reversed by this court, for missconstruction of the constitution of Iowa. Gelpcke v. City of Dubuque, 1 Wall. 175, 206. But a writ of error to review one of those decisions of the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the State to be a law of the State, within the meaning of the provision of the constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, the only question was of its construction by the State court. Railroad Co. v. McClure, 10 Wall. 511, 515.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the constitution of the United States. Walker v. Sauvinet, 92 U. S. 90; Head v. Amoskeag Co., 118 U. S. 9, 26, 5 Sup. Ct. Rep. 411; Morley v. Railway Co., 146 U. S. 162, 171, 13 Sup. Ct. Rep. 54; Bergemann v. Backer, 157 U. S. 655, 15 Sup. Ct. Rep. 727.

This court, therefore, has no authority to decide the main questions argued at the bar, whether the decision of the Supreme Court of Appeals of West Virginia, in effect and erroneously, overruled the prior decision of that court and of the Supreme Court of Appeals of Virginia before West Virginia became a separate State; und the writ of error must be dismissed for want of jurisdiction.

LEGISLATURE - ELECTION OF OFFICERS -QUORUM.—The Supreme Court of North Carolina, in State ex rel. v. Ellington, 23 S. E. Rep. 250, determined an interesting question of parliamentary law, the holding being that though the roll call of the house of representatives showed that a quorum assembled for the transaction of business, but the roll call on the election of an officer disclosed that less than a quorum voted, it will not be presumed that a quorum was present at such election, and that the general rule is that a majority of the members of a legislative body will constitute a quorum, in the absence of a constitutional provision fixing the number. The court says:

Prior to the 13th day of March, 1895, the board of trustees of the State library, under existing law, elected to and filled this office. On that day (March 13, 1895) the legislature passed and ratified an act repealing the law authorizing the board of trustees to elect, and provided for the election of this officer by the legislature. And on the same day, to-wit, the 18th day of March, 1890, the plaintiff claims that he was duly elected State librarian by the legislature pursuant to said act. And this not being a bill enacted into a law ratified and signed by the presiding officers of senate and house, and deposited in the office of secretary of state, which then becomes the evidence of its passage (Carr v.Coke, 116 N.C. 228, 22 S. E. 16; U. S. v. Ballin, 144 U. S. 4, 12 Sup.Ct. Rec. 507), it became necessary for plaintiff to introduce the record of the legislature for the purpose of proving his election and right to the office he was claiming. These records show than on the morning of the 18th of March there was a roll call of the house, a quorum answered, and the house proceeded to business. They also show that there was a proposition in both branches of the assembly (senate and house) to go into the election of State librarian; that these motions prevailed, and both the president of the senate and the speaker of the house appointed two tellers, each, to take this vote. And they reported that in the senate there were 26 votes cast, 25 being for the plaintiff and 1 against; and in the house there were 48 votes cast for the plaintiff, and none against him. It is admitted by plaintiff that there must be a quorum present to do business, or in this case, to elect the plaintiff to the office he claims. But he claims that it appearing there was a quorum present that morning, and it not appearing there had been an adjournment since, it will be presumed that there continued to be a quorum present. We think this is undoubtedly true,—that the quorum will be presumed until it shall appear there is not one. Cush. Elect. (2d Ed.) 869. This is usually made to appear by what is called a "division;" and this is usually had after a vote by yeas and nays, when the presiding officer announces the vote and some opposing member doubts the correctness of the announcement and demands a division,—a call of the body. Id. § 1798. And strictly speaking this is what is called a "diviston." Cush. Parl. Law, § 1814. The original purpose of a division was for the purpose of ascertaining who voted "Aye" and who voted "No," and it was effected in this way: the ayes occupied one part of the hall and the noes another, and there remained until the tellers appointed counted them. In this way it came

to be called a "division." In more modern assemblies it is more usually effected by a call of the house,—a yea or nay vote when each member's name is called. Cush. Elect. § 1615. This mode is used for two purposes,—one to determine on which side the majority yoted; and also for the purpose of determining whether there is a quorum present. U.S. v. Ballin, supra. In this case it was no viva voce vote preceeding the roll call. With this exception, there seems to have been all done that is usually done before a division, which is now usually had by a call of the roll. Cush. Elect. § 1615. Why this was not done, we do not know. Const. U. S. art. 1, § 5, requires that in all elections under this constitution the vote shall be viva voce. And if this section applies to this election it does not mean a roll call, but a vote by voice, and not by ballot. And if the vote had been taken that way, and announced by the presiding officers in favor of plaintiff, and no division called for, the presumption contended for by plaintiff would have availed him. But when the roll was called, the name of each member voting recorded, and the tellers appointed report the number voting for plaintiff and the number voting against him, -a modern division,-we have the facts, and they must prevail over the presumption which existed in favor of a quorum before that time. Cooley, Const. Lim. p. 168; U. S. v. Ballin, supra. It may be there was a quorum present when this vote was taken. But if there was it does not appear to us, and we have no means of finding out whether there was or not, and no authority to do so if we had the means. And if they were present, whether they could have been compelled to vote is not before us, as there was no such proposition made, so far as we know. But it seems to be conceded that the speaker of the house of representatives of the United States could not compel a member to vote. Nor had he any right to count members present and not voting, to make a quorum, until the house adopted a rule to that effect. He then counted nonvoting members present to make up a quorum, and the Supreme Court of the United States sustains his action. U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. Rep. 507. So may the legislature of North Carolina adopt a similar rule, as there is nothing in the constitution to prevent it doing so. But it has not adopted such a rule, and under the authority of U.S. v. Ballin, supra, we suppose the presiding officers were powerless, if a quorum was actually present, either to make them vote or to count them to make up a quorum. This brings us to the consideration of what is a quorum. They are of two kinds, -one fixed by the constitution or power creating the body or assembly. In this way a majority of a majority may constitute a quorum and do business. But, where the quorum is not fixed by the constitution or the power that creates the body, the general rule is that a quorum is a major. ity of all the members (Cotton Mills v. Commissioners, 108 N. C. 678, 18 S. E. Kep. 271; Cush. Elect. § 247; U. S. v. Bailin, supra), and a majority of this majority may legislate and do the work of the whole. There is no constitutional quorum; that is, a number prescribed by our constitution that shall constitute a quorum. We therefore fall under the general rule applying to legislative bodies. U.S. v. Ballin, supra. The legislature of North Carolina consists of 170 members,-50 in the senate and 120 in the house. Therefore it takes the presence of 26 senators to constitute a quorum in the senate, and 61 members of the house. In this election 26 senators voted, which was a majority of that body, and a quorum. But in the house there but 48 members who voted. This we see was less than a quorum. For this reason plaintiff has failed to establish his right to the office.

SERVICES WHOSE PERFORMANCE IS EXCUSED BY SICKNESS OR LIKE DISABILITY.

Classification of Services coming within Doctrine or Otherwise.—The familiar doctrine concerning impossibility of performance of contracts, whereby sickness, death or physical or mental disability excuses a failure to perform the contract,1 is well known to apply only where the contract is for services such as involve skill and could not be performed ' by another. The vitally and practically important question which then arises, and which will be discussed in the present article is, what services come within this category? The answers given by the courts have been so conflicting as to render highly desirable an attempt to clarify them and suggest the solution of the inquiry. These answers may be reduced to the following propositions: 1. Services of an artistic cast, like those of a theatrical performer, are typical of the class of services which come within the doctrine. 2. Hired manual labor for a given period has apparently been quite extensively viewed as coming within the doctrine. 3. Contracts to marry have been sometimes held not such that sickness would excuse performance, though death, of course, would have that effect. 4. Contracts which can be performed by the representatives of a deceased person do not come within the doctrine.

Theatrical Contracts.—Perhaps the most common class of agreements to which the doctrine under consideration is applicable, is found in theatrical contracts. The sickness of the famous German tenor Wachtel, for example, has been held² to excuse the failure

¹ See Spalding v. Rosa, 71 N. Y. 40, 44, 27 Am. Rep. 7, 10; Wolfe v. Howes, 20 N. Y. 197, 200 202, 75 Am. Dec. 388; Fisher v. Monroe, 16 Daly, 461, 464; People v. Manning, 8 Cowen, 297, 298-99; Billings' Appeal. 106 Pa. St. 558, 560; Scully v. Kirkpatrick, 79 Pa. St. 324, 381-33, 21 Am. Rep. 62, 68-65; Johnson v. Walker, 155 Mass. 253, 254-55, 31 Am. St. Rep. 550-51; Harrington v. Fall River Iron Works Co., 119 Mass. 82; Stewart v. Loring, 5 Allen, 306, 81 Am. Dec. 747-48; Yerrington v. Greene, 7 R. I. 589, 598-95, 84 Am. Dec. 578, 579-81; Knight v. Bean, 22 Me. 531, 584; Siler v. Gray, 86 N. Car. 566, 569; Jennings v. Lyons, 89 Wis. 553, 557, 20 Am. Rep. 57, 59; Janin v. Browne, 59 Cal. 37, 44; Boast v. Firth, Law R., 4 Com. P. 1, or 38 Law J. Com. P. 1; Pollock, C. B. in dissenting opinion in Hall v. Wright, El. Bl. & E. 746, at pp. 793-94; Robinson v. Davison, L. R., 6 Ex. 269, 274, 277, 278. Impossibility of performance of contracts in general is discussed in 12 Cent. L. J. 4.

² In Spalding v. Rosa, 71 N. Y. 40, 43, 44, 27 Am. Rep. 7, 9-10.



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to furnish an opera troupe of which he was the leading attraction. Similar effect has been given to the illness of a wife for whom the husband contracted that she should play the piano at a concert. Of course in cases of this and like character, the peculiar nature of the services, such as makes it ordinarily difficult to supply the place of the disabled performer, is obvious, and significantly illustrates the general doctrine.

Contracts for Hired Manual Labor for a Particular Period.—Contracts for hired manual labor for a particular period seem to be not infrequently placed by the courts in the category of contracts for personal services of such a character that sickness or death will excuse their performance. Thus in one leading American case,4 it is said that a contract of this sort is "for the personal services of the individual who is hired, and cannot be performed by the agency of another person." In this important respect the contract is deemed peculiar, and "different from a contract by which one agrees to do a particular piece of work, as, for instance, to build a house, which may be performed through another person." In another such case it is laid down that in a contract "for the performance of personal manual labor, requiring health and strength," the contract "must be understood to be subject to the implied condition that health and strength remain."6

See, also, as to the failure of a skilled operatic singer to perform in a new piece through serious illness as going to the essence of the contract and justifying dismissal by the manager. Pooussard v. Spiers, Law R., 1 Q. B. D. 410, 414 415, 17 Moak's Eng. Rep. 93, 97, 98.
4. Ryan v. Dayton, 25 Conn. 188, 193, 65 Am. Dec.

50, 568.

5 Dickey v. Linscott, 20 Me. 453, 455-56, 37 Am. Dec. 66, 67. See, also, a similar statement to the first part

of that next quoted in the text, in Fenton v. Clark, 11 Vt. 557, at p. 563.

⁶ Again, in a comparatively recent leading case much later than either of these, Judge Finch of the New York Court of Appeals, while admitting that most of the cases holding that the death of a person whom the law designates as a "servant" dissolves the contract are marked by the circumstance that the services belonged to the class of skilled labor, where the impossibility of a substituted service by a representative of the servant is very apparent, denies that these cases depend on that characteristic. He insists that even as respects common labor like that on a farm the servant's character, habits, capacity, industry and temper, all enter into the contract which the master makes and affect that contract, and are material and ential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. Lacy v. Getman, 119 N. Y. 109,

Often the like view appears to be assumed, or at any rate, nothing is said of any special skill involved.7 Sometimes, however, the reference made to the personal services of "skilled artists, artizans and mechanics," would seem to exclude the idea of unskilled labor as coming within the doctrine under consideration.9 In some cases involving death, furthermore, a position adverse to that which would exclude the criterion of skill has been taken. These authorities, while conceding that the death of the master, as well as of the servant, dissolves the contract, appear still to leave the question of the liability of the representatives of the master dependent, as in other cases, upon the purely personal character of the contract as measured by the requirement of special skill or knowledge. 10 This certainly seems the more consistent view; and it is submitted that even the acknowledged ability of the judge who so plausibly sustained the opposite view in a case mentioned in one of the preceding notes, 11 can hardly justify a departure from the more reasonable criterion. That criterion itself gives ample room for flexibility of interpretation; and it would seem better that in a particular case there should be a strained construction in determining whether the labor is skilled or unskilled, than that such a fundamental test should be discarded altogether.

Contracts to Marry.—It appears to be fairly settled or admitted that a party will be ex-

114 15, 16 Am. St. Rep. 806, 808-9. Even the idea that a contract with a writer, artist, physician or lawyer, would die with the party regardless of the question whether he was the most indifferent or the most eminent in his profession or vocation, is advanced in Shultz v. Johnson's Admr., 5 B. Mon. 497, 501.

⁷ Personal services in drilling a well, for example have been held to come within the rule excusing performance on account of sickness. Green v. Gilbert, 21 Wis. 395, 400. See, also, for a like view as to farm labor, Fahy v. North, 19 Barb. 341, 342.

8 Like that made in Fisher v. Monroe, 16 Daly, 461, at p. 466.

9 The distinction is fully recognized, and stress laid upon the skill and experience required for the art of pot-making, and the impossibility of a common laborer supplying the place of one so skilled, in Wolfe v. Howes, 20 N. Y. 197, 199, 75 Am. Dec. 388.

10 This is true of Babcock v. Goodrich, 3 How. Pr. (N. S.) 52, 54, 57, where the employee was engaged to cut garments for a merchant tailor. A like view appears to be assumed in the case of a farm bailing in Farrow v. Wilson, 4 Com. P. 744, though in the other case just cited this seems to be viewed as a case of principal and agent and so of a different character.

¹¹ Finch, J., in Lacy v. Getman, 119 N. Y. 109 or 16

Am. St. Rep. 806.



cused from performing a promise to marry, and relieved from liability thereon, not only because of the physical or mental disability of the other party, arising or discovered after the promise, 12 but also because of the promising party's own incurable impotence,18 or, presumably, because of the insanity of such party¹⁴ arising or subsisting after the promise. The reasoning upon which these conclusions may be consistently supported, though not always set forth by the courts, is that there can be no duty to keep the promise, or liability for breaking it, in case of the incapacity of the opposite party, or of the promising party, to enter into the contract of marriage or fulfill the functions it involves. But can the promising party set up any other disability, like sickness or disease of an aggravated character, as a defense to a breach of promise suit? The same reasoning would seem to be applicable. Yet in regard to this question there has been considerable divergence of view. On the one hand a negative answer has been given by a majority of the judges in a wellknown English case¹⁵ where the man sued was troubled by occasional bleeding at the lungs which rendered him incapable of marriage without great danger to life. But the case has been much discredited, and is sometimes deemed to have been materially affected by the fact that notice of the cause of failure to perform was not given to the opposite party. And American cases have favored a different Indeed a directly opposite position has been taken n two later leading decisions in this country.16 They substantially hold.

¹² See Atchison v. Baker, Peak Ad. Cas. 103, 104; Gring v. Lerch, 112 Pa. St. 244, 249, 56 Am. Rep. 314, 315-17; Kantzler v. Grant, 2 Ill. App. 236, 238; also, remark of Williams, J., in Hall v. Wright, El. Bl. & E. 765, at pp. 791-92.

¹³ See Gulick v. Gulick, 41 N. J. L. 18-15; Pollock, C. B., dissenting, in Hall v. Wright, El. Bl. & E. 765, at p. 795. Compare, however, 1 Bish. Marr. Div. & Sep. § 204.

14 See remark of Lord Campbell, C. J., in the decision of the lower court in Hall v. Wright, El. Bl. & E. 746, at page 759. But compare Baker v. Cartright, 10 Com. B. (N. S.) 124, 127, or 100 Eng. Com. L. 124, 127.

Left Hall v. Wright, El. Bl. & E. 765, reversing same case at p. 746. See comments on this case in Robinson v. Davison, Law R. 6 Ex. 269 at pp. 274, 277; in remarks of Montague Smith, J., in Boast v. Firth, Law R. 4 Com. P. 1, or 38 Law J. Com. P. 1, 2, 3; and in Allen v. Baker, 86 N. Car. 91 at pp. 96-97, 41 Am. Rep. 444, 446-47.

Allen v. Baker, 86 N. Car. 91, 95-98, 41 Am. Rep.
 444, 445-48; Shackleford v. Hamilton, 19 S. W. Rep.
 (Ky.) 5, noted 34 Cent. L. J. 466.

that marriage is not to be treated like any other contract, such as a bargain making a sale of personal property, where damages are given as a substitute when the subject matter cannot be delivered. They consider that the contract of marriage is subject to implied conditions peculiar to itself, such as preclude a duty to perform, or liability for not doing so, on the part of a person afflicted with a venereal disease deemed incurable or pronounced an objection to marriage. They insist that a party should surely not be responsible in damages for not contracting marriage under circumstances which would be productive of intense misery instead of mutual comfort, and where the marriage would be a crime against society, which has an interest in the matter, as well as against the individuals concerned and these who come after them. One of these cases¹⁷ further assigns the more general reason that the doctrine which excuses performance in cases of impossibility to fulfill the main part of a contract, applies to cases where the party has become unfit to carry out the chief objects of marriage. view which may be termed intermediate is adopted by some American cases. They hold that in an action for breach of promise, the defendant may show in mitigation of damages that he was afflicted with an incurable disease at the time of the breach.18 The conclusions reached in the more radical American cases seem, however, in every way reasonable, whether considered on grounds of justice and considerations of public policy, or by viewing marriage more especially as a status, or regarding it as based on contract and involving duties and liabilities which are contractual in their nature. From the last point of view, the considerations which govern would seem to be like those regulating contracts of a personal nature involving skilled services such as could not be performed by another. for any liability imposed by law outside of that arising from the contract, it is difficult to see how there could be any such responsibility except in cases where there had been culpability in contracting the disease, or

17 Allen v. Baker, just cited.

¹⁸ Mabin v. Webster, 129 Ind. 430, 432-35, 28 Am. St. Rep. 199, 200-202; Sprague v. Craig, 51 Ill. 288, 292. For a like view as to the sickness of the opposite party, see Walker v. Johnson, 6 Ind. App. 600, 605, or 38 N. E. Rep. 267, 269; Goddard v. Westcott, 82 Mich. 180, 186-87.

wrong in concealing it such as might give ground for an action of deceit.

Contracts which Need not be Performed by Representatives of Deceased Persons .- The discussion of the question: "What contracts need not be performed by the representatives of deceased psrsons?" which is perhaps most frequently considered in dealing with the estates of such persons, cannot be fully here pursued without undulv tending the limits of the present article.19 Reference must be made, however, to the existence of a familiar exception to the general rule that the contracts of the deceased must be performed by his executors or personal representatives,20 arising when the nature of the contract is such as to admit of personal performance only, or as to imply that the contract is to be operative during the continuance of personal relations only.21 Noticeable illustrations of the exception, 22 though they are not always placed on the ground that they are such, occur on the death of a party to a contract of marriage before the time fixed for the marriage by the contract:28

19 The effect of death upon contracts may be generally gathered from such authorities as Drummond v. Crane, 159 Mass. 577, 578-79, 38 Am. St. Rep. 460, 461-62; Martin v. Hunt, 1 Allen, 418, 419; Yerrington v. Greene, 7 R. I. 589, 593, 594.95, 84 Am. Dec. 578, 579, 580-81; Chamberlain v. Dunlop, 146 N. Y. 45, 52-58, 22 Am. St. Rep. 807, 810-11, and note, 811-15; Kernochan v. Murray, 111 N. Y. 306, 308, 7 Am. St. Rep. 744, 745; Stumpf's Appeal, 116 Pa. St. 33, 38-39; White's Exe're v. Commonwealth, 39 Pa. St. 167, 176; McClure's Exe'rs v. Gamble, 27 Pa. St. 288, 290; Phipps v. Jones, 20 Pa. St. 260, 263, 59 Am. Dec. 708, 710; Siler v. Gray, 86 N. Car. 566, 570; McGill's Creditors v. McGill's Admr., 2 Met. (Ky.) 258, 262; Hawkins v. Ball's Admr., 18 B. Mon. 816, 820, 68 Am. Dec. 755, 757; Smith v. Brennan, 62 Mich. 849, 854, 4 Am. St. Rep. 867, 869; Janin v. Browne, 59 Cal. 37, 44; Wentworth v. Cock, 10 Ad. & E. 42, 46.

²⁰ See fuller statement of the rule in Stumpf's Appeal, 116 Pa. St. 33, 38.

²¹ See the opinion by Andrews, J., in Kernochan v. Murray, 111 N. Y. 306, at p. 308 or 7 Am. St. Rep. 744 at p. 745. This exception has been recently considered in Marvel v. Philips (Mass.), 40 Cent. L. J. 104.

See enumerations in Stumpf's Appeal, 116 Pa. St.
 38-39; Janin v. Browne, 59 Cal. 37, 44; Siler v. Gray, 86 N. Car. 566, 570.

28 See as to this entire subject, Flint v. Gilpin, 29 W. Va. 740, 741-43; Grubb's Adm'r v. Sult, 32 Gratt. 203, 204, 208, 34 Am. Rep. 765, 768; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Stebbins v. Palmer, 1 Pick. 71, 78-79, 11 Am. Dec. 146, 147-48; Smith v. Sherman, 4 Cush. 408, 412-14; Kelley v. Riley, 106 Mass. 339, 341; Chase v. Fitz, 132 Mass. 359, 363-66; Lattimore v. Simmons, 13 Serg. & R. 183, 184-86; Finlay v. Chirney, Law R., 20 Q. B. D. 494, 497-99, 501, 507-8; Chamberlain v. Williamson, 2 Maule & S. 408, 114-16; Hovey v. Page, 55 Me. 142, 144-45; Wade v.

the death of a master or apprentice before the expiration of the term of service limited in the indentures; the death of an employer of a salesman or other clerk;24 the death of attorneys, physicians or teachers contracting to render services appropriate to their professions;25 or the death of an author or artist before the time contracted for the finishing and delivery of a book, picture, statue or other work of art. An undertaking to promote in every way the introduction of a patent elevator and conveyer, has been recently held to come in the same category in Marvel v. Philips (Mass.), 40 Cent. L. J. 104. But here, as in regard to disability in general, there is a conflict of authority upon the question whether the element of personal skill or taste must form an important feature of the contract to bring it within the exception. Some of the cases hold that such an element must be present as a factor of the contract.26 Others take an opposite view.27 Both classes of cases lay stress on the criterion of the intention of the parties.28 It seems most reasonable, however, to adopt a view which may be thus formulated: Whether the contract be such as the representatives of a deceased person are bound to perform and free to enforce, depends primarily on the intention of the parties. Material factors in determining this intention may be the subject-matter of the contract, and the occupations of the parties concerned with the contract. The skill of the contracting parties, if not an essential feature of the contract, may at least be a

Kalbfleisch, 58 N. Y. 282, 284, 17 Am. Rep. 250, 251; Shuler v. Millsaps, 71 N. Car. 297, 298-99; Allen v. Baker, 86 N. Car. 91, 94, 41 Am. Rep. 444; Harris v. Tyson, 63 Ga. 629, 630, 36 Am. Rep. 126, 127.

24 See Yerrington v. Greene, 7 R. I. 589, 594-95, 84
 Am. Dec. 578, 580-81; Greenburg v. Early, 30 Abb. N. C. 300, 301, where the employer was a firm.

²⁶ See as to an attorney, Seymour v. Cagger, 18 Hun, 29, 32. But compare, for contrary view, Smith v Hill, 18 Ark. 178, 176.

28 See Janin v. Browne, 59 Cal. 37, 44, quoting an expression of Parke, B., in Siborne v. Kirkman, 1 Mees. & W. 418, at p. 423; also, Hawkins v. Ball's Admr., 18 B. Mon. 816, at pp. 819-20, 68 Am. Dec. 755, 757; Marvel v. Philips (Mass.), 40 Cent. L. J. 104.

²⁷ See especially Shultz v. Johnson's Admr., 5 B. Mon. 497, 501; Lacy v. Getman, 119 N. Y. 109, 114-15, 16 Am. St. Rep. 806, 808-9.

28 See Janin v. Browne, 59 Cal. 87, 44; Shultz v. Johnson's Admr., 5 B. Mon. 497, 501; McGill's Creditors v. McGill's Admr., 2 Met. (Ky.) 258, 262. This criterion in its relation to survivorship of contracts in general, is considered in Billing's Appeal, 106 Pa. St 568, 560; Dickinson v. Calahan's Admr., 19 Pa. St. 227 233; and Siler v. Gray, 86 N. Car. 566, 576.

material factor in determining the intentions of the parties.²⁹

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29 A preference may at any rate be given to the phraseology used in Billing's Appeal, 106 Pa. St. 558, 560. See, also, Smith v. Wilmington Coal, etc., Co., 83 Ill. 498, at p. 500.

SPECIAL CONTRACT — QUANTUM MERUIT— ISSUE.

BOCKWELL STOCK & LAND CO. V. CASTRONI.

Court of Appeals of Colorado, October 14, 1895.

- 1. A plaintiff who alleges and endeavors to prove a special contract, cannot at the same time offer proof to recover on a quantum meruit on an implied assumpsit.
- 2. The plaintiff is only entitled to maintain the issue which he has tendered.

BISSELL, J.: As suggested in the antecedent opinion (42 Pac. Rep. 180), Joseph Castroni's suit was tried with Martha's action, and before the same jury. The record in this case shows some irregularities other than what appears in the wife's suit. Probably this comes from the circumstance of counsel's reliance on the main error committed in the trial of the suit brought by the other plaintiff, while in this he preferred to preserve all the questions. Some of them are probably not of sufficient gravity to upset the judgment, but they seem to require some little discussion in the settlement of the issue between the parties. No narration of the history of the case, other than what is contained in the statement preceding the other opinion, will be given, save to particularize some matters which were incidental to our conclusions in that matter. The alleged hiring on which Joseph sued occurred, if at all, at the time of the arrangement between the company and his wife, Martha, with reference to the establishment of the hennery. It was insisted on behalf of the plaintiff that, when the discussion occurred in the latter part of August, Mr. Rockwell hired him to go out to the farm and labor at whatsoever he might be called upon to do at an agreed price of \$25 per month and his board. It was Joseph's contention that he was in no manner connected with the negotiations entered into between the company and his wife with reference to the establishment of the traffic in hens, but that he was hired independently, as a farm hand, to work at fixed wages. He insists he went out to the farm, and labored from that time on, until the disagreement between the parties in January, when he was discharged. The defendant company insists there was no agreement of this sort, but that he was simply hired, while the barvesting was going on, to do a specific class of work, for which he was to receive \$1 per day and board. The company claimed to have paid him for all the time he worked. The issue was thus sharply defined as to the existence or non-existence of a contract of hiring for a definite period at a fixed wage. The testimony was directed to this end, though, in the progress of the trial, the plaintiff offered testimony to show the value of his services, and thereby established his right to recover for work and labor done upon a quantum merutt. When the case was concluded, the court, over the objection of the defendant, instructed the jury upon both hypotheses. The jury were told, if they should find the agreement to have been made as the plaintiff alleged, they were bound to find for him at the rate of \$25 a month and his board, making whatever deduction was proper for any payments which had been made. The jury were further told, even though they might find from the evidence there was no such agreement as the plaintiff attempted to show, if they found he had done work for the company from the time of going out there to the day of his discharge, and found its value to be of a certain sum, they should return a verdict in accordance with such finding. Under the instructions, the jury were bound to find for the plaintiff, even though they might find there was no contract made, if they found he had done work which was of an ascertainable value. case was tried on the 9th of February. On the conclusion of the trial, the jury returned a verdict that the company was indebted to the plaintiff in the sum of \$15, which had been paid. The court refused to accept it, sent the jury back to their rooms, and they found a general verdict for \$1 for the plaintiff. This verdict was promptly set aside. The court proceeded to retry the case at 2 o'clock of the day on which the verdict was returned, whereupon the company moved to continue it for a reasonable time to procure witnesses to meet the plaintiff's contention that he was entitled to recover on the basis of the value of his services, regardless of the special contract which he had attempted to prove. The showing would seem to make it clear that a severe snowstorm had occurred, which prevented the running of trains, and the procurement of witnesses in time to testify. The motion was overruled. The court proceeded to try the case, and the plaintiff had judgment for \$114.46. The defendant company made the same application for security of costs in this case as in the other. The account which was filed before the justice, and which stood for the pleading in the county court, was simply: "The Stock and Land Company, debit, to four months' labor at \$25 a month, and 18 days, and board."

Some of the chief difficulties which have been encountered in this case proceed from the circumstance that both cases were begun before the a justice without written pleadings. Since both these cases must go back for a new trial, it is suggested to the county court that both parties be ordered to file pleadings setting up their causes of action and defenses, respectively,

thereby putting the case in such shape as to relieve the appellate court, in case of any future appeal, of the difficulties which are experienced on the present hearing. Of course, it is true there is no difference, with respect to the principles which must be applied, in the trial of a case which comes by appeal to a court of record from a justice, and one which originates there, and is heard on written pleading. The legal rights of the parties are precisely the same. They must be determined on the same principles, and the plaintiff is bound to establish his cause by the same proofs. Stout v. Tribune Co., 52 Mo. 343. There is a well-recognized distinction between the forms of pleading by which a party is permitted to recover a debt under the Code, and those which must have been observed by him when the common-law procedure was in full force. The distinction between the common-law forms of assumpsit are thoroughly settled, and were well understood by lawyers who practiced under that system. The difference between the declaration in an action upon a special contract and one upon a quantum meruit was well-defined and thoroughly recognized. Of course, it was true, even under that system, a person might declare in general assumpsit, and recover upon proof of the value of his services, even though there was a special contract which constituted the basis of the action. This happened in the case where the contract had been completed by performance, and the only thing which remained to be done was to pay the contract price. This distinction was recognized and well settled. It was likewise established that, in declaring upon a quantum meruit, it was necessary to aver the implied promise which the law raised against the defendant, and therefore the forms always proceeded that the defendant promised and agreed to pay. We are, however, unconcerned with these distinctions, since the allegation of the promise and agreement to pay is not indispensable, whether the party sues on a special contract or on a quantum meruit. It is only needful for him to state the facts out of which his cause of action grows, and, these being proven, he may recover, whether he has alleged a promise by the defendant, or has omitted to state any. This is true in either case, though necessarily it would happen, in pleading the special agreement, the statement of its exact terms or their legal effect would probably result in averments which would show the defendant's promise. This would not be true in the case of the promise implied by the law, nor is it believed that any averment of this promise is at all necessary under the present system. Hurst v. Litchfield, 39 N. Y. 377; Sussdorff v. Schmidt, 55 N. Y. 319; Kerstetter v. Raymond, 10 Ind. 199; Green v. Gilbert, 21 Wis. 401; Pom. Rem. & Rem. Rights, § 543 et seq. This discussion is only indulged in because counsel, in their arguments, seem to have confused the principles announced by the various cases which declare the proper rule for the construction of pleadings, and

those which determine the legal rights of the parties. It seems to be universally true that there can be no promise implied by the law where an express one is both laid and proven. The allegation of an express promise destroys the possibility of the implication, for the last only exists by virtue of the legal obligation cast upon the party, by virtue of a performance by one without an express agreement by the other. It is a very familiar doctrine in the law, so well established and so long existing as to be worthy the term "elementary." It is useless to discuss it, state the various forms which it may take, or the circumstances under which such contract is enforceable. It is enough to say the statement of the express agreement will exclude the existence of one resulting by operation of law from the acts of the parties. Weston v. Davis, 24 Me. 374; Whiting v. Sullivan, 7 Mass. 107; Galloway v. Holmes, 1 Doug. (Mich.) 330; McClelland v. Snider, 18 Ill. 58; Hancock v. Ross, 18 Ga. 364; Hill v. Balkcom, 79 Ga. 444, 5 S. E. Rep. 200; Delaplaine v. Turnley, 44 Wis. 31.

It must be understood the antecedent discussion, and the citation of these authorities, are not intended to decide the general question of the rules of pleading in such cases, nor the right of a plaintiff to recover on any special contract which he may prove, even though his complaint has taken the form of a declaration to recover for services according to their value. That is not the question at issue. This concerns the right of the plaintiff to both allege and prove a special contract, and in the same action offer evidence to establish the value of the work which he has done, and have the jury instructed that he is entitled to recover in either case, -in the one, because there was a special contract for a definite wage; and in the other, because he rendered services of a proven value. It is simply decided, if the plaintiff declares on a special contract, and undertakes to prove it, he may not at the same time offer proof of the value of his services, and recover, according as the jury may conclude with reference to the matter. We do not disagree with a certain line of authorities which holds that, where there is a controversy between parties as to the agreed price at which work was to be done, evidence may be introduced of the value of the work for the purpose of supporting the plaintiff's contention respecting the agreed price. There are well-considered cases in this direction. Allison v. Horning, 22 Ohio St. 138; Richardson v. McGoldrick, 43 Mich. 476, 5 N. W. Rep. 672. No such question was presented here. The contention between the plaintiff and defendant was not as to what the agreed price was, but it was a sharply-defined issue, made by the assertion on the one side of a contract for employment at a fixed wage, and a denial on the other of the making of any contract at all. The plaintiff was thus only entitled to maintain the issue which he tendered, and to have the jury instructed that he might recover if they should find the contract to

be as he had laid it, and according to its terms. The defendant's objection to the instruction which permitted him to recover on a quantum meruit was well taken, and the court should have given the instruction which the defendant company asked.

The case must be reversed because of this error in the instructions. There are some matters to which it seems wise to call the attention of the trial court, even though they be not deemed sufficiently radical to reverse the judgment. There is no necessity to re-express our views concerning the limitation which the court placed on the defendant's right to argue the case. The two cases were tried together. The abstract which was filed in this court covers nearly 100 pages, and it would seem as though a liberal exercise of the court's authority would have given the defendant a greater latitude. We need not repeat what was said concerning the motion for security of costs. It would seem to be a case in which the order might properly be made, if an adequate showing in conformity to the statute were aptly and duly presented. The refusal of the court to continue the case after it set aside the verdict must have worked considerable hardship to the defendant, under the assumption that the evidence respecting the value of the services was properly introduced. Where a case has been tried and a verdict returned, a reasonable time should be permitted to elapse, if the defendant makes an application therefor, before he is crowded into a further trial of the same controversy. Nothing further need be said about it, as the thing is not likely to occur on the subsequent trial of the case. We discover no other errors of sufficient magnitude to justify a discussion, or to call for an expression of the court's opinion. Reversed.

NOTE.—Special Contract Controls.—An implied contract cannot exist when there is an existing special contract about the identical thing. The right to bring indebitatus assumpsit for money due on an executed contract does not authorize a party to abandon the contract and sue on a quantum meruit. Where parties have made a special contract none can be implied. Cutler v. Powell, 6 Term R. 824; Touissant v. Martinant, 2 Term R. 100, 104; Young v. Paxton, 4 Cranch (U.S.) 229; Raymond v. Barnard, 12 Johns. (N. Y.) 374; Whiting v. Sullivan, 7 Mass. 107, 109; Robertson v. Lynch, 18 Johns. (N. Y.) 456; Massachusetts General Hospital v. Fairbanks, 129 Mass. 78; Scoville v. Miller, 40 Ill. App. 237, 241; Jennings v. Camp, 13 Johns. (N. Y.) 96; Wood v. Edwards, 19 Johns. (N. Y.) 212; Miller v. Watson, 4 Wend. (N. Y.) 275; Shepard v. Palmer, 6 Conn. 100; Russell v. South Brittain, 9 Conn. 522; Londregon v. Crowley, 12 Conn. 561; Hull v. Heighman, 2 East, 145; Weston v. Downes, Dug. 23; Morrison v. Ives, 4 Sm. & M. (Miss.) 652; Pringle v. Samuels, 1 Bibb (Ky.), 172; Christie v. Price, 7 Mo. 433; Stollings v. Sappington, 8 Mo. 119; Chambers v. King, 8 Mo. 519; Charles v. Dana, 14 Me. 387; Chesapeake, etc., Canal Co. v. Knapp, 9 Pet. (U. S.) 365; Hill v. Balkcom, 79 Ga. 444; Hancock v. Ross, 18 Ga. 364; Anderson v. Dickinson, 72 Hun, 556. So where there is a specified contract for a stipulated amount, and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a quantum meruit on an implied assumpsit. Walker v. Brown, 28 Iii. 378; Miller v. Watson, 4 Wend. (N. Y.) 275; Wright v. Butler, 6 Wend. (N. Y.) 284; Shepard v. Palmer, 6 Conn. 100; Christle v. Price, 7 Mo. 438; Eyser v. Weissgerler, 2 Iowa, 463; Freher v. Geeseka, 5 Iowa, 472; Formholz v. Taylor, 13 Iowa, 500; Imhoff v. House, 36 Neb. 28; Stock Co. v. Lamb, 38 Neb. 389. See, also, Succession of Jackson, 47 La. Ann. 1069.

The Allegata and Probata Must Agree.—It is a familiar rule in pleading, that a party who bases his right of recovery upon the breach of a special contract cannot recover upon proof of the breach of an implied contract. Armacost v. Lindley, 116 Ind. 295. Hence when the plaintiff declares on a special contract, as in the principal case, and proves it, he cannot recover on a quantum meruit. Mayer v. Ver Bryck (Neb.), 64 N. W. Rep. 691. He is not allowed to allege one cause of action and prove another upon the trial. The allegata and probata must agree. Imhoff v. House, 36 Neb. 28. After alleging and proving a special contract, this negatives the claim of an implied contract, and no evidence can be introduced to prove something that does not exist, besides the proof would not agree with the allegations. Whiting v. Sullivan, 7 Mass. 109; Massachusetts General Hospital v. Fairbanks, 129 Mass. 78; Scoville v. Miller, 40 Ill. App. 241.

To recover upon a quantum meruit, facts justifying such recovery must be pleaded and then proved. Stock Co. v. Lamb, 38 Neb. 389. And so when the plaintiff insists on the benefits of a special contract he must declare on it; otherwise he might count on one contract and recover on another. Algeo v. Algeo, 10 Serg. & R. (Pa.) 235; Schaffner v. Kober, 2 Ind. App. 409, 411; Condran v. New Orleans (La.), 9 South. Rep. 31.

Indebitatus Assumpsit.—When a contract has been performed, the plaintiff may recover on a simple contract the price of the services under indebitatus assumpsit, but then the contract must regulate the amount of the recovery. Bank v. Patterson, 7 Cranch (U. S.), 299; Holmes v. Stummel, 24 Ill. 370; James v. Colton, 7 Bing. 266. But the right to bring indebitatus assumpsit for money due on an executed contract does not authorize a party to abandon the contract and sue on a quantum meruit. Walker v. Brown, 28 Ill. 278. Indebitatus assumpsit will lie to recover the stipulated price due on the special contract, not under seal, when the contract has been completely excuted; and in such case it is not necessary to declare upon the special contract. Bank v. Patterson, 7 Cranch (U.S.), 299; Chesapeake, etc. Canal Co. v. Knapp, 9 Pet. (U.S.) 566; Stafford v. Sibley (Ala.), 17 South. Rep. 824; Mansori v. Botts, 80 Mo. 651; Dermott v. Jones, 2 Wall. (U. S.) 9; Gaus v. Manuf. Co., 118 Mo. 98; Williams v. Railroad Co., 112 Mo. 468; Yeates v. Ballentine, 56 Mo. 836. The plaintiff may recover upon the general counts for work done; and the addition of a special count setting forth a contract the addition of a special count setting forth a contract different in terms from the one proved will not affect his right to recover upon the general counts. Londregon v. Crowley, 12 Conn. 558. And when the plaintiff has a right to sue on a quantum meruit for part performance, the general rule is that the contract must regulate the price for the work done. Paradine v. Jayne, Aleyn, 27; Beal v. Thompson, 3 Bos. & Pul. 420; Beebe v. Johnson, 19 Wend. (N. Y.) 500; Dermott v. Jones, 2 Wall. (U. S.) 1; School Trustees v. Bennett, 3 Dutch. (N. J.) 513; Williams v. Railroad Co., 112 Mo. 463; Gaus v. Manuf. Co., 113 Mo. 98; Brecknock Co. v. Pritchard, 6 Term. R. 750. D. H. PINGREY.

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BOOK REVIEWS.

This is a volume of a little over four hundred pages, ordinary law book size, and is neat in appearance, good as to mechanical execution and convenient to handle. As is announced in the preface this volume "has been prepared primarily for the use of students at law and instructors in law schools, and designs to present succinctly the elements of the law of torts." The works of this very eminent author are among the best in legal literature. His familiarity with the subject and his great experience in teaching law make entirely unnecessary any extended remarks as to his peculiar fitness to prepare a student's work on torts. Judge Cooley is one of those who believe that the student is entitled to the very best, and in this age of cheap and defective law books the appearance of such a volume as the one before us is very welcome. The subject of torts has become almost a bug-bear to students and instructors, and much of the difficulty attending its study in law school has no doubt arisen from the lack of adequate, and at the same time concise introduction and definition in the text books. Judge Cooley's first two chapters, devoted to the consideration of rights and wrongs as known to the law, and a general classification of legal rights, present in a brief space a very thorough and satisfactory explanation. The following quotation beginning on the first page, is noteworthy, and serves to explain the standpoint of the auther: "Wrongs for which individuals may demand legal redress are classified as, first, those which consist in a breach of contract; and second, those which are independent of contract. The classification is not strictly accurate, since there are many cases in which on the same state of facts the injured party may at its option count upon a breach of contract as his grievance, and complain in such form that the breach of contract is not the gist of the action. These cases make clear the lack of utility and convenience of the classification, and that it may be misleading. And it is perhaps more correct to say, as to the second class, that it embraces those wrongs which arise out of conduct which, while it may be involved in the breach of a contract is accompanied by some other unlawful element." The learned author then defines a tort to be "any wrong not consisting in a mere breach of contract for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer." Any one who reads these paragraphs and the context cannot but feel the breaking in of a great light. The nature and classification of rights and wrongs, the remedies for civil injuries and the rules of legal responsibility which apply in case of torts are considered in the first thirty-five pages of this book, in a manner more satisfactory than we have elsewhere found. On every page there is evidence that the writer was master of his subject and that he understood precisely what he wanted to say. The text is clear and terse, and the propositions of law are stated in an unequivocal manner. We find no discussion of ancient and modern theories of doubtful value; and no unnecessary criticisms of the views of other legal writers. This is a course of conduct which we cannot too highly recommend to those who prepare books for the use of students. The notes are excellent and sufficient. They seem to avoid all discussion of collateral matters and to be confined to the illustration and explanation of the propositions of the text. The citation is up to date, and as far as we have had opportunity to examine the cases support the statements of law. We have noticed in several instances

reference to modifications of old rules of law, made by very recent cases. It is important, for example, under the head of libel to notice the tendency of legislation to confine the recovery to actual damages "in cases where the publication complained of was made in good faith, there being reasonable grounds for believing the statements to be true, if, after the falsity or mistake in the publication was brought to the knowledge of the publisher of the paper making it, a correction or retraction was printed in the next two regular issues thereof, in as conspicuous a manner and place as was the libel itself." And, in considering the action for injuries which one may suffer in the relation of parent and child, it is important to note, that there is a revolt from the old rule basing the action upon the relation of master and servant. and that "in this country there has been a tendency toward a more liberal and more reasonable action basing the right of action upon parental relation." We approve very highly of the double method of citation. So many lawyers depend for the decisions of courts other than those of their own State, upon the different series of selected cases that it seems to us where a case is re-reported in one of those series that the citation should refer to such series as well as to the official volume. The table of contents is really what its name imports, and shows the contents of the book. The table of cases contains not only the names of cases, but the reports as well, and shows that a great number of cases have been consulted, and is very valuable as reference. The index is full and has evidently been prepared with a view to the assistance it will render in the use of the book. We recommend the volume to students and instructors of law, and to all those who wish to have, in a short space, a clear and accurate treatment of that difficult department of law falling under the head of torts.

NEGLIGENCE OF IMPOSED DUTIES - CARRIERS OF FREIGHT.

The author of this work has heretofore written an acceptable treatise on the Negligence of Imposed. Duties as applied Personally and to Carriers of Passengers. The present treatise discusses in an elaborate manner the subject of the liability of carriers of freight for negligence in transportation of goods and freight. It treats in successive chapters of the liability and duty to provide safe transportation, limitation of liability by contract and by statute, acceptance of goods by carrier, bills of lading, "act of God," "perils of the sea," "fire clause," freight charges regulated by value of article, transportation of cattle, packing and storing goods, deviation from route, delay of transportation of goods, connecting lines, interstate and State commerce, competition, discrimination and continuous carriage, unjust discrimination, freight charges and carrier's lien, delivery of goods, and action against carriers of goods. The book is well prepared, the text being clear and concise, and the citation of authorities is exhaustive. It is not a mere digest of authorities, but the author frequently enters into a discussion of the principles, and does not hesitate to express his own opinion on controverted questions, which his standing as a lawyer and ex-chief justice of the Supreme Court of Indiana renders of more than ordinary value. The book is quite bulky, being nearly twelve hundered pages, with a good index. Published by the Lawyers' Co-operative Publishing Co., Rochester, N. Y.



WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recont Decisions.

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- 1. ABATEMENT—Action Pending.—Pending an action in one county to determine the liability of a deceased surety on a guardian's bond, an action will not lie in another for the same purpose, and to subject the decedent's estate to the payment of the debt.—MCNEILL V. CURRIE, N. Car., 23 S. E. Rep. 216.
- 2. ACCIDENT INSURANCE— Condition Disability.—A company is not liable on its accident policy insuring against loss of time for injuries through external and accidental means which shall, independently of all other causes, "immediately" and wholly disable the insured from transacting any business in his occupation, where the insured, injured by a fall, was able for two months to attend partially to his business, but at the end of that time became totally incapacitated by a stroke of paralysis which was the direct result of the accident.— MERRILL V. TRAVELERS' INS. CO. OF HARTFORD, CONN., Wis., 64 N. W. Rep. 1039.
- 8. ACCORD AND SATISFACTION.—To establish a plea of accord and satisfaction under the statute, it must not

- only appear that there was an agreement to accept, in full settlement of an obligation, something different from or less than that to which one of the parties thereto is entitled, but it must be shown that such agreement has been fully executed, and the obligation extinguished by the creditor's actual acceptance of the consideration specified in the agreement constituting an accord.—CARPENTER v. CHICAGO, M. & ST. P. RI. CO., S. Dak., 64 N. W. Rep. 1120.
- 4. ADMINISTRATOR—Action by Heirs.—Heirs of a deceased minor cannot maintain an action against the administrator, who was also deceased's guardian, and his sureties, to recover money coming into the hands of such administrator and guardian by virtue of his guardianship, until there has been a settlement on his accounts as such guardian.—CRAIN v. VINCENT, Ky., 32 S. W. Rep. 759.
- 5. ADMINISTRATION—Action on Note Due Decedent.— The right to maintain an action upon a promissory note belonging to the estate of a deceased person is vested in the personal representative of the deceased, and not in his heir atlaw.—Presbury v. Picket, Kan., 42 Pac. Rep. 405.
- 6. ADMINISTRATION Claims against Estates.—One who claims to be a beneficiary of funds received by a decedent as trustee must present his demand against the estate for allowance, like other claims, unless the identical trust property, or its product in a new form, can be traced into the possession of the personal representatives.—McGrath v. Carroll, Cal., 42 Pac. Rep. 466.
- 7. ADVERSE POSSESSION.—Actual occupation of land up to a boundary fence will not give title by adverse possession, it being claimed by one of the owners that it was not the true boundary, and understood by both that the true line was to be ascertained by a survey.—PETERS V. GRACIA, Cal., 42 Pac. Rep. 455.
- 8. ADVERSE Possession.—The possession of a decedent's land by his widow and child as such is not adverse to decedent's children by former marriage.—HULVEY V. HULVEY, Va., 28 S. E. Rep. 233.
- 9. APPEAL.—An appeal from a decree dismissing a bill the whole object of which was to secure a right to vote at an election of delegates to a State constitutional convention will be dismissed if, before the appeal was taken, the date fixed for the election had passed, and, before the entry of the appeal, the convention had assembled.—MILLS V. GREEN, U. S. S. C., 16 S. C. Rep. 132.
- 10. APPEAL Accepting Benefits of Judgment.—A sale of land set off to one by judgment in partition bars his right of appeal.—McGrew v. Kitch, Ind., 41 N. E. Rep. 1027.
- 11. APPEAL Affirmance. Where several parties unite in a joint assignment of error, the judgment will be affirmed on appeal unless the assignment is good as to all.—KEMPF v. UNION SAVINGS & LOAN ASS'N, NO. 2, Inc., 41 N. E. Rep. 1065.
- 12. APPEAL—Rehearing. This court will not consider, and therefore will not allow a rehearing for the discussion of the constitutionality of a law in a respect or particular not affecting the controversy to be decided.— VALLIER V. BRAKKE, S. Dak., 64 N. W. Rep. 1119.
- 18. APPEAL BOND—Waiver of Defects.—After a general appearance on appeal from a justice of the peace, a party is not entitled, in response to a motion for security for costs, to have the appeal dismissed because the sureties on the appeal bond did not justify before the justice, as required by How. Ann. St. § 7000.—SHEEWOOD V. IONIA CIRCUIT JUDGE, Mich., 64 N. W. Rep. 1045.
- 14. APPEAL FROM JUSTICE'S COURT.—On appeal from a judgment of a justice of the peace by defendants against whom the judgment was rendered, other dendants jointly liable, but not served, are not adverse parties, on whom the notice of appeal must be served.



-TERRY V. SUPERIOR COURT OF SAN DIEGO COUNTY, Cal., 42 Pac. Rep. 464.

15. APPEARANCE—Summons.—A special appearance to move or set aside a summons for irregularity of service, with costs of the motion, is not a waiver of want of jurisdiction.—Kingsley v. Great Northern BY. CO., Wis., 64 N. W. Rep. 1086.

16. ARREST OF FLEEING CRIMINAL — Reward. — Code 1892, § 1397, allows a reward for the arrest of "any one who has killed another, and is fieeing or attempting to fiee before arrest," to be paid by the county in which the "homicide occurred." One who wounded another, while his victim was still alive, was arrested, and tried for assault with intent to kill, and discharged. On his victim's subsequently dying, he fied: Held, that one arresting him was entitled to the reward.—NEWTON COUNTY V. DOOLITTLE, Miss., 18 South. Rep. 451.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Hill's Ann. Laws, § 3173 et seq., providing a procedure for the settlement of estates assigned for the benefit of creditors, and authorizing the court to discharge the assignors in certain cases from pre-existing liabilities, deprives equity of its ordinary jurisdiction touching the administration of insolvent estates.—Sprinkle v. Wallace, Oreg., 42 Pac. Rep. 487.

18. ASSIGNMENT OF CHOSE IN ACTION—Receiver.—A corporation assigned certain accounts payable, being only a small portion of its assets, to a trustee, to secure certain creditors. The trustee immediately accepted the trust, and notified the secured creditors and also the parties owing the accounts. Afterwards, but on the same day, a receiver was appointed in a suit brought by a creditor to wind up the corporation: Held, that the secured creditors should be first paid out of the proceeds of the assigned accounts collected by the receiver, since such an assignment is enforceable in equity.—CHICAGO TITLE & TRUST CO. V. SMITH, Ill., 41 N. E. Rep. 1076.

19. ATTACHMENT.—Where defendant's property is attached while in the possession of one who is not summoned and returned as garnishee, the failure of the latter, even when he is the plaintiff in the attachment suit, to give defendant notice of the attachment, will not invalidate the proceeding.—REGISTER v. WOODWARD IRON CO., Md., 33 Atl. Rep. 320.

20. ATTACHMENT — Insufficient Affidavit.—An attachment, in an action to recover damages for breach of contract to convey real estate, that has been issued upon an affidavit which falls to enumerate any of the acts or omissions constituting actionable detriment, under section 4686 of the Compiled Laws, and which states no ground for damages ascertained or ascertainable by reference to the contract, or from which the court can definitely determine, by any fixed rule of law or measure of damages, the amount which plaintiff is entitled to recover, should be, on motion, vacated and discharged.—NARREGANG v. MUSCATINE MORTGAGE & TRUST CO., South Dak., 64 N. W. Rep. 1129.

31. ATTACHMENT BOND—Obligee.—In the attachment of property alleged to have been fraudulently conveyed the attachment bond may properly be made payable to the alleged fraudulent debtor.—ARCHENBOLD V. B. C. EVANS CO., Tex., 32 S. W. Rep. 786.

22. ATTORNEY AND CLIENT—Action for Services.—The guaranty of Const. U. S. Amend. 6, that a person accused of crime shall be entitled to counsel, does not include a guaranty that such counsel shall be furnished at the expense of the public.—HOUK V. BOARD OF COM'ES OF MONTGOMERY COUNTY, Ind., 41 N. E. Rep. 1868.

22. ATTORWEY AND CLIENT—Privileged Communications. — Communications by parties to an attorney acting professionally for all in the same transaction are not, as between such parties, privileged.—Living-strom v. Wagner, Nev., 42 Pac. Rep. 290.

M. Barks—Refusal to Pay Check—Damages.—Where a check, properly indorsed, was by due course of mail sent for collection to the bank on which it was drawn.

the drawer having at the time sufficient funds on deposit in that bank with which to pay the check, and it was returned unpaid, this was in effect a refusal to pay, although there was no protest or williful dishonor of the paper, and in such case the bank, even though there was no proof of special damage, was liable to the drawer of the check for such "temperate" damages as would be a reasonable compensation for the injury, and in legal contemplation this means something more then mere nominal damages.— ATLANTA NAT. BANK v. DAVIS, Ga., 23 S. E. Rep. 190.

25. BILL OF EXCEPTIONS.—Entering judgment on a verdict without formally overruling a pending motion to set aside the verdict is a mere informality, not assignable as error.—FERRIS V. COMMERCIAL NAT. BANK OF CHICAGO, Ill., 41 N. E. Rep. 1118.

26. Bond — Construction.—A bond conditioned that the obligor pay off a mortgage on land part of which he had conveyed to the obligee does not merely bind him to save harmless the obligee from the mortgage to the extent of the value of the land, but requires the obligor to compensate the obligee for whatever sum he may be required to pay to save his land from the mortgage, to the extent of the penalty of the bond.—Jackson v. Steffens, Tex., 32 S. W. Rep. 862.

27. CARRIERS OF PASSENGERS — Carriers—Depot Platform—Lights.—Sayles' Supp. Rev. St. art. 4238, requiring railroad companies to keep their depots lighted, requires the lighting only of such platforms or approaches as are necessary for ingress and egress of passengers; and where a passenger is injured at night by falling over an obstruction on an unlighted south platform of a union depot, and it appears that the trains of several of the defendant companies stop on that side of the depot, the question of the negligence of a company whose trains stop at a platform on the north side is for the jury.—Texas & P. Ry. Co. v. Reich, Tex., 32 S. W. Rep. 817.

28. Carriers of Passengers — Liability of Sleeping-Car Company.—Relatively to a passenger occupying a berth in a sleeping car, for which he has paid the customary fare, a sleeping car company is under the duty of maintaining such watch and guard while the passenger is sleeping as may be reasonably necessary to secure the safety of such money, jewels, and baggage as he may properly carry on his person or have in his possession while traveling in the car; and if, while he is asleep, such property is taken from his possession, the burden is upon the company of showing the loss did not occur because of a failure upon the part of its employees to discharge this duty.—Kates v. Pullman Palace Car Co., Ga., 23 S. E. Rep. 186.

29. CERTIORARI — Order in Contempt.—Certiorari will not issue to review an order of court adjudging the petitioner guilty of contempt in disposing of his property in violation of a decree of divorce enjoining him from so doing, on the ground that the restraint is perpetual, since it is an error which can be corrected by appeal.—WHITE V. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 42 Pac. Rep. 480.

30. CERTIORARI TO JUSTICE'S COURT.—In an action in justice's court, in the absence of an appearance or objection by defendant, where an affidavit in form sufficient to sustain plaintiff's claim is introduced, defendant cannot for the first time raise the question by certiorari that the preliminary service entitling plaintiff to make use of it was not made.—FORBES LITHOGRAPH MANUF'S CO. V. WINTER, Mich., 64 N. W. Rep. 1053.

81. CONFLICT OF LAWS — Limitations.—Actions on contract are subject to the limitations of the State where brought, and not of the State where the contract is made.—TILLIARD v. HALL, Tex., 32 S. W. Rep. 863.

32. CONSTITUTIONAL LAW—Cruel and Unusual Punishment.—A State statute providing that a person who has been before convicted of crime shall suffer as everer punishment for a subsequent offense than for a first offense is not invalid as subjecting him to be put twice in jeopardy for the same offense.—MOORE V. STATE OF MISSOURI, U. S. S. C., 16 9. C. Rep. 179.

- 33. CONSTITUTIONAL LAW Irrigation Companies.— The act approved March 26, 1895, known as the "District Irrigation Law." provides that, when bonds are authorized by a vote of any irrigation district, application may be made to the district court of the county in which such district or part thereof is situated, for an order confirming and approving the same. At the time set for hearing, and after notice by publication to all concerned, any person interested in said district may appear and resist such application; and the court may examine into and determine all questions pertaining to the organization of the district, as well as the regularity of the voting and issuing of such bonds: Held not to contemplate the taking of property without due process of law, by means of taxation, within the prohibition of the State or federal constitution .-BOARD OF DIRECTORS OF ALFALFA IRRIGATION DIST. V. COLLINS, Neb., 64 N. W. Rep. 1086.
- 84. CONSTITUTIONAL LAW-Judicial Power.-The provision in section 6 of the act of congress of June 22, 1874, that no payment shall be made to an informer furnishing information which leads to the seizure of smuggled goods in a case where judicial proceedings have been had, unless the value of his services shall have been certified by the court or judge for the information of the secretary of the treasury, who, however, shall not be bound by such certificate, is an attempt to confer upon the court or judge a power not judicial, which congress has no power, under the constitution, to require the judiciary to exercise; and, accordingly, the courts and judges are without jurisdiction to make such certificate .--EX PARTE RIBBELING, U. S. D. C. (Tex.), 70 Fed. Rep. 810.
- 85. CONSTITUTIONAL LAW Lack of Uniformity.—The county government act, § 190, subd. 16 (8t. 1891, p. 885), in allowing a witness in a criminal case before the superior court of counties of the twenty-eighth class alone, "subject to the discretion of the court," the same per diem and mileage as jurors in like cases, violates Const. att. 1, § 11, requiring general laws to have a "uniform operation."—TURNER V. SISKIYOU COUNTY, Cal., 42 Pac. Rep. 484.
- 86. CONTEMPT.—Where a court, without jurisdiction adjudges a person guilty of contempt for refusing to comply with its decree, but temporarily suspends the execution of the judgment, prohibition is the proper remedy to test the validity thereof.—COSBY V SUPERIOR COURT OF LOS ANGELES COUNTY, Cal., 42 Pac. Rep. 460.
- 87. CONTEMPT OF WITNESS Refusal to be Sworn.—A witness in attendance upon a court who, on being ordered to be sworn or affirmed, contumaciously refuses, is guilty of a contempt of court, and is punishable therefor.—WILCOX V. STATE, Neb., 64 N. W. Rep. 1072.
- 88. CONTRACT.—Plaintiff agreed to lease to defendant certain premises at expiration of an existing lease. There were on the premises certain fixtures belonging to the tenant, which, under the lease, plaintiff was to buy at an appraised price. The agreement to lease provided that defendant should "be entitled to take" said fixtures at their appraised value, or to purchase them direct from the tenant, and that at the expiration of defendant's lease plaintiff shouldbuy said fixtures from him: Held, that defendant was bound to purchase the fixtures, his only option being as to the mode of purchase.—Street v. Chicago Wharfing & Storage Co., Ill., 41 N. E. Rep. 1108.
- 89. CONTRACT Compromise Consideration. A promise made in consideration of the compromise of an unenforceable claim, which both parties believe at the time was enforceable, is based on sufficient consideration.—Sweitzer v. Heasley, Ind., 41 N. E. Rep. 1664.
- 40. CONTRACT—Consideration.—A waiver by a landlord of his lien for rent on crops of his tenant is a sufficient consideration to support a promise by a vendee of the crops to pay to him the rent.—SHARP v. CAR-MODY, Ky., 82 8. W. Rep. 749.
- 41. CONTRACT—Consideration.—A new contract may be substituted for an executory contract of employ-

- ment, not performed !n whole or in part by either, without a new consideration other than the mutual acquittance of each other in the old promise.—BROWN V. CATAWBA RIVER LUMBER CO., N. Car., 28 S. E. Rep. 268.
- 42. CONTRACT—Failure to Perform.—One who accepts a well as completed according to the contract for drilling it cannot, in an action for the contract price, claim that the contract was not performed.—ELWOOD NATURAL GAS & OIL CO. V. BAKER, Ind., 41 N. E. Rep. 1068.
- 48. CONTRACTS Implied Stipulations. In the absence of anything to the contrary, incidental stipulations necessary to carry a contract into effect, or make it reasonable, or comfortable to usage, are implied therefrom.—MORROW v. BOARD OF EDUCATION OF CITY OF CHAMBERLAIN, S. Dak., 64 N. W. Rep. 1126.
- 44. CONTRACT—Interpretation—Engineer's Estimate.
 —The provision in a construction contract that, when
 the work is completed, there shall be a final estimate
 made by the engineer of the quantity, character, and
 value of the work, agreeably to the terms of the contract, and the balance, after deducting monthly payments, and on the contractor's giving a release, will
 be paid in full, is not an agreement that the engineer's
 estate shall be conclusive.—CEMTRAL TRUST CO. OF
 NEW YORK V. LOUISVILLE, ST. L. & T. RY. CO., 70 Fed.
 Rep. 382.
- 45. CONTRACT—Validity.—Where testator left property to his wife for life, with remainder to his children who survived his wife, a contract between them, during her life, that the shares of the children should be regarded as vesting at the death of testator, and the survivorship clause be disregarded, is valid.—IF RE RALSTOM'S ESTATE, Penn., 38 Atl. Rep. 273.
- 46. CONVERSION—Intermingling of Crops. Where goods of the same kind and value, belonging to different owners, are intermingled and confused by one owner willfully, but not in bad faith, the other owner does not thereby become the owner of the whole; but when the part of the whole mass belonging to the latter is, by reason of such confusion, made uncertain, every reasonable doubt as to the amount of his share must be resolved in his favor.—D. M. OSBORNE & CO. V. CARGILL ELEVATOR CO., Minn., 64 N. W. Rep. 1135.
- 47. CORPORATIONS Director.— A director has the right to take an assignment of a claim against an insolvent corporation for the unpaid purchase price of land, and enforce the same for the amount paid, and a judgment entered thereon will be prior to subsequent judgments, though the original vendor's lien be lost by the assignment.—BONNEY v. TILLEY, Cal., 42 Pac. Rep. 489.
- 48. OREDITORS' SUIT—Limitations of Actions.—An action for the purpose of settling a trust estate becomes one for the benefit of general creditors by a decree requiring a report of all outstanding debts, and restraining the general creditors from maintaining separate actions.—Houck's Adm'r v. Dunham, Va., 28 S. E. Rep.
- 49. ORIMINAL EVIDENCE—Confession.—A confession to an officer making the arrest, who cautioned defendant that whatever he might say would be used as evidence against him, and who informed defendant "that it might go lighter with him if he told all about" the crime, was admissible, in the discretion of the court.—THOMAS V. STATE, Tex., 32 S. W. Rep. 771.
- 50. CRIMINAL EVIDENCE—Homicide—Res Gestæ.—The declaration of deceased, made a few minutes after he was shot, that he struck defendant because he saw defendant was going to shoot him, is res gestæ.—LINDSEY v. STATE, Tex., 32 S. W. Rep. 768.
- 51. ORIMINAL EVIDENCE Rape Chastity of Prosecutrix.—Upon a charge of rape, testimony that the general reputation of the prosecutrix for chastity is not good is competent, but testimony of specific acts of unchastity is not competent to prove her probable consent to sexual intercourse with the defendant.—STATE V. BROWN, Kan., 42 Pac. Rep. 363.

- 52. CRIMINAL LAW—Amendment of Record.—After the expiration of the term at which a criminal case is tried the court cannot amend the record so as to show the venue of the case.—BELCHER V. STATE, Tex., 82 S. W. Rep. 770.
- 58. CRIMINAL LAW—False Pretenses—Variance.—The mere fact that a false pretense of an existing or past fact, by reason of which the owner of money or property is induced to part with the same, is accompanied by a future promise, will not take the case out of the operation of the statute which prohibits and punishes the obtaining of money by false pretenses.—STATE v. GORDON, Kan., 42 Pac. Rep. 346.
- 54. CRIMINAL LAW—Felony Trial—Verdict.—A verdict in a felony case is not invalid because rendered in the absence of accused, notwithstanding How. Ann. St. § 968, providing that no person indicted for a felony shall be tried unless personally present during the trial; he being out on bail, and verdict being rendered during court hours.—FREY v. CALHOUN CIRCUIT JUDGE, Mich., 64 N. W. Rep. 1047.
- 55. CRIMINAL LAW—Forgery.—Though furnishing intoxicating liquors to Indians is prohibited by law, Indians may be convicted of forging an order to furnish liquor to "bearer."—PEOPLE v. JAMES, Cal., 42 Pac. Rep. 479.
- 56. CRIMINAL LAW Former Jeopardy Incest.—An acquittal for rape does not bar a prosecution for incest arising from the same transaction.—Stewart v. State, Tex., 32 S. W. Rep. 766.
- 57. CRIMINAL LAW Homicide.—Though defendant was in the act of committing a forcible trespass, decased was not justified in trying to kill him in attempting to prevent it.—Prople v. Hecker, Cal., 42 Pac. Rep. 307.
- 58. CRIMINAL LAW—Homicide—Insanity.—In a prosecution for murder, the defense relied upon being insanity at the time of the homicide, an order previously made by the proper county board finding the accused to be a fit subject for treatment in the hospital for the insane, is at most evidence of the defense relied upon, and raises no conclusive presumption that the accused was at the time in question insane, in the sense that he is not accountable for the act charged.—PFLUEGEE v. STATE, Neb., 64 N. W. Rep. 1094.
- 59. CRIMINAL LAW—Homicide—Insanity.—Where, on a trial for murder, insanity is relied on as a defense, an expert may testify to statements made to him by the defendant of previous sufferings, which formed the basis of, and are declared by him to be necessary to, his diagnosis of the case.—PEOPLE v. SHATTUCK, Cal., & Pac. Rep. 815.
- 60. CRIMINAL LAW Homicide—Malice.—On the trial of a person charged with murder the jury ought not to be instructed that, the killing with a deadly weapon being admitted, the presumption therefore is that such killing was done with malice and that this presumption stands until it is rebutted by evidence. It would be better to instruct them that malice may be inferred from the fact of killing with a deadly weapon, and that they should consider this circumstance in connection with all the other evidence in the case for the purpose of determining whether the act was malicious or not.—STATE V. EARNEST, Kan., 42 Pac. Rep. 359.
- 61. CRIMINAL LAW Jeopardy.—Where the separate property of two persons is stolen from each at the same time, a conviction for theft from one is not a bar to a prosecution for the theft from the other.—State v. By Mr. Car., 23 S. E. Rep. 219.
- 63. CRIMINAL LAW Larceny.—One who obtains money from another on the pretense that he will bet it for him on a race, which he pretends to do, and converts the money to his own use, is guilty of larceny.—Does v. Prople, Ill., 41 N. E. Rep. 1093.
- 66. CRIMINAL LAW Murder Self-defense.—Where condeavors to withdraw from a fight, but cannot do to by reason of the hostile opposition of his adversary, and to continue the attempt would result in death or

- great bodily harm, he may kill his adversary in self defense.—STATE v. POE, Dela., 33 Atl. Rep. 257.
- 64. CRIMINAL LAW Objections to Information.—The objection that the information in a criminal case does not state facts sufficient to constitute a public offense must be first made in the trial court, either by demurrer to the information, or at the trial under a plea of not gulity, or after the trial by motion in arrest of judgment.—STATE V. HINCKLEY, Idaho, 42 Pac. Rep.
- 65. CRIMINAL LAW Presentment by Grand Jury .-Const. 1879 omits all reference to presentments as a mode of charging a person with a public offense. Pen, Code, § 682, provides that every public offense must be prosecuted by indictment or information, except of-fenses tried in justices' and police courts. Section 872 requires the magistrate, after a defendant has been examined, to hold him to answer if it appears that an offense has been committed, and that he is guilty. Section 888 requires the magistrate, on holding him to answer, to return the warrant and depositions to the clerk. Section 809 provides that, when so held, defendant must be proceeded against by information or indictment. Section 1426 provides that all proceedings in actions before a justice's or police court, for a public offense of which they have jurisdiction, must be commenced by complaint under oath, etc.: Held, that a "presentment" by a grand jury is unauthorized.—IN RE GROSBOIS, Cal., 42 Pac. Rep. 444.
- 66. ORIMINAL LAW-Prior Conviction.—Pen. Code, § 1093, provides that, is cases where the indictment charges a previous conviction, and defendant has confessed the same, the cierk, in reading it, shall omit therefrom all that relates to such previous conviction: Held, that it was error to admit testimony tending to show a previous conviction, defendant having confessed the same.—PEOPLE v. THOMAS, Cal., 42 Pac. Rep. 456.
- 67. CRIMINAL LAW—Rape.—The word "abuse," in the sense in which it is used in section 12 of the Criminal Code, is synonymous with the word "ravish."— CHAMBERS V. STATE, Neb., 64 N. W. Rep. 1078.
- 68. CRIMINAL LAW Remarks of Counsel. On trial for murder, comment by the district attorney on the prevalence of stabbing affrays in the city, with allusions to their similarity to the case at bar, is not ground for reversal, where it was made in reply to similar comment by defendant's attorney, and the court, in a charge, instructed the jury to disregard it.—BARCZYNSKI V. STATE, Wis., 64 N. W. Rep. 1026.
- 69. CRIMINAL TRIAL—Juror Competency,—One who has formed an opinion of the guilt of accused but states that he can try the case uninfluenced by his opinion, is not incompetent as a juror because he has talked with a witness; it not appearing that he got his opinion from talking with the witness.—WADE V. STATE, Tex., 32 S. W. Rep. 772.
- 70. DEATH BY WRONGFUL ACT —Corporation. Rev. St. art. 2899, authorizing an action for death caused by "the wrongful act, negligence, unskillfulness, or default of another," gives a right of action against a private corporation.—LYNCH v. SO_THWESTERN TELEGRAPH & TELEPHONE CO., Tex., 32 S. W. Rep. 776.
- 71. DEED—Bona Fide Purchaser Constructive Notice.—A person who has knowledge of facts sufficient to put a prudent man on inquiry with regard to the existence of an unrecorded deed, and fails to make such inquiry, cannot claim protection as a bona fide purchaser under the recording act.—DORAN V. DAZEY, N. Dak., 64 N. W. Rep. 1023.
- 72. DEED-Conveyance to Several.—Code 1892, § 2441 (Code 1871, § 2301), provides that all conveyances of lands to two or more persons shall be construed to create estates in common, unless it appears that it was intended to create an estate in joint tenancy: Held, that a conveyance of land to three persons for their natural lives, and at their death to descendants of their bodies in fee, but, if they have none, to the heirs of their brothers and sisters in fee, createda

tenancy in common, whereby the estate of each tenant at her death passed to her heirs, until the last tenant dies, when the ulterior limitation will take effect.

—HAWKINS V. HAWKINS, Miss., 18 South. Rep. 479.

- 73. DEED—Description.—A deed described the land conveyed as all of a certain farm composed of a tract called the "M" and one called the "P," "the interest intended to be conveyed thereby being the entire interest and estate" received by will from 8 "and which said farm is particularly described in a deed from P:" Heid, that the deed did not convey a tract received by will from 8, which was not included in the deed from P, and which was a separate tract from either the M or the P.—JAY V. MICHAEL, Md., 33 Atl. Rep. \$22.
- 74. DEED-Infant.—Rev. St. 1894, §§ 8864, 8865, providing that restoration of the purchase money must be made to avoid the conveyance of an infant femecovers, in which her husband, being of full age, has joined, or to avoid the conveyance of an infant who falsely represents himself to be of age, do not require an offer to restore the purchase price, where it was alleged that the husband was not of full age, and the facts pleaded did not disclose any representation by the infant as to age.—GILLENWATER V. CAMPBELL, Ind., 41 N. E. Rep. 1041
- 75. DEED—Recital.—A recital in a deed to the effect that the grantees were the only heirs of a certain person did not bind others whom the evidence indisputably showed were also heirs.—MARIPOSA LAND & CATTLE CO. V. SILLIMAN, Tex., 32 S. W. Rep. 843.
- 76. DEPOSITION—Formal Defect—Waiver.—A stipulation as to the taking of a deposition that "all formalities are expressly waived" waives a defect consisting in a signing by the witness at a place other than at the close of the deposition, though a statute requires such deposition to be subscribed by the witness, where it appears from the notary's certificate that the witness read and swore to the whole deposition.—CHIPLEY v. GREEN, Colo., 42 Pac. Rep. 498.
- 77. DESCENT AND DISTRIBUTION—Discovery of Will.—Twenty years after the distribution to the heirs at law of the estate of a supposed intestate, his will was discovered. There was no claim that it could have been earlier found: Held, that the statute of limitations to recover from a distributee, who was not a legatee, the amount handed over to him, did not begin to run until the discovery of the will.—Crauford's Adm'r v. Smith's Ex'r., Va., 23 S. E. Rep. 235.
- 78. DIVORCE Pleading.—In a suit for divorce the allegation that the husband has been guilty of adultery on many occasions, is too general, and, although the name of the person with whom the defendant committed adultery need not be pleaded, the time, place, and circumstances should be set forth.—MILLER V. MILLER, Va., 23 S. E. Rep. 232.
- 79. DRAINAGE—Parol License—Revocation.—The fact that an executed parol license to use another's land was based on a valuable consideration will not render it irrevocable.—THOEMKE V. FIEDLER, Wis., 64 N. W. Rep. 1030.
- 80. EJECTMENT—Equitable Defense.—In ejectment, a claim by defendant of title under an unregistered deed, which has been lost, is an equitable defense, and to be available must be set up by answer as a defense in a court of equity.—WILSON v. WILSON, N. Car., 28 S. E. Rep. 272.
- 81. EJECTMENT BY MORTGAGEE.—The mortgagee in a mortgage of the statutory form, in which the mortgagor "mortgages and warrants" the land, may maintain ejectment against third persons after condition broken and before foreclosure sale.—ESKER v. HEFFERNAN, Ill., 41 N. E. Rep. 1113.
- 82. ELECTION Australian Ballot Law.—Under the statute requiring voters to mark a cross in the square opposite the name of the candidate of their choice, a ballot in which are marked in the square two lines which do not cross should not be counted.—APPLE V. BARCROFT, Ill., 41 N. E. Rep. 1116.

- 88. EQUITY—Excessive Rate of Interest.—Under Civ. Code, § 1918, providing that parties may contract in writing for the payment of any rate of interest, equity will not relieve one who has contracted to pay interest largely in excess of the current rates, in the absence of accident, mistake, actual fraud, or undue influence.

 —BOYCE V. FISK, Cal., 42 Pac. Rep. 478.
- 84. EQUITY—Injunction.—Where a bill for injunction against threatened trespasses to land alleges the defendant's insolvency as the reason why the remedy at law is inadequate, evidence of defendant's solvency deprives the court of jurisdiction.—HARMS V. JACOBS, Ill., 41 N. E. Rep. 1071.
- 85. EQUITY—Removing Executed Contract Mutual Mistake.—Equity will not reform an executed contract on the ground of mistake unless the mistake is shown to have been mutual.—DOUGHERTY V. GREENWICH INS. CO. OF THE CITY OF NEW YORK, N. J., 33 Atl. Rep. 296.
- 86. ESTATES Contingent Remainder.—A man conveyed land to trustees in trust to collect the rents, and pay same to his wife, and directed that at her death the trustees should sell the land, "and divide the proceeds equally among the children" of said grantor and his said wife: Held, that the children took no interest in the land, and that their interest in its proceeds was contingent on their surviving their mother.—STEODE v. MCCORMICK, Ill., 41 N. E. Rep. 109.
- 87. ESTOPPEL Against Married Woman.—The fact that a married woman, who executed with her husband, to secure a debt of the husband, a mortgage on land owned by her and him as tenants by entireties, knew that the mortgage as to her was invalid, and took no steps to notify the mortgagee of her interest in the land, will not estop her from denying the absolute ownership of the husband in it.—Coats v. Gordon, Ind., 41 N. E. Rep. 1044.
- 88. EVIDENCE—Account—Proof of Entries.—On proof that the person who made the entries in an open account was outside the State, proof of his handwriting was admissible as *prima facte* evidence of the truth of the entries.—HEISKELL V. ROLLINS, Md., 33 Atl. Rep. 263.
- 89. EVIDENCE—Impeaching Evidence.—Impeaching evidence should be limited to the weight and credibility of that which it was introduced to impeach.—SPIARS v. DALLAS COTTON MILLS, Tex., 32 S. W. Rep. 777.
- 90. EVIDENCE—Parol Evidence.—Where an instrument accompanying a deposit in a bank does not undertake to state the terms of the contract under which it is made, parol evidence is admissible to show the contract.—NOWLIN v. FRICHOTT, Tex., 32 S. W. Rep. 33
- 91. EVIDENCE—Parol Evidence Contract.— Where the language of a written instrument applies equally well to more objects than one, parol evidence is admissible to show to which the instrument relates.— PFEIFER V. NATIONAL LIVE STOCK INS. CO., Minn., 64 N. W. Rep. 1018.
- 92. EVIDENCE—Undue Influence—Deed.—On an issue as to whether a deed was procured from a deceased grantor through undue influence, a witness cannot state that the grantor was one who could not be influenced by "any power on earth," such opinion being an invasion of the province of the jury.—SMITH V. SMITH, N. Car., 23 S. E. Rep. 270.
- 93. EXECUTION—Recitals.—A recital in a sheriff's return of execution that no fees were paid or tendered to lay off a homestead for the execution of defendant, is prima facie evidence of the truth of the statement.—MILLER v. POWERS, N. Car., 23 S. E. Rep. 183.
- 94. FEDERAL COURTS—Appeal—Sentence of Death—Supersedeas.—When an appeal to the United States Supreme Court by one under sentence of death by a State court from a refusal of an application for habeas corpus is dismissed, and final judgment is entered, and the mandate is issued, the State authorities may pro-



ceed with the execution of the sentence, though the mandate is delivered to them instead of to the Circuit Court from which the appeal was taken.—LAMBERT V. BARRETT, U. S. S. C., 16 S. C. Rep. 135.

26. FEDERAL COURTS—Circuit Court of Appeals—Jurisdiction.—Act March 3, 1891, authorizes appeals or writs of error from the district or Circuit Courts directly to the Supreme Court in cases of conviction of an infamous crime, and section 6 gives the Circuit Court of Appeals power to review decisions in the Circuit or District Courts in cases not provided for by the preceding section, and in terms makes its judgments final in criminal cases: Held, that the decisions of the Circuit Courts of Appeals are not final in cases of infamous crimes.—Folsom v. United States, U. S. S. C., 16 S. C. Rep. 222.

96. FEDERAL COURTS—Jurisdiction of Circuit Courts of Appeals.—The Circuit Courts of Appeal have no jurisdiction to entertain an appeal in which the only question at issue is as to the jurisdiction of the court below over the cause.—THE ALLIANCE, U. S. C. C. of App., 70 Fed. Rep. 278.

37. FEDERAL COURTS—Supreme Court.—A decision by a State Supreme Court that the holder of a mining claim had no right to appropriate gold at the intersection of two veins is not reviewable by the United States Supreme Court as presenting a federal question involving the application of Rev. St. §§ 2822, 2386, when the State court based its decision on the ground that such holder was estoped, by a deed previously made by him, to claim the gold at such point of intersection.—GILLIS V. STINCHFIELD, U. S. S. C., 16 S. C. Rep. 181.

98. FEDERAL COURTS—Township Bonds—Decision of State Court.—Bonds issued by a township under authority of acts passed in 1882 and 1885 were purchased by plaintiff in 1896, in reliance on their validity; such bonds being then treated as valid by the township, the public, and the different departments of the State, and decisions of the Supreme Court of the State having apparently assumed their validity. In 1888 the State Supreme Court, by a majority of two to one, held the bonds to be invalid. In 1889 the same court affirmed the constitutionality of an act passed December 22, 1898, declaring bonds previously issued by a township to be valid,—a decision apparently in conflict with the previous one: Held, that the Supreme Court, in determining the validity of the plaintiff's bonds, would not be bound by the decision rendered in 1888 by the State Supreme Court.—Folsom v. Township Ninetyski, Abbeville, U. S. S. C., 16 S. C. Rep. 174.

99. FEDERAL OFFENSE—Robbery of Mails—Fictitious Letter.—A letter addressed to a fictitious person, known to be such, is a "letter" within the meaning of Rev. St. §§ 5467, 5469, making the stealing of a letter from the mail or post-office a penal offense.—GOODE v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 136.

100. Fraud—Relief.—Neither law nor equity will aid a party to a fraudulent transaction, though he has suffered as a result of the fraud.—LEACH v. DEVEREUX, Tex., 52 S. W. Rep. 837.

101. Frauds, Statute of. — Where there was an agreement between defendant bank and a dealer in hay, whereby the bank was to collect for the sales of hay, and from the proceeds pay checks given by the dealer for the purchase price thereof, and such agreement was communicated by the bank to plaintiff, who, relying thereon, sold hay to said dealer, the transaction was not within the statute of frauds, as a verbai promise to answer for the debt of another.—WILLS v. BANK OF NEVADA, Nev., 42 Pac. Rep. 490.

102. Frauds, Statute of—Trusts.—A verbal statement by a purchaser of laud at foreclosure sale, that he buys it for the benefit of another, is ineffective, under the statute of frauds, to create a trust in favor of the latter.—Modearmon v. Burnham, Ill., 41 N. E. Rep. 1804.

18. FRAUDULENT CONVEYANCES.—A transfer by a corporation of all its property to another corporation is consideration of the assumption by the latter of the

former's debts, and the issuance of stock of the grantee to the grantor, which is carried out by the delivery of such stock to individual stockholders of the grantor, so that they could, if they saw fit, divide it among themselves, instead of applying it to payment of debts, is prima facte fraudulent as to creditors of the grantor.—COUSE V. COLUMBIA POWDER MANUF'G CO., N. J., 88 Atl. Rep. 297.

104. FRAUDULENT CONVEYANCE—Action to set Aside.

—Where an assignor of a claim might have sued to set aside as fraudulent a conveyance by the debtor, the assignee may do so.—EMMONS v. Barron, Cal., 42 Pac. Rep. 303.

105. GARNISHMENT — Issue for the Court. — On the issue in garnishment as to whether the garnishee was indebted to the principal defendant at the time the former was served, the parties are not entitled to a jury trial as a matter of right.—DELANEY v. HARTWIG, Wis., 64 N. W. Rep. 1035.

106. GIFTS OF HUSBAND IN FRAUD OF WIFE.—Subject to certain limitations not applicable to this case, and as against any post-morten claim of his widow, a married man, in Illinois or in Kansas, may, during coverture, give away to his children absolutely the bulk of his property, when the known effect of the gift will be to deprive the widow of the fair share of the property which otherwise would have fallen to her.—SMALL V. SMALL, Kan., 42 Pac. Rep. 828.

107. GUARDIAN OF INFANT—Appeintment.—Civ. Code, § 208, deciaring that abuse of parental authority is the subject of judicial cognizance in a civil action, and, when the abuse is established, the child may be freed from dominion of the parent, and the duty of support and education enforced, does not limit the authority to appoint a guardian on petition to the superior court, as provided by Code Civ. Proc. § 1747.—EX PARTE MILLER, Cal., 42 Pac. Rep. 428.

108. HABBAS CORPUS—Jury Trial.—The refusal of the court to grant a jury trial on a prosecution for a mis demeanor cannot be reviewed on habeas corpus.—IN RE FIFE, Cal., 42 Pac. Rep. 299.

109. HOMESTEAD — Extension of City Limits. — The mere extension of the corporate limits of a city, without defendant's consent, so as to include part of several tracts constituting his rural homestead, little or nothing being done to change the rural character of the property, will not affect defendant's homestead.— NEELEY V. CASE, Tex., 32 S. W. Rep. 785.

110. HUSBAND AND WIFE—Community Property.—In a suit against a wife, as survivor of her husband, to foreclose a mortgage on community property, it was not necessary to prove that community property came into her hands as such survivor, as the judgment does not bind her if she has no such property.—BONNELL v. PRINCE, Tex., 32 S. W. Rep. 855.

111. INJUNCTION—Electric Railroad on Highway.—A person whose land is subject to the servitude of a public highway is not entitled to a preliminary injunction to restrain the construction of an electric railroad on such way, merely because defendant is proceeding without legal authority, but must show, either that the proposed railroad will impose an additional servitude on his land, or that he will suffer some special injury.—BORDEN V. ATLANTIC HIGHLANDS, R. B. & L. B. ELECTRIC RY. CO., N. J., 33 Atl. Rep. 276.

112. INSURANCE—Proofs of Loss.—When proofs of loss are furnished, and a negotiation follows between the assured and insurer, ended by a disagreement as to the basis for the adjustment of the loss, it will be no defense to a suit on the policy that plans and specifications were not furnished by the insured; it being apparent that if furnished there would have been no solution of the difference, and suit was inevitable.—MONTELEONE V. ROYAL INS. CO. OF LIVERPOOL & LONDON, La., 18 South. Rep. 472.

113. INSURANCE POLICY — Warranties.—In an action on an insurance policy, plaintiff, to make out a prima facie case, need not negative his failure to comply with





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all the stipulations of the policy.—PHOERIX ASSUE. CO. OF LONDON, ENGLAND V. COFFMAN, Tex., 32 S. W. Rep. 810.

114. Intoxicating Liquors—Illegal Sale—Evidence.—Where a defendant is charged with the unlawful sale of intoxicating liquor and with maintaining a common nuisance by keeping a place where liquors are unlawfully sold, and the evidence shows that certain sales were made at the defendant's place of business by another person, and in the absence of the defendant, there must be sufficient competent evidence to establish the fact that such sales were made by some clerk, agent, or employee of the defendant with the knowledge or consent of the defendant; in order to sustain a conviction.—State v. Beam, Kan., 42 Pac. Rep. 394.

115. JUDGMENT.—The fact that a judgment entered on compromise by the parties contained an agreement that, if defendant would file within a certain time secured notes equal in amount to the amount of the judgment, plaintiff would satisfy the judgment of record, does not render the judgment conditional.—NIMOCKS V. POPE, N. Car., 28 S. E. Rep. 269.

116. JUDGMENT—Collateral Attack.—Where the record of a justice of the peace shows jurisdiction of the subject matter and of the parties, and he renders a judgment in a proceeding had before him after acquiring such jurisdiction, such judgment cannot be questioned or set aside in a collateral proceeding.—VINCENT V. DAVIDSON, Kan., 42 Pac. Rep. 890.

117. JUDGMENTS—Confession.—A judgment confessed on a bond without action is void for failure of defendant's statement to allege that the debt is "justly due," as required by Code, § 571. An allegation of the consideration for the bond, as also required by the section, is insufficient.—SMITH v. SMITH, N. Car., 23 S. E. Rep. 270.

118. JUDGMENT—Payment in Gold Coin. — Where a judgment rendered by default in another State recites that it is payable in gold, when there is nothing in the pleadings showing any contract to pay in gold, such judgment is valid only for the amount it finds due payable in any legal tender.—BELFORD v. WOODWARD, Ill., 41 N. E. Rep. 1097.

119. JUDGMENT LIEN-Dramshop Act.—Under Rev. St. 1893, ch. 43, § 10, which declares that for the payment of any judgment that may be recovered against any person in consequence of the sale of intoxicating liquors the property of such person, of every kind, except such as may be exempt, shall be liable, such a judgment is not a paramount lien to a mortgage upon the building in which the liquor was sold, where the mortgage was executed and recorded before rendition of the judgment.—Bell v. Cassem, Ill., 41 N. E. Rep. 1089.

120. JUDGMENT LIEN-Priorities.—Under Code, § 485, making a judgment, when docketed, a lien on realty subsequently acquired, previously docketed judgments take pro rata the after-acquired lands of the judgment debtor, and not by their priorities according to the dates when docketed.—MOORE v. JORDAN, N. Car., 28 S. E. Rep. 259.

121. LANDLORD AND TENANT—Distress.—In an action by a tenant against his landlord for wrongful distress it appeared that plaintiff, who was to pay as rent a fourth of the cotton raised on the premises, called at defendant's house to ask him where he should deliver his portion of the cotton, and defendant ordered him off his place; that defendant, when again asked where the cotton should be delivered, told plaintiff that he had nothing to say to him. Plaintiff afterwards removed three bales of cotton from the rented premises, leaving one on the land: Held, that defendant was authorized in selzing for his rents the cotton removed.—HOLT V. MILLER, Tex., 32 S. W. Rep. 828.

122. LANDLORD AND TENANT—Eviction.—If a tenant holding over after the expiration of his term be evicted by force by his landlord, an action of trespass is one

of his legal remedies.—Thibl v. Bull Ferry Land Co., N. J., 38 Atl. Rep. 281.

128. LANDLORD AND TENANT—Tenants at Sufferance.—Tenants holding over after the expiration of a lease for a fixed term of years are strictly tenants at sufferance, though the lessors may treat them either as tree-passers or tenants from year to year, or, by permitting the holding over to run on, may turn the tenancy into one at will.—WILLIAMS V. LADEW, Penn., 88 Atl. Rep. 829.

124. LIFE INSURANCE — Notice of Assessments. — Where the by laws of a mutual insurance company provide that failure to pay assessments within 30 days from date of mailing notice of same to his address for feits the policy, such a failure to pay is fatal, where a notice is sent, but never received by the assured.— SURVICE V. VALLEY MUT. LIFE ASS'N, Va., 28 S. E. Rep. 228.

125. LIMITATIONS.—Where the bill in a suit to recover a tract of land disclaims a tract lying within it, and covered by a grant issued on a certain entry, an amendment striking out such disclaimer, and disclaiming other land covered by another entry, though made on the ground of clerical error of the draftsman of the original bill, introduces a new cause of action, and does not relate back to the date of the original, but takes effect, so far as the question of limitation is concerned, as of the time it is made.—East Tennessee Iron & Coal Co. v. Broyles' Heirs, Tenn., 32 S. W. Red. 761.

126. MANDAMUS TO JUDGE.—A district judge may be required by mandamus to hear a petition for the enlargement of the city limits under section 121 of the act to incorporate cities of the second class, as amended. Gen. St. 1889, par. 884.—CITY OF EMPORIA V. RANDOLPH, Kan., 42 Pac. Rep. 876.

127. MARRIAGE — Breach of Marriage Promise.—In an action for breach of marriage promise, plaintiff need not aliege or prove her capacity to enter into the marriage contract, as such capacity will be presumed.—TUCKER v. HYATT, Ind., 41 N. E. Rep. 1047.

128. MARRIAGE—Validity—Law.—A marriage in a foreign State, proved only by general reputation, if valid there is valid in Maryland, in the absence of a law positively prohibiting it.—Jackson v. Jackson, Md., 88 Atl. Rep. 817.

129. MARRIAGE SETTLEMENT—Consideration.—A deed in consideration of a marriage to be solemnized is founded on a valuable consideration, and it cannot be assailed by the grantor's creditors.—BUMGARDNER V. HARRIS, Va., 23 S. E. Rep. 229.

180. MARRIED WOMEN — Separate Estate.—A writing by a married woman, engaged in a business managed by her husband, "that for the purpose of establishing my credit, and as a basis therefore, I make the following statement, which shall apply to all future purchases," in which a schedule of his separate property is set out, is an agreement to charge her separate estate for future purchases from the person to whom the statement was made.—Bates v. Sultan, N. Car., 28 S. E. Rep. 261.

181. MARRIED WOMAN—Wife's Separate Estate.—Money which a husband has permitted his wife to accumulate, by raising and selling pigs, chickens, etc., and to use, not requiring her to account for it, and losing sight of it for 18 months after she has invested it in real estate, is separate estate.—SNODGRASS V. HYDER, Tenn., 32 S. W. Rep. 764.

132. MASTER AND SERVANT.—One constructing a building by employing a contractor with his employees to do the carpenter work, paying the wages of such employees to the contractor, but keeping, himself, the control and management of it, becomes a master of such employees.—DEHORITY v. WHITCOMB, Ind., 41 N. E. Rep. 1059.

183. MASTER AND SERVANT — Injury — Contributory Negligence.—Const. 1830, § 193, in providing that knowledge by an employee of defects in machinery shall not bar a recovery by him for injuries caused by such de-



fects, does not preclude such knowledge, as a fact controlling the degree of care to be exercised by the employee under the circumstances, from being admissible to show contributory negligence.—BUOKNER v. RICHMOND & D. R. CO., Miss., 18 South. Rep. 448.

134. MASTER AND SERVANT—Negligence.—In an action by an employee against his employer for injury caused by an explosion of a barrel of paint containing benzine, it appeared that the barrel had taken fire, and while plaintiff and others, at the request of defendant's foreman, were endeavoring to extinguish the flames the explosion took place, and that such paint was of common and necessary use in defendant's business: Held, that plaintiff could not recover.—BURKE v. PARKER, Mich. 64 N. W. Rep. 1065.

135. MASTER AND SERVANT—Safe Place to Work.—In an action by a servant against his employer for injuries from the explosion of powder stored in a room in which he was operating a forge in the performance of his duties, where it was in question whether plaintiff had been informed of the presence of the powder, an instruction that if plaintiff by negligence brought about his injury, and that if, before he went into the house where the powder was, he had been notified by defendant of its presence, or that, if plaintiff knew it was there, and he voluntarily exposed himself, and was in consequence injured, he could not recover, is without error.—Downey v. Pence, Ky., 82 S. W. Rep. 737.

136. MECHANICS' LIENS — Petition.—In an action to enforce a mechanic's lien, which accrued under a contract with a decedent while he was the owner of the land, a demurrer to the petition for failure to show why the personal representatives and heirs of decedent were not necessary parties is properly overruled, where demurrant's answer shows that neither the representative nor the heirs of decedent have any interest in the property, the land having been sold under a deed of trust prior to the commencement of the action.—SECURITY MORTGAGE & TRUST CO. v. CARUTHERS, Tex., 22 S. W. Rep. 837.

137. MECHANICS' LIENS - Rights of Subcontractor .-Where a lien statement filed by a subcontractor alleges that two persons are the owners of the real estate sought to be affected by said lien, and the petition filed to enforce said lien makes the same allegation, and seeks to establish a lien upon all the real estate named therein for the total sum claimed to be due from the original contractor for material furnished, and it appears from an agreed statement of facts upon which the case was tried that the two persons so named were not the sole owners, but that the premises were owned by such two persons and another, who was not named either in the lien statement filed or in the petition to enforce the same, held that, under such a state of facts and such pleadings, the subcontractor is not entitled to a lien for a proportionate share of his claim upon the undivided interest of the premises named in his statement and petition .- F. A. DREW GLASS CO. V. EAGLE MILL CO., Kan., 42 Pac. Rep. 887.

123. MECHANIC'S LIEN—Time of Filing.—Code Civ. Proc. § 1183, provides that work done or materials furnished by any but the original contractor under a contract void for want of filing shall be deemed to have been done or furnished at the personal instance of the owner, and that the value thereof shall be a lien. Section 1187 requires every person but the original contractor to file his claim within 30 days after the completion of the building: Held, that the filing of a lien under such implied contract with the owner, prior to the completion of the building, was premature, and that the lien was not enforceable.—DAVIS V. MACDOMOUGH, Cal., 42 Pac. Rep. 450.

130. MINING CLAIM — Authority of Agent.—An agent of attorney in fact may locate a mining claim for his principal, and may do everything necessary to perfect mach location, including the making of the affidavit regard by section 3104, Rev. St.—Dunlap v. Pattison, Make, 42 Pac. Rep. 504.

140. MORTGAGE.—A mortgage on land previously purchased by plaintiff from her father, but standing in the father's name, executed by the father, without plaintiff's knowledge, to defendant, who knew at the time that the land had been sold to plaintiff, that part of the price had been paid, and that possession had been taken under claim of title, is void as against plaintiff.—GORE v. CONDON, Md., 33 Atl. Rep. 261.

141. MORTGAGE — Parol. — An agreement whereby plaintiff conveyed certain land to defendant in consideration that defendant would assume the payment of certain indebtedness owed by plaintiff, and, upon repayment by plaintiff within 10 years of the amounts so paid, with interest, defendant was to reconvey the land, constitutes a mortgage, which may be shown by parol.—LOEB v. MOALISTER, Ind., 41 N. E. Rep. 1061.

142. MORTGAGE — Sale under Power — Injunction.—A sale under a power in a mortgage given to secure bonds of the mortgagor will not be enjoined till the mortgagor can obtain adjudication on unliquidated and disputed claims against the bondholder, his title to the bonds being absolute.—NATIONAL RUBBER CO. V. EHODE ISLAND HOSPITAL TRUST CO., R. I., 38 Atl. Rep. 254.

148. MORTGAGE DEBT — Waiving Security. — Where a mortgage on its face purports to secure a note, the mortgage cannot release the security, and maintain an action on the note.—HIBERNIA SAVINGS & LOAN SOC. V. THORNTON, Cal., 42 Pac. Rep. 447.

144. MUNICIPAL CORPORATION. — An information by the attorney general will not lie to compel municipal officers to repay into the city treasury moneys unlawfully taken therefrom. — ELLIS V. CITY OF DETROIT, Mich., 64 N. W. Rep. 1057.

145. MUNICIPAL CORPORATIONS—Defective Sidewalk—Injuries.—One who has knowledge of the defective condition of a sidewalk before going upon it in the dark is required to exercise more care than if he were ignorant of the defect, or if there were no defect, and it were daylight.—CITY OF BEDFORD V. NEAL, Ind., 41 N. E. Bep. 1029.

146. MUNICIPAL CORPORATIONS — Defective Streets.—Where the construction and maintenance of waterworks of a city are by statute vested in an independent commission, the city will not be liable for injuries from defects in the street due to negligence of its own, or the servants employed by the commission, in laying the pipes.—Gross v. CITY OF PORTSMOUTH, N. H., 88 Atl. Rep. 256.

147. MUNICIPAL CORPORATION—Estoppel—Injuries.—Where an action is begun against a city, and it is described in the petition as a municipal corporation organized under the laws of the State, and the officers of the city, in response to the summons, make a general appearance for the city, and ask for affirmative relief, it cannot afterwards deny its corporate existence, and proof of the same by the plaintiff is unnecessary.—CITY OF ERIE V. PHELPS, Kan., 42 Pac. Rep. 836.

148. MUNICIPAL CORPORATIONS—Indebtedness—Contract for Lighting.—Where a municipal corporation contracts for water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, within the meaning of Acts 1891, p. 389, since the debt for each year does not come into existence until the compensation for each year has been earned.—FOLAND v. TOWN OF FRANKTON, Ind., 41 N. E. Rep. 1081.

149. MUNICIPAL CORPORATION—Payment of City Warrants.—Every lawfully issued and valid municipal warrant should be paid in the order of its registration for payment, although the same was issued in payment of an indebtedness of a prior year.—STATE v. CAMPBELL, S. Dak., 64 N. W. Rep. 1025.

150. MUNICIPAL CORPORATION—Regulating Construction of Building by Ordinance.—An ordinance requiring that "any owner or contractor who shall build or cause to be built" any building abutting on a public sidewalk shall, after the completion of the first story, cause a





roofed passageway to be built in front of the building, on the sidewalk, is reasonable.—SMITH V. MILWAUKEE BUILDERS' & TRADERS' EXCHANGE, Wis., 64 N. W. Rep. 1041.

151. MUNICIPAL CORFORATIONS—Regulating Price of Gas.—Rev. St. 1894, § 4806, authorizes a municipal corporation to enact an ordinance regulating the supply and distribution of natural gas, and exacting a fee from companies using its streets in supplying it: Held, that where a city passed an ordinance granting the right to lay natural gas mains in its streets, prescribing the maximum price to be charged, and requiring an approved bond that a company accepting such privilege would comply with the ordinance, the price fixed by the ordinance is binding on the company whose bond has been presented to and accepted by the city, and in whose favor the city has waived its right to exact a fee for the use of its streets.—Westfield Gas & MILL-ING CO. v. MENDENHALL, Ind., 41 N. E. Rep. 1083.

152. MUNICIPAL OFFICERS—Fixing Salaries.—A council empowered to fix the compensation of municipal officers, provided only that the salary of no officer shall be diminished during the term for which he is elected or appointed, may, after appointment of an officer, but before commencement of his term, fix his salary at less than the amount received by the incumbent for the preceding term. — WESCH v. COMMON COUNCIL OF CITY OF DETROIT, Mich., 64 N. W. Rep. 1051.

153. NATIONAL BANKS — Receiving Usurious Interest.
—Following the decisions of the Supreme Court of the United States, it was held that usurious interest paid a national bank on a note cannot be applied by way of set-off of payment against the principal sum due in any suit by the bank upon such note.—NORFOLK NAT. BANK V. SCHWENK, Neb., 64 N. W. Rep. 1078.

154. NEGLIGENCE — Imputed Negligence.—Parents' negligence in failing to procure medical aid after an injury cannot be imputed to a child of tender years in a suit by the child for its own benefit.—TEXAS & P. RY. CO. V. BECKWORTH, Tex., 32 S. W. Rep. 809.

155. NEGLIGENCE—Injury to Trespassing Child.—An owner of land who knows or might reasonably have expected that children would play thereon will not be liable for injury to a trespassing child from the falling of a pile of lumber if in piling it he has used the care which a reasonably prudent person under like circumstances would have used, though the construction of the pile might in fact be dangerous to children climbing thereon.—Missouri K. & T. Ry. Co. of Texas v. EDWARDS, Tex., 32 S. W. Rep. 815.

156. NEGLIGENCE — Reservoir — Negligent Construction.—A waterworks company is liable for the damages proximately resulting from the fall of a water tower negligently constructed on its own premises.—
RIGDON v. TEMPLE WATERWORKS Co., Tex., 82 S. W. Rep. 828.

157. NEGOTIABLE INSTRUMENTS — Accommodation Paper—Consideration.—It matters not that an accommodation maker affixed his signature to the note in question after the bank discounting it as payee had paid the money thereon to his comaker, for whose benefit the note was executed, if, before such comaker received the money, he promised the bank that he would cause the accommodation maker to sign the note, and the bank advanced the money relying in good faith upon that promise, not entering the note as discounted until after the other signature was obtained.—Paully v. Murray, Cal., 42 Pac. Rep. 318.

158. NEGOTIABLE INSTRUMENT—Note—Defense.—In an action on a note for the price of a harvester, a subsequent contract pleaded by defendant in avoidance, whereby the payees were to extend the time of payment until the next harvest, and put the machine in working order, cannot be shown on plaintiff's cross-examination.—HAINES V. SNEDIGAR, Cal., 42 Pac. Rep. 462

159. NEGOTIABLE INSTRUMENT-Note — Assignment.— An indorsement of a non-negotiable note by the payee, accompanied by delivery, operates as an assignment.

—MERCHANTS' NAT. BANK OF BATTLE CREEK V. GREGG.
Mich., 64 N. W. Rep. 1052.

160. NEGOTABLE INSTRUMENT—Promissory Note.—Evidence that the deceased was "a man of property," and had money "loaned out" when he died, is not competent to disprove his execution of a note, particularly as it was not shown that at any time from the execution of the note to his death deceased had money on hand.—Pettiford v. Mayo, N. Car., 28 S. E. Rep. 252.

161. NUISANCE.—A riparian lot owner, by the maintenance by a city of a cesspool on a stream above his lot, which, besides being offensive to all persons living in the neighborhood, causes, when the cesspool is flushed, offensive sewerage matter to be deposited on his lot, suffers a special injury, entitling him to sue to abate the nuisance.—LIND v. CITY OF SAN LUIS OBISTO, Cal., 42 Pac. Rep. 487.

162. NUISANCE — Liability for Erection.—Where an owner of land, in possession thereof, consents to and authorizes the erection thereon by a third party of a structure which creates or constitutes a nuisance, he is as liable for the consequences as if he had erected the structure himself.—SIMPSON V. STILLWATER WATER Co., Minn., 64 N. W. Rep. 1144.

163. OFFICE AND OFFICER—Treasurer—Official Bond.

The sureties on the bond of a city treasurer, conditioned for the discharge of the duties of the office and the delivery to his successor of property which he should hold as such officer, are not liable for moneys of the sinking fund, of which he is custodian, subject to the order of the sinking fund commissioners, where, without the knowledge of the sureties, the commissioners, under their power to invest it subject to the approval of the council, loan it to him as a banker; and it is immaterial that the steps taken by the commissioners and council before making the ioan were not strictly formal.—City of Wilkes Barre v. Rockafellow, Penn., 33 Atl. Rep. 269.

164. PARTITION—Action by Heir. — Where relief is sought by an alleged heir only as to real estate of which he claims a portion, and no part has been sold for the payment of debts, and no division has been made, such heir may have specific relief as to the property itself, and need not pursue the circuitous remedy of contribution in the the probate court.—SHORTEN V. JUDD, Kan., 42 Pac. Rep. 387.

165. PARTNERSHIP — Death of Partner—Survivors.—The death of one partner does not authorize the surviving member of the firm to bring an action at law on a note discounted by the firm, but executed by the deceased partner to defendant, who indorsed it for the accommodation of the maker; defendant's liability being simply that of a surety.—PATTON V. CARR, N. Car., 28 S. E. Rep. 182.

166. PARTMERSHIP—Individual Debts—Conversion.— The individual members of an insolvent firm cannot convert the partnership estate to the payment of the individual debts of its members, leaving the firm debts unpaid.—Jackson Bank v. Durfey, Miss., 18 South. Rep. 456.

167. PARTMERSHIP—Sale of Firm Business—Contract.
—When a partnership business, after it has been sold, continues to be carried on in the firm name, a contract within the scope of the firm business, made by a member of the firm with a person who has no knowledge of the change in the ownership of the business, is binding upon the person to whom the business has been sold.—THATCHER V. ALLEN, N. J., 33 Atl. Rep. 284.

168. PLEADING—Res Judicata.— To sustain a plea of res judicata it must be alleged and proved that the former judgment pleaded was final.— SOUTHERN RI. CO. v. BRIGMAN, Tenn., \$2 S. W. Rep. 762.

169. PLEDGE OF CROPS FOR RENT.—An oral agreement between landlord and tenant that title to crops raised



during the term should remain in the landlord, and that the crop was to be put in warehouse in the landlord's name, and that from a sale thereof the landlord was to retain as rent an amount equal to the rent reserved in the lease, and turn over the balance to the tenant, is merely an agreement, that after the crop was harvested and stored, it should become a pledge for payment of the rent, and does not create a lien which would support an action of conversion against a sheriff or levying on the crop while growing, and seizing it under attachment against the tenant as soon as harvested.—STOCKTON SAVINGS & LOAN SOC. v. PUR-VIS, Cal., 42 Pac. Rep. 447.

170. PRINCIPAL AND AGENT—Authority of Agent. — The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has.—CREIGHTON V. FINLAYSON, Neb., 64 N. W. Rep. 1103.

171. PRINCIPAL AND AGENT—Notice to Agent as Notice to Principal.—Where one agreed with a firm to purchase sheep for it, and to share in the profits from the sale of the sheep, and afterwards entered into another agreement with another firm, from which he purchased the sheep, by which he and the second firm were to share the profits and losses as partners, it cannot be said, in behalf of the sureties on notes executed by the second firm to the first, to secure the latter for damages suffered by a breach of the contract of sale, for the performance of which the same sureties were bound, that the knowledge of the agent as to his own fraud could be imputed to the purchasing firm.—
JURGE V. REED, Utah, 42 Pac. Rep. 292.

172. PRINCIPAL AND AGENT — Pleading and Proof.—
Judgment cannot be had against a principal for the
negligent act of his agent on a petition charging the
principal with the act without alleging the agency.—
PETTON V. COOK, Tex., 32 S. W. Rep. 781.

172. PRINCIPAL AND AGENT—Batification—Estoppel.—The mere fact that defendant knew that a physician was treating a third person, at the request of another, on defendant's account, and relied for compensation on defendant, and that it made no objection, does not render it liable to plaintiff for the services, on the ground of ratification.—Deane v. Gray Bros. Artificial Storm Paving Co., Cal., 42 Pac. Rep. 443.

174. PROCESS—Service—Motion to Quash.—Objection by a defendant corporation to service of process on the ground that the person served was not in fact its agent should be raised by motion to quash the return.—AMERICAN CEREAL CO., V. ELI PETTIJOHN CEREAL CO., U. S. O. C. (III.), 70 Fed. Rep. 276.

173. PROCESS—Service.—In the absence of statutory direction to the contrary, service of process must be by reading, and not by delivery of a copy.—LAW v. GROMMES, Ill., 41 N. E. Rep. 1068.

176. PROCESS—Service.—Under Rev. St. 1898, ch. 110, § 2, which declares that it shall not be lawful, except in local actions, to sue any defendant out of the county where he "resides or may be found," one who is present in a county other than that of his residence, pursuant to a notice to take depositions in a case in which he is interested, may be served with process while taking such depositions, in the absence of any fraud or artifice whereby he was induced to come there.— Cassem v. Galvin, Ill., 41 N. E. Rep. 1087.

177. PROCESS—Service.—A resident of a foreign State, while attending a court of this State as a witness, cannot be served with process for the commencement of a civil action against him.—MALLOY V. BREWER, S. Dak., 64 N. W. Rep. 1120.

179. PROCESS—Service on Agent.—A return of service which does not set forth the character of the agent served is presumably good, but may be inquired into, and depositions may be taken, on a motion to set aside the same, and it will be set aside if the presumption of a good service is conclusively rebutted.—FULTON V. COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA, Pens., 38 Atl. Rep. 524.

179. PROHIBITION.—Since an appeal lies from, and is an adequate remedy to prevent execution of, an order of court appointing a receiver of, and directing a sale by him of, property of a plaintiff in a divorce action, to satisfy a judgment of alimony against him, prohibition will not issue for such purpose, though the order is void as in excess of the jurisdiction of the court.—WHITE V. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 42 Pac. Rep. 471.

180. PUBLIC LANDS — Bona Fide Purchaser. — The rights of a bona fide purchaser from one who has entered timber lands under the act of congress of June 8, 1878, which provides that, for a false statement by the entryman, any grant which he may have made shall be void, except in the hands of a bona fide purchaser, are not affected by a subsequent cancellation of the entry for false representations, although at the time of his purchase no patent for the land had been issued.—LEWIS V. SHAW, U.S. C.C. (Wash.), 70 Fed. Rep. 289.

181. Public Lands — Estoppel. — Where defendant owning a tract of land, induced plaintiff and his grantors to procure patents to adjoining land, representing the same to be vacant public domain, defendant cannot, on discovering that said land was part of its tract, question the regularity of the proceedings leading up to plaintiff's patent.—NEW YORK & T. LAND CO. V. GARDNER, Tex., 32 S. W. Rep. 786.

182. PUBLIC LANDS — Railroad Rights of Way. — The claim of one who has settled on and improved public lands with the declared intention of obtaining title under the pre-emption laws is a "possessory claim," within the meaning of Act March 3, 1875 (18 Stat. 482), granting to railroads the right of way through the public lands of the United States, and providing that the legislature of the proper territory might provide the method of condemning possessory claims on the public lands.—WASHINGTON & I. R. CO. V. OSBORN, U. S. S. C., 16 S. C. Rep. 219.

183. Quieting Title—Action.—An action to remove cloud on title will not lie in favor of one alleging perfect legal and equitable title against one attaching it as the property of another.— HEATH V. FIRST NAT. BANK OF CLEBURNE, Tex., 32 S. W. Rep. 778.

184. RAILBOAD COMPANY — Crossing—Negligence.—Whether the person who, relying on the custom not to run trains between a depot and a train standing opposite it, discharging express and passengers, is guilty of contributory negligence in going on the intervening track, to get mail and express from the train opposite, without looking to see if another train is approaching, is a question for the jury.—Tubbs v. Michigan Cent. B. Co., Mich., 64 N. W. Rep. 1061.

185. BAILEOAD COMPANIES—Death of Fireman—Risks of Employment.—Where a cattle chute is constructed in dangerous proxmity to a railroad track, the defect is not one of the risks assumed by a fireman.—NEW YORK, C. & ST. L. R. CO. v. OSTMAN, Ind., 41 N. E. Rep. 1037.

186. RAILBOAD COMPANY—Fires—Contributory Negligence.—In an action brought under section 1821, Gen. St. 1889, the defendant is only released from liability on account of the negligence of the plaintiff when there exists a real proximate causal connection between the plaintiff's negligent act and the injury complained of. Hence, where the jury find specially that the plaintiff was negligent in not taking any precaution to protect his property from incursions by prairie fires, but also find that such negligence did not contribute to the setting out of the fire which caused the injury, or to the damages which result therefrom, a judgment in favor of the plaintiff upon such special findings, and a general verdict in favor of the plaintiff will not be disturbed.—Union Pac. Ry. Co. v. Eddy, Kan., 42 Pac. Rep. 413.

187. RAILEOAD COMPANIES — Fires—Negligence. — A railroad company is required to use ordinary care in providing the best appliances to prevent the unnecessary escape of fire therefrom, and to use a like degree of care to keep its right of way free from combustible

material, and is only liable for negligence in falling to do this, whether the fire starts on the right of way or beyond it.—GULF, C. & S. F. RY. CO. V. REAGAN, Tex., 82 S. W. Bed. 846.

188. RAILROAD COMPANIES — Injury — Negligence.— Where one is walking on a footpath at the end of the cross-ties along a railroad track, in the daytime, the engineer of a train going in the same direction may reasonably assume that such person will either stay there, or step further from the track, when he sees the train.—MATTHEWS V. ATLANTIC & N. C. R. CO., N. Car., 23 S. E. Rep. 177.

189. RAILROAD COMPANY — Right of Way—Crossing.—A deed of a right of way to a railroad company having provided for a private way on the grantor's farm under the railroad, and the grantor having, with the consent of the company, elected to accept such way over and on a public highway, the company cannot close it without liability for damages.—LAKE ERIE & W. B. CO. v. LEE, Ind., 41 N. E. Rep. 1058.

190. RAILROAD COMPANIES — Right of Way—Damages.
—A subsequent purchaser, to whom has been sold the right of his vendor to institute legal proceedings and to recover damages therein for such demands as would have accrued to such vendor, may recover of a rail road company which has occupied the street on which the property abutted without instituting condemnation proceedings or settling with the owners for damages resulting to abutting property.—FREY v. DULUTH, S. S. & A. RT. CO., Wis., 64 N. W. Rep. 1038.

191. RAILEOAD COMPANIES—Negligence—Contributory Negligence.—Where an engineer, by the exercise of ordinary care, can see that a human being is lying apparently helpless on the track in front of his engine, in time to stop the train without peril to the persons on the train, the company is liable for any injury resulting from his failure to perform his duty, notwithstanding the previous negligence of the person injured.—Pickett v. Wilmington & W. R. Co., N. Car., 23 S. E. Rep. 264.

192. RAILEOAD COMPANY—Negligence of Superintendent—Fellow-servants.—Under Laws 1889, ch. 488, declaring a railroad company liable for damages to an employee caused by the negligence of a "train dispatcher, telegraph operator, superintendent, yard master, conductor or engineer, or of any other employee, who has charge or control of any stationary signal, target point, block or switch," the word "superintendent" applies only to one having to do with the movement of trains and cars, and does not include the foreman of a repair shop.—Hartford v. Northern PAC. R. CO., Wis., 64 N. W. Rep. 1038.

193. RECEIVER—Liabflity for Money Lost.—A member of a firm was appointed receiver in 1861 to collect certain money and have it at the next term of court. He collected the money and deposited it to his firm's account in a bank. For the next five years after his appointment no term of court was held, because of the war. The firm account always had more to its credit than the sum so collected, the members of the firm each having his private account in the same bank. The bank was wrecked by the war, and the money lost: Held, that the receiver was not liable therefor, he having used the same care that a prudent man would have used with his own.—Barton's Ex'r v. RIDGEWAY'S ADM'R, Va., 23 S. E. Rep. 226.

194. REFEREES—Powers.—A referee cannot, under Code, § 422, authorizing him "to allow amendments to any pleadings," permit a defaulting defendent to file an answer, except by consent.—Jones v. Beaman, N. Car., 28 S. E. Rep. 248.

195. RELEASE AND DISCHARGE.—The payment of a less sum in satisfaction of a larger one is no satisfaction.—Chambers v. Niagara Fire Ins. Co., N. J., 38 Atl. Rep. 283.

196. RELIGIOUS ASSOCIATION—Removal of Trustees.— A member of a church had such an equitable interest in the property thereof that he may maintain an action for the removal of trustees, who have deprived the church of the use of property held by them in trust in the manner provided by Code, ch. 54; and the judgment may be so framed as to appoint plaintiff as trustee in their place, and to direct a conveyance of the property to him, to be conveyed by him as the church may direct.—NASH V. SUTTON, N. Car., 28 S. E. Rep. 178.

197. RELIGIOUS SOCIETY—Church Litigation.—Where a large part of a congregation refuse a pastor regularly sent them by the duly constituted church authorities, and adhere to another pastor, and retain possession of the church property, it is improper to compel them thereafter to deliver to the duly appointed pastor not only contributions and collections for general church purposes, but also contributions voluntarily made by them for the specific purpose of paying the salary of the pastor to whom they adhered.—BLIEM v. SCHULTZ, Pa., 33 Atl. Rep. 887.

198. REMOVAL OF CAUSES—Jurisdiction.—In an action to annul title to land acquired under a sale decreed by a federal circuit court in a case removed from a State court under Act Cong. March 8, 1875, the petition for removal showed that a citizen of Iiiinois sued a citizen of the same State, and an alien, but complainant did not set out the bill, cross bill, and answers in such case: Held, that it did not appear beyond controversy that on the record the federal court could not have had jurisdiction, so as to render such decree void.—GOODSELL V. DELTA & PINE LAND CO., Miss., 18 South. Rep. 452.

199. REPLEVIN — Demand.—The gist of the action of replevin being the wrongful detention, if a person rightfully comes into the possession of personal property of which he is not the owner his possession is not wrongful until a demand is made upon him for a return of it; but if a person comes into the possession of the personal property of another by his own rong, and without the consent of and against the wish of the owner, he is wrongfully in possession of the property, and no demand is necessary.—JORDAN v. JOHNSON, Kan., 42 Pac. Rep. 415.

200. RES JUDICATA.—Where each of two defendants claimed title in himself in an action against them to recover a tract of land, and it was adjudged that one defendant was the owner of a specified portion, and the other defendant of the remaining portion, the judgment is res judicata as between defendants themselves and those claiming under them.—BAUGERT V. BLADES, N.-Car., 28 S. E. Rep. 179.

201. Sale—Auction Sale—Contract.—Where real estate is sent to sale at public auction under a written advertisement, the intention of the seller as to the Object intended to be sold, and of the purchaser as to that intended to be bought, is to be ascertained by the advertisement, and not by conversations or letters written between the parties in prior negotiations for a private sale, which had failed and been abandoned. The advertisement binds both parties.—Magginnis v. Union Oil Go., La., 18 South. Rep. 459.

202. SALE—Conditional Sale.—An executory agreement for the sale of property on condition that the owner shall not be divested of his title until the price has been paid is valid against third persons, in the absence of fraud.—RODGERS v. BACHMAN, Cal., 42 Pac. Rep. 448.

203. SALE—Conditional Sale—Election of Remedies.—A corporation delivered to E a machine, taking his notes, and also a contract providing that the company did not part with its title until the notes were fully paid; that, should E make default in any of the payments, the company might terminate the contract, and take the machine; and that all payments prior to such default should be compensation for its use. After default by E, he died, and the company presented to his administratrix its claim upon the notes for the balance due, and the claim was allowed and approved by the court: Held, that the company waived its right to retake the machine, and elected to treat the transac-

tion as an absolute sale.—Holt v. Manuf's Co. v. Ewing, Cal., 42 Pac. Rep. 485.

2M. SALES—Contract.—Where the buyer refuses to accept goods purchased, in an action by the seller for the contract price, less than the net proceeds of a resale of the goods, he cannot recover damages as for a repudiation of the sale prior to the time of delivery.—HEIDENHEIMER V. CLEVELAND, Tex., 82 S. W. Rep. 826.

205. SALE — Contract—Parol Evidence. — A positive sale, in writing, of personal property, which provides a price which is to be paid, is not varied by a contemporaneous parol contract as to how the price is to be paid, nor as to when the price is to be paid, if the time is in the future.—SLATTEN v. KONRATH, Kan., 42 Pac. Rep. 399.

26. SALE—Vesting of Title—Fixtures.—Where one of the terms of sale of machinery required that the notes for the price be indorsed by a certain person, but there was testimony that said indorsement was to be given merely as "additional security," and the vendee declined to make a contract reserving title to the vendor, the failure to obtain such indorsement did not prevent the passing of title, and the machinery, having been fastened to the mill as a permanent fixture, became subject to a prior vendor's lien on the mill and on the machinery thereafter to be placed therein.—HAZLE-RUBBER CO. v. J. A. FAY & EAGAN CO., Mias., 19 South. Rep. 485.

207. SALE OF GOOD:—Ratification.—When a vendor brings an action to recover the price of goods sold, he thereby ratifies the sale, and he cannot afterwards, nor by amendment in the same action, elect to rescind the sale and recover the goods on the ground of the fraud of the vendee.—WACHSMUTH V. SIMS, Tex., 32 8. W. Rep. 821.

266. Sale of Personalty—Rescission.—A contract by which a boiler maker agrees to deliver and set up boilers of a specified capacity, to be determined by a test made after the boilers are set up, is executory, and may be rescinded by the purchaser if the test fails to show compliance with the contract.—SMITH v. York Manup's Co., N. J., 33 Atl. Rep. 244.

309. SHERIFFS—Liability. — Where a deputy sheriff employs one as keeper of attached property, and the sheriff acquiesces for a period of 14 months, he cannot thereafter, and after the death of the deputy, repudiate such employment. — CHENOWITH V. CAMERON, Idaho, 42 Pac. Rep. 508.

210. SLANDER—Imputing Unchastity.—Where fornification is not by statute a criminal offense, defamatory language charging it is not actionable per se.—LEDLIE V. WALLEN, Mont., 42 Pac. Rep. 289.

111. SPECIFIC PERFORMANCE.—Payment of part of the price, with payment of taxes, and a listing of the land with real estate agents for sale, is not such part performance as will warrant specific performance of such agreement.—HARNEY V. BURHANS, Wis., 64 N. W. Rep. 1051.

212. Taxation of Bank Stock— Injunction. — The shares of stock of an incorporated banking association being, as provided by chapter 14, Laws 1891, assessed against the individual owners thereof, and the tax extended thereon being against and payable by such individual shareholders, and not by the bank, such bank cannot, in its own name, and for itself, maintain an action to restrain the collection of such tax from the individual stock owners.—NORTHWESTERN LOAN & BARKING CO. V. MUGGLI, S. Dak., 64 N. W. Rep. 1122.

213. TAXATION OF STREET RAILROADS—Construction.

—A practical construction of a statute by a governmental department, while not of such high authority as a judicial interpretation of the act, is, when not in condict with the constitution or the plain intent of the act, of great persuasive force and efficacy.—BLOXHAM T. COMBUMBES ELECTRIC LIGHT & STREET RAILROAD Co., Fla., 18 South. Rep. 444.

-354. Tax Title.—The effect of a tax sale on the title of the owner of the land is not changed by the fact has his refusal to pay the taxes assessed on it as part

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of a certain warrant was based on an honest, though erroneous, belief that it was within another warrant on which he paid the taxes. — WILSON V. MARVIN, Penn., 33 Atl. Rep. 276.

215. TELEGRAPH COMPANY—Failure to Deliver Message.—A telegraph company is liable for its negligent failure to deliver a message to plaintifi informing him of the lilness of his brother, and requesting him to come immediately, whereby plaintiff was prevented from seeing his brother before death, it appearing that said message was prompted by mutual affection, though it was also sent to secure plaintiff's services as a nurse.—Western Union Tel. Co. v. Hale, Tex., 32 S. W. Rep. 814.

216. TELEGRAPH COMPANIES-Government Messages. -Act Cong. July 1, 1862, July 2, 1864, and May 7, 1878, entitled the government to retain and apply on the debt due it by the Union Pacific Railroad Company all sums due for services rendered in its behalf by such company. The railroad company constructed and owned a telegraph line along its road, as did the Western Union Telegraph Company, and by agreement the wires of the railroad company were operated and used by the telegraph company: Held, that the government could not recover sums paid by it on account of government messages delivered to the telegraph company for transmission, on the ground that they in part passed over the wires of the railroad company, there being no evidence that any part of them were sent over such wires rather than over the wires of the telegraph company, nor any requirement in that regard .-United States v. Western Union Tel. Co., U. S. S. C., 16 S. C. Rep. 210.

217. Towns—Bridges—Rebuilding.— Where two adjoining towns have by mutual agreement constructed a bridge on a road separating the towns, and the bridge has become worn out, such towns are bound to rebuild such bridge, both at common law and by virtue of Rev. St. 1893, ch. 121, § 21. which declares that bridges over streams on roads on town lines shall be built and repaired at the expense of such towns.—Prople v. Commissioners of Highways of Town of Dover, Ill., 41 N. E. Rep. 1106.

218. TRUSTS—Enforcement in Equity.—Where a bill by one appointed by the court as successor to a deceased trustee under a will, filed to ascertain the amount of the trust estate in the hands of the deceased at his death, shows that the will appointing deceased devised an estate to him in trust to pay the income therefrom to the testator's daughter during her life, and at her death to divide it among her children and grandchildren, and that the daughter is still living complainant's cestuis que trustent are not necessary parties, the object of the suit being simply to recover the trust estate from the former trustee's estate.—STEVENS V. BOSCH, N. J., 33 Atl. Rep. 298.

219. TRUSTS—Failure of Trustee to Act.—One who, as trustee, has accepted and proceeded to execute a deed of trust, cannot, by his own act or default, terminate the trust.—NBLSON v. RATLIFF, Miss., 18 South. Rep. 497

220. TROVER — Junior Mortgagee. — Where property was attached and taken from the possession of a first mortgagee on the ground that the first mortgage was fraudulent, but subject to subsequent mortgages, which recognized the validity of the first, and said first mortgagee's demand for the return thereof was refused, but the attachment was afterwards dissolved, and the property returned to the first mortgagee, the junior mortgagees not having any right to the possession thereof, cannot maintain trover against the attaching creditors.—MCGRAW v. SAMPLINER, Mich., 64 N. W. Rep. 1060.

221. TRUSTS — Purchase at Judicial Sale. — A trust is raised where one purchases at judicial sale, having, at the time of bidding or previously, agreed, by parol or otherwise, that he would buy it, and hold it subject to the right of the other to repay the parchase money and

demand a conveyance.—COBB v. EDWARDS, N. Car., 23 S. E. Rep. 241.

222. TRUSTS IN REALTY—An agreement whereby defendant's mother was to convey certain land, purchased with her money, to defendant, said conveyance to take effect on her death, in consideration that he would pay taxes thereon, and support her during her life, is within Civ. Code, § 852, requiring trusts in realty to be in writing.—WITTENBROCK V. CASS, Cal., 42 Pac. Rep. 300.

223. Usury — Foreign Statute — Presumptions. — Although promissory notes hearing on their face a greater rate of interest than 6 per cent. were executed and made payable in the State of Tennessee, and it appeared, by an admission in open court, that the legal rate of interest in that State was 6 per cent., in the absence of any further evidence as to the laws of Tennessee on the subject of usury, the courts of Georgia will not hold that these notes are absolutely void, and will sustain a verdict making a person who guarantied their payment liable for the principal of the notes, with interest thereon at 6 per cent.—Craven v. Bates, Ga., 23 S. E. Rep. 202.

224. VENDOR AND PURCHASER — Conditions of Sale—Walver.—Where the vendor of land agrees to furnish the vendee an abstract of title within 30 days from the date of sale, which is not done, and the vendee thereafter treats the default as immaterial, and continues to make payments under the contract, and otherwise treats it as still in force, he will be deemed to have walved the performance of that condition, and cannot obtain a rescission, or a recovery of the money advanced, by reason of such default. — MCALPINE v. REICHENBEER, Kan., 42 Pac. Rep. 839.

225. VENDOR AND PURCHASER — Rescission. — Defendent contracted to convey certain land to plaintiff on or before a specified date, "except unavoidably restrained." At the time of such contract defendant had not title to all the land, but had applied for a patent, and had done all in her power to procure it: Held, that defendant's failure to perform her agreement within the specified time was not ground for rescinding the contract.—BURWELL v. SOLLOCK, Tex., 32 S. W. Rep. 844.

226. VENDOR AND VENDEE — Contract — Landlord's Lien.—After default in payments on a contract to convey, an agreement whereby the vendee was to pay rent for the premises is valid, and, though the contract was not abandoned, the crops, under Code, § 1754, are subject to a landlord's lien, but the amount paid for rent must be applied in discharge of the payments due on the contract to convey.—Jones v. Jones, N. Car., 23 S. E. Red. 214.

227. VENDOR AND VENDEE—Sale of Land—Assumption of Mortgage.—The vendor of land "under and subject to the lien of" a mortgage has no right of action against the purchaser on account of such stipulation until he has actually paid the mortgage debt, or until the land has been withdrawn from the reach of the holder of the mortgage, and the fact that the holder of the mortgage is indebted to the vendor in an amoung greater than the mortgage debt is immaterial.—Blood v. Crew Levick Co., Penn., 33 Atl. Rep. 344.

228. VENDOR'S LIEN — Foreclosure.—In an action by heirs to set aside a sale of the decedent's land under the foreclosure of a vendor's lien, the evidence showed that, prior to the foreclosure sale, the land had been sold under an execution against the decedent: Held that, as the execution sale passed the equity of redemption, is was not error to direct a verdict for the defendants.—Russell v. Campbell, Tex., 32 S. W. Red. 558.

229. WATERS—Riparian Rights—Injunction.—Injunction does not lie at the instance of a prior appropriator of the water of a river through an irrigation ditch, to restrain a subsequent appropriator further up the stream from diverting water from the river, and, after using it, turning it into complainant's ditch, instead of returning it to the river above the opening of com-

plainant's ditch, where it appears that the water is turned into such ditch above the point where it is to be used by complainant, and that complainant has the same quantity as he would have if defendant returned the part used by him to the river.—Austin v. Chand-Ler, Ariz., 42 Pac. Rep. 493.

230. WILL — Devise to Widow.—Testator gave his property to his widow "for her own proper use and behoof as long as she shall remain my widow, and, if she should get married, then she shall be only entitled to the one-third in said property, the balance, being to thirds, to my youngest daughter, K, and, if the said K should die, then I will and bequeath the two-thirds to my son W, and, if both should die, then the residue remaining shall be equally divided among my remaining children: Held, that the whole estate was given to the widow in fee, subject to the condition that she should not marry again, and defeasible as to two thirds upon the breach of that condition.—REDDING v. RICE, Penn., 38 Atl. Rep. 380.

231. WILL—Estoppel.—Where a person, before reaching majority, receives from the nominated executor of a paper purporting to be a will land thereby devised to her for life, remains in possession of the land for a considerable period after becoming of age, accepting and acquiescing in the validity of certain probate proceedings, whereby the paper has been adjudged to be the true last will and testament of the alleged testator, and also recognizing the paper itself as such will, and claiming thereunder a life estate only, a subsequent judgment creditor of such person is conclusively estopped from denying the validity of the paper as a will, or questioning the jurisdiction of the court admitting it to probate, or the regularity of the probate proceedings, and also from asserting that the debtor has any greater interest in the land than a life estate.—Branson v. Watkins, Ga., 28 S. E. Rep. 204.

282. WILLS—Sale of Land by Executor.—In an action for specific performance of a contract for the purchase of land from the executors, the defense of unmerchantableness of title in that, under the statute, the will was void, and no power of sale conferred on the executors, cannot prevail where the statute is so clear as to leave no doubt of its construction in favor of the validity of the will and of the power.—LEPPINCOTT V. WIROFF, N. J., 83 Atl. Rep. 805.

283. WILL—Trusts.—A testator stated in his will that he intended to have all his land ultimately divided equally between his nine children, and that in part execution of this plan he had deeded one tract to his daughter and two tracts to two of his sons. The will contained no devise to the daughter, and did not expressly devise to any one the tract described as having been deeded to her. He had in fact deeded this tract to her, but she had afterwards reconveyed it to him, without consideration, at his request: Held, that said tract descended as intestate estate.—STODDER v. HOFFMAN, III., 41 N. E. Rep. 1062.

234. WITNESS—Conversation with Decedent.—Code, § 590, excluding the testimony, in his own behalf, of a party interested in a suit, concerning a personal transaction between the witness and a deceased person, as against the personal representative then defending or prosecuting the suit, does not exclude the testimony of defendant as to a conversation with a decedent and two other persons who were associated with decedent in the transaction which is the subject of a suit, in which the personal representative of the decedent and such other persons were coplaintiffs.—JOHNSON V. TOWNEEND, N. Car., 23 S. E. Rep. 271.

285. WITNESS—Transaction with Decedent.—Neither a sheriff who has levied a writ of attachment upon chattels nor the attachment creditor is an "assignee" of the attachment debtor within the meaning of section 322 of the Code of Civil Procedure; and a vendee of such attachment debtor, although a party to the action, may testify in his own behalf to the transaction whereby he claims title from the attachment debtor, who has died in the meantime.—Burlington Natl. Bank v. Be ard, Kan., 42 Pac. Rep. 320.

Central Law Journal.

ST. LOUIS, MO., JANUARY 17, 1896.

In 1891 the legislature of Kansas passed an act "to prohibit the editing, publishing, circulating, disseminating and selling of certain classes of newspapers and other publications." * * * "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons." In a recent habeas corpus case-In re Banks-before the Supreme Court of Kansas, the act was held constitutional and valid, and it was also decided that in order that a publication may fall within the terms of said act, as being "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons," it is not necessary that more than half the columns, or any other definite number, be filled with such items. It is sufficient if such items are a prominent feature, and especially characteristic of the publication. The contention was made on behalf of the petitioner, who had been arrested on the charge of having sold a Sunday newspaper which infringed against the provisions and spirit of the statute, that the act was void because in contravention of the bill of rights. But the court thought otherwise, holding that the act was not passed to prevent the publication of libels, nor to suppress papers indulging in such publications, but to prevent the publication and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral "Without doubt," they say, "a conduct. newspaper, the most prominent feature of which is items detailing the immoral conduct of individuals, spreading out to public view an unsavory mass of corruption and moral degradation, is calculated to taint the social atmosphere, and, by describing in detail the means resorted to by immoral persons to gratify their propensities, tends especially to corrupt the morals of the young and lead them into vicious paths and immoral acts. We entertain no doubt that the legislature has power to suppress this class of publications, without in any manner violating the constitution."

. Vol. 42-No. 3.

In many of the Southern States the legislature has wisely provided for the separation of white and colored passengers on railroad trains, by the passage of what is known as "separate coach laws." In the transportation of passengers, prior to the enactment of these laws, the frequent disturbances arising between the two races, resulting often in serious injuries being inflicted by the one on the other, and the danger to other passengers, led to their enactment as a police regulation, in order to prevent, as far as possible, these altercations upon railroad trains, and to check the disposition of those of the dominant race to offend and humiliate those who were entitled to the protection of the law. No discrimination is made by the law in favor of the one race or the other. Each have the same facilities as to transportation, as to conveniences and accommodations, in the coach to which they are assigned. In order to make this law the more effectual, heavy penalties are imposed on the railroad companies for not having separate coaches, and upon the conductors, or those in charge of trains, for not assigning to each white or colored passenger their respective compartment.

An interesting phase of this law came up in the recent Kentucky case of Quinn v. Louisville & N. R. Co., 32 S. W. Rep. 742. There it appeared that a conductor of one of defendant's trains, whereon were separate coaches for white and colored persons, as provided by the Kentucky statute, allowed an intoxicated white passenger to enter and remain in a coach reserved for colored persons, where he created a disturbance, was guilty of obscene language and otherwise maitreated a colored passenger. It was held that the railroad company was responsible for his conduct while there and liable in damages to the passenger. The court stated that while the mere presence of the intruder into the coach for colored persons, with the knowledge of the conductor, would not give to the occupants a cause of action against the corporation, they could not concur with counsel or the court below that the separate coach law has no application to the facts of this. case. If, they say, each one of the passengers had been assigned the coach required by the statute, and the white passenger had left his coach, and gone into the coach with these colored people, without the knowledge

of the conductor, while he was attending to his duties in the other cars, and had there abused and insulted the appellant, it is plain no action could be maintained against the company; but when the white passenger is assigned to the cars set apart for those of another race, the company will be held responsible for his bad conduct, affecting the rights of other passengers, although the conductor may be ignorant of what is transpiring; and where the conductor, or those managing the train, knows that one is in the wrong car, it is his duty to expel him, and, by consenting to his remaining, the company becomes responsible for his conduct so long as he does remain. If a contrary rule is applied, and no liability exists on the part of the corporation to the passenger, the separate coach law becomes a dead letter, and those who are entitled to its protection have no means of enforcing its provisions but by an indictment, where a penalty may be adjudged in favor of the State.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW - SELF-INCRIMINATing Testimony.—In Brown v. Walker, 70 Fed. Rep. 46, the United States Circuit Court for the Western District of Pennsylvania, held that the provision in the fifth amendment to the constitution of the United States, against compelling a person in a criminal case to be a witness against himself, is not intended to shield a witness from the infamy or disgrace resulting from incriminating testimony, but only from actual prosecution and punishment. It was further held that the act of congress of February 11, 1893, providing that no person shall be excused from testifying in proceedings under the interstate commerce act on the ground that his testimony may incriminate him, but that no person shall be prosecuted or subjected to penalty for anything concerning which he may testify, does not contravene the provisions of the fifth amendment to the constitution of the United States, since it affords the witness a protection as broad as the constitutional provision. The following is from the opinion of the court:

To our mind it is clear the infamy or disgrace to a witness which may result from disclosures made by

him are not matters against which the constitution shields, and that so long as such disclosures do not concern a crime of which he may be convicted, the provision quoted does not apply. But does the act of congress give the petitioner as broad protection as the constitutional provision? Unquestionably it does. It says he "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise." This affords him absolute indemnity against future prosecution for the offense to which the question relates. The act of testifying his, so far as he is concerned, wiped out the crime. It has excepted him from the operation of the law, and, as to him, that which in others is a crime has been expunged from the statute books. If, then, there exists, as to him, no crime, there can be no self-crimination in any testimony he gives, and if there can be no self-crimina. tion, if neither conviction, judgment, nor sentence can directly or indirectly result from his testimony, what need has he for the constitutional provision? For, says Broom (Leg. Max. p. 654), in speaking of the maxim quoted above, "Where, however, the reason for the privilege of the witness or party interrogated ceases, the privilege will cease also; as, if the prosecution to which the witness might be exposed on his liability to a penalty or forfeiture is barred by lapse of time, or if the offense has been pardoned, or the penalty or forfeiture waived"—a doctrine approved, as we have seen above, by Lord Eldon.

In practical effect, the legislative act throws a greater safeguard around the petitioner than the constitutional provision. Before he testified, he could have been charged with a violation of the interstate commerce law, in which case the amendments only protected him against compulsory self-crimination. He was liable to a possible verdict of guilty if the necessary proofs were given, but under the legislative act, when he has testified the law excepts him from its operation, makes that which was before a possible crime a mere matter of indifference, and shields him from subsequent prosecution. sweeping words of the statute-as broad as human language can make them-afford absolute indemnity to the witness. No crime exists as to him. It is not a pardon-not an act of amnesty. No charge can be made against him, for it is illegal to even prosecute him, viz., "No person shall be prosecuted." To our mind, the constitutional provision in words and purpose is plain. In the Counselman case, 142 U. S. 547, the witness was protected from the manifestly selfcriminating answers which would have disclosed facts upon which a prosecution, to which he was still left exposed, could be based. But, owing to the act of 1898, no such consequence can ensue if the present petitioner is made to answer. Such being the case, the constitutional provision does not concern him, and if it does not, the act which compels him to testify is not unconstitutional.

In reaching this conclusion we have given due regard to the case of U. S. v. James, 60 Fed. Rep. 257, where the act was held to be unconstitutional. While we regret to differ from this only federal decision on the matter, we find support for our position in the opinion of the Supreme Court of New Hampshire, in State v. Nowell, 58 N. H. 314, and of the Supreme Court of California, in Ex parte Cohen, 38 Pac. Rep. (Cal.) 364.

The prayer of the petitioner to be discharged will therefore be denied, and he will be remanded to the custody of the marshal.



CORPORATIONS — ACTION ON SUBSCRIPTION FOR STOCK.—One of the points decided by the Supreme Court of Georgia in the case of Branch v. Augusta Glass Works, is that where a number of persons sign a written contract, by the terms of which they agree to subscribe to the capital stock of a company to be thereafter incorporated, under a designated name, for the purpose of carrying on a given business,—each subscriber to take the number of shares set opposite to his name, and pay 50 per cent. of his subscription on demand, "and the balance as the directors may direct,"—the corporation, after being duly formed and organized, may maintain in its own name an action upon this contract, against a subscriber thereto, for the amount of his subscription thus made to its capital stock. Upon this point the court says:

It was further insisted that the Augusta Glass Works could not, as a corporation, and in its corporate name, maintain an action upon the contract which formed the basis of the present suit. That contract was in writing, signed by the defendant and several other persons, and was in the following words: "We, the undersigned, do severally agree to subscribe to the capital stock of a company, to be incorporated, and known as the Augusta Glass Works, the amounts set opposite our respective names below. The capital stock is to be not less than (\$50,000), fifty thousand dollars, in shares of (\$100) one hundred dollars, par value, each. The works are to be located in or near Augusta, Richmond county. Fifty per cent. of the subscriptions hereto are to be payable on demand, and the balance as the directors may direct. The contract is to be binding upon each party hereto when \$50,000 has been vona fide subscribed, and not before." After some investigation, we are satisfied that the corporation had the legal right to bring and maintain in its own name an action upon this contract, against any subscriber thereto, for the amount of his unpaid subscription thus made to its capital stock. In this conclusion we are supported by a considerable array of respectable authorities, to a few of which we will briefly call attention. Thus, in 1 Spel. Priv. Corp. \$ 306, it is laid down that where several persons sign a written instrument which involves the formation of a corporation, and the parties have so far progressed with the execution of their agreement as to organize the corporation under it, the corporation immediately becomes a party to the undertaking, by relation, and may sue for the sums promised in such agreement. In Haskell v. Sells, 14 Mo. App. 91, it was said that "an agreement to take shares in a corporation to be formed inures to the benefit of the corporation, when organized in pursuance of the subscription." Bakewell, J., who delivered the opinion of the court in that case, observed that the subscription paper signed by Sells was an unconditional contract to take a certain number of shares, and that this, prima facie, constitated him a stockholder, adding: "That there was no corporation in existence at the time the paper was signed is immaterial. The objection that there is no promise in such a case is satisfactorily met by the enggestion that the promise becomes definite and fixed

when, in accordance with the expectation of the subscribers, the corporation is effected." A somewhat similar subscription for stock was before the Supreme Court of New Hampshire in the case of Ashuelot Co. v. Hoit, 56 N. H. 548; and it was held "that the corporation, when organized, could maintain a suit against a delinquent subscriber to enforce the collection of its subscription." A corporation was organized in Illinois under a general statute, and the Supreme Court of that State, in Cross v. Mill Co., 17 Ill. 54, held that payments of subscriptions to stock made before the organization of the company could be enforced in an action brought by the company itself after its organization. The same rule is laid down in Railroad Co. v. Gifford, 87 N. Y. 294. And see, also, Hall Co. v. Carey, 116 Mass. 471; Railroad Co. v. Dummer, 40 Me. 172. It is true that many of the contracts of subscription dealt with in the preceding cases contained agreements, not only to take shares of stock in the corporation to be formed, but also to pay the company itself for the same, or something to that effect. We have not the slightest doubt, however, that the contract with which we are now dealing in the present case amounts substantially to the same thing. The cases above cited rest upon the principle that, where persons are authorized by law to obtain a charter for a specified legal purpose, they represent, in the initial steps, the yet unborn corporation, and whatever they lawfully do in the premises operates to the benefit of the corporation when it attains to complete legal existence, and it may then enforce contracts made in its behalf by its promoters.

CONTRACT IN RESTRAINT OF TRADE.—In Consumers Oil Co. v. Nunnemaker, 41 N. E. Rep. 1048, the Supreme Court of Indiana holds that a contract by which defendant, formerly a dealer in oil in the city of H, agreed to refrain from following such occupation for five years within the State of Indiana, the city of Indianapolis excepted, is unreasonable and void as a restriction of trade, and that such contract is not divisible, and being void as to the restriction within the State is void as to the restriction in the city of H. The court says in part:

We are not favored with a brief upon appellee's part, but infer from statements in the brief of the learned counsel for appellant that the contract in controversy was assailed by the appellee upon the ground that it sought to prohibit him from selling and delivering oil at any place in the State of Indiana, outside of the city of Indianapolis, and constituted an unreasonable restraint upon trade, and was, therefore, invalid, and not enforceable in any respect. Appellant contends that, notwithstanding the territory is the entire State of Indiana, with the exception mentioned, in which appellee is restricted from pursuing his business as an oil merchant, the restraint is a reasonable limitation, and that the complaint based upon the contract in question set forth a sufficient cause of action for the relief thereby sought. It is settled that a contract in general restraint of trade is invalid, but one restraining a party from trading within reasonable limits, so as not to be injurious to the interests of the public, is valid, and may be enforced by an injunction, upon a proper showing of facts. Beard v. Dennis,

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6 Ind. 200; Duffy v. Shockey, 11 Ind. 70; Spicer v. Hoop, 51 Ind. 365; Baker v. Pottmeyer, 75 Ind 461; Beatty v. Coble (at this term), 41 N. E. Rep. 890. The settled rule, as enunciated by the American and English decisions of the highest courts, seems to be that where, in the particular case before the court, the restraint in controversy, as to territory, appears to be broader or larger than is necessary to the protection of the party seeking to enforce the restrictive contract, it is of no benefit to either party, but in that event becomes oppressive upon the party against whom the enforcement is sought, and, being oppressive, the law regards the restriction as unreasonable and injurious to the interests of the public. It is not the interests of the parties alone which in the eye of the law are to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, will it be inimical to the public interest? If so, then, and in that event, the agreement must be held as hostile to public policy, and therefore void. Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good. This principle owes its existence to the very sources from which the common law is supplied. Greenh. Pub. Pol. pp. 2, 8. The law regards the good will of a particular trade or business as a species of property, possessing a market value, and subject to sale or disposal. But it is also a well-established principle of law and public policy that, where a person is engaged in trading or other legitimate pursuits, he shall not be unreasonably fettered in the exercise of such business, and, when he sells or disposes of the good will incident thereto, the law will only sustain such a restraint as to his future engagement in such business or pursuit as will appear to be a reasonable space of interdicted territory, and what are such reasonable limits is a question of law for the court to determine, under all the facts and circumstances in each particular case. In support of the several general propositions herein asserted, see Wiley v. Baumgarden, 97 Ind. 66, and authorities there cited; Lawrence v. Kidder, 10 Barb. 641; Hubbard v. Miller, 27 Mich. 15; Horner v. Graves, 7 Bing. 785; Navigation Co. v. Winsor, 20 Wall. 64; Taylor v. Blanchard, 13 Allen, 870; Dunlop v. Gregory, 10 N. Y. 241; Greenh. Pub. Pol. ch. 6, p. 683; 3 Am. & Eng. Enc. Law, 883, and authorities there cited; 22 Am. Law Rev. 878 889; Mallan v. May, 11 Mees. & W. 652. In the case of Dunlop v. Gregory, supra, the Court of Appeals of New York said: "Contracts, upon whatever consideration made, which go to the total restraint of trade anywhere in the State, are void. Such contracts are injurious to the public and operate oppressively upon one party, without being beneficial to the other. . The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenanter must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business." In the case of Taylor v. Blanchard, supra, it was held that an agreement not to set up, exercise, or carry on the trade or business of manufacturing or selling shoe cutters at any place within the commonwealth of Massachusetts was void. In the case of More v. Bonnet, 40 Cal. 251, a stipulation not to engage in a business of a particular kind in the county or city of San Francisco or State of California was held to be void. In Lawrence v. Kidder, supra, a covenant not to conduct the business of manufacturing or trading in palm leaf beds or mattresses in the State of New York west of Albany was held to be invalid. In Price v. Green, 16 Mees. &

W. 846, a contract not to carry on the perfume business within 600 miles of London was adjudged void. In Horner v. Graves, supra, an agreement not to practice dentistry within a district 200 miles in diameter was held to be void. In Beal v. Chase, 31 Mich. 490, where it appeared that the obligor sold a printing establishment, and the business thereof, which extended over the entire State, a covenant not to engage in the same business in that State so long as the vendee should continue in the business at the place of sale, under the circumstances, was held to be reasonable and valid. In Rousillon v. Rousillon, reported in 14 Ch. Div. 851, the English court of chancery held that there is no "hard and fast" rule holding contracts of this character, unlimited as to space, void, but that the validity depends upon the reasonableness of the contract; and, where it appears that the broad restriction is reasonably necessary for the full protection of the contractee, it will be sustained. In a recent English decision in the appeal of Nordenfelt v. Maxim Nordenfelt, etc., Co. (1894), App. Cas. 585, where a patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company, and covenanted with the latter not to engage in that business for a term of 25 years, it was held that, owing to the nature of the business, and the limited number of customers to whom sales might be made, confined mainly to governments of countries, the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injurious to the public interest.

The decisions serve to illustrate the manner in which the courts, under varied circumstances, have been, and are, inclined to view such contracts. The rule in question, in its application by the courts in later decisions, to an extent, seems to have been modified, and is made to yield, in some respects, to the nature or character of the particular trade or business, and the territory over which it extends at the time of the sale of the good will. Cases do and will arise, as, for instance, in Beal v. Chase, supra, and Nordenfelt v. Maxim Nordenfelt, etc., Co., supra, where the particular business has been built up so as to extend over an entire district or State, and sometimes beyond, or where, from its nature, the number of those who patronize it are comparatively of a limited number, and where, consequently, broad or enlarged restrictions are considered as reasonably necessary for the desired protection, and are therefore sustained.

Viewed, then, in the light of the authorities cited herein, how stands the case at bar? It appears, and is conceded by appellant, that the particular business or trade in which appellee was engaged at the time he sold out and executed the contract in controversy was confined to the limits of the city of Hammond. There is no contention that it extended to any other parts of the State, beyond these limits. Neither from the nature of the business, nor otherwise, does it appear that it was necessary for the protection of appellant that the appellee should be prohibited from engaging therein at any and all places in the State, other than the city of Indianapolis. It is a matter of general knowledge that there are numerous consumers of oil for fuel and illuminating purposes in this great and growing State, and it is manifestly to their interest that there should be competition in the selling of the same, at least, that the price thereof may be reasonable. The enlarged covenant of restraint as to territory, it is obvious, was unnecessary under the circumstances. It could serve no purpose, except as a tendency towards a monopoly of the business. If appellant could buy out appellee, and restrict him in

this manner, it might proceed to do so to every other person in the whole State engaged in a similar business; and, eventually, reduce the sale of oils in the State to comparatively few hands, or, possibly, to its own absolute control, and thus virtually stifle legitimate competition. The law has always been hostile to the creation of monopolies, when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good is void on the ground of public policy. This policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance prices, to the injury of the public in general. Salt Co. v. Guthrie, 35 Ohio St. 666; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. Rep. 798.

Appellant apparently insists that the contract may at least be held enforceable against appellee in the city of Hammond, and cites Peltz v. Eichele, 62 Mo. 171. In that case the agreement was not to enter into the manufacture of matches in the city of St. Louis, or any other place, for five years. The stipulation as to St. Louis was sustained, upon the ground that it was reasonable, and could be separated from the other clause. It is a recognized principle that when a contract is or can be so separated in parts as to constitute two agreements, one illegal and the other legal, the latter may be enforced, and the transaction pro tanto sustained. But it is otherwise where the contract in its nature is not divisible. Beard v. Dennis, supra; Wiley v. Baumgarden, supra. The contract before us is not of this character, and does not come within the provisions of the rule stated, and it must either stand or fall as an entirety. The restraint of the trade or business, as therein stipulated as to territory, under the circumstances, was manifestly too large, and is therefore in violation of the principles of public policy to which we have referred, and consequently void, and cannot, in any respect, be enforced. Judgment affirmed.

EMINENT DOMAIN — RIGHTS OF TENANTS.

- 1. Relation of Landlord and Tenant.
- Condemnation of Part of the Premises under Right of Eminent Domain.
- 8. Condemnation of the Entire Premises.
- 4. Condemnation Money—Apportionment.
- 5. The Minority Doctrine.
- 6. Application of the Doctrine that the Tenant must Repair.
- 7. Destruction of the Subject-matter.
- 8. Future Rents-Landlord's Remedy.
- 9. Conclusion.

1. Relation of Landlord and Tenant.—In the feudal economy, rent had a two-fold quality: 1. Something issuing out of the land and tenements corporeal, as a compensation for the possession; 2. An acknowledgment by the tenant to the lord, of his fealty or tenure. Under the modern conception rent is a return or compensation for the possession of some corporeal inheritance, and is a certain profit

¹ Pingrey on Real Prop. 115.

in money, provisions or labor issuing out of the land and tenements in return for their use.² Nothing but a surrender, a release, or an eviction, in whole or in part, can absolve the tenant from the obligation of his agreement to pay rent.⁸ The owner of the leasehold and the owner of the reversion, together hold the fee-simple. Each has a distinct estate. The interest of the tenant, in law, is just as potential as that of the landlord, although in fact it may not practically be so valuable. Whatever be the method of ascertaining the values of these distinct interests, the sum of those values must be the full value of the property.

2. Condemnation of Part of the Premises under Right of Eminent Domain.—Taking a part of the property leased by the sovereign under the right of eminent domain is not an eviction. Hence, it is held partial appropriation has no effect on the covenant to pay rent.4 So a condemnation of a part of the leased premises under this rule does not amount to an eviction; and whether the fee or mere easement be taken, the tenant still remains liable under his covenant to pay rent, originally reserved, because nothing short of a surrender, a release, or an eviction will discharge him. And if condemnation of part of the premises will not discharge the tenant's covenant to pay rent, neither will it operate to apportion the rent as to relieve the tenant of any portion of his liability to the lessor. A partial condemnation is not an eviction or partial eviction, for an eviction is the act of the landlord or a third party holding under a paramount title.6 Nor is it a release which is

² Bouvier's L. Dict. tit. "Rent;" Spencer's Case, 5 Co. 16; 2 Bl. Com. 41; 3 Kent's Com. 460; Buszard v. Capel, 8 Barn. & Cress. 141.

³ Gluck v. Baltimore (Md.), 27 Chi. L. News, 891; Fisher v. Milliken, 8 Pa. St. 111.

4 Corrigan v. Chicago, 144 Ill. 537; Stubbins v. Evanston, 136 Ill. 37; Gluck v. Baltimore (Md.), 27 Chicago L. News, 391; Frost v. Earnest, 4 Whart. (Pa.) 90; Peck v. Jones, 70 Pa. St. 85; Ellis v. Welch, 6 Mass. 246; Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 210; Foote v. Cincinnati, 11 Ohio St. 408; Emmes v. Feeley, 132 Mass. 346; Patterson v. Boston, 20 Pick. (Mass.) 159; Chicago v. Garrity, 7 Ill. App. 474; Workman v. Mifflin, 30 Pa. St. 362; Wagner v. White, 4 Har. & J. (Md.) 564; Schilling v. Holmes, 23 Cal. 230; Ross v. Dysart, 33 Pa. St. 452; Dyer v. Wightman, 66 Pa. St. 425; Dobins v. Brown, 12 Pa. St. 75. Compare Biddle v. Hussman, 23 Mo. 597; Commissioners v. Johnson, 66 Miss. 248; Rolle's Abrid. 236.

⁵ Gluck v. Baltimore (Md.), 27 Chicago L. News, 391.

⁶ Taylor's Land. & Ten. 381.





the descending of the greater estate upon the less.7 Nor is it a surrender, which is the yielding up of the less estate to him who has the reversion or remainder.8 Taking part of the property under the rule for a public use leaves the tenant in the position of being deprived of part of his property, while he still is liable on his covenant to pay rent for the whole estate. So the condemnation proceedings cannot extinguish the rent. Hence, where a part of the leased premises has been appropriated for a street, the tenant is not released from payment of rent, but is entitled to recover from the city the damages he has sustained.9 lessee takes his term just as any other owner takes his title, subject to the right and power of the State to take it or part of it for public use, whenever the public use and necessity may require. Such a right is not an incumbrance, and such taking is no breach of the covenant of the lessor for quiet enjoyment.10 Such a taking operates upon the lessee's interest as an injury for which the State is to make compensation, but does not affect his liability to pay rent for the entire estate according to the tenor of his lease, as the courts generally hold.

3. Condemnation of the Entire Premises.— While condemnation proceedings may not amount to a technical eviction, yet where the entire tract of land is taken, its effect is to abrogate the relation of landlord and tenant, for whatever title the tenant, as well as the landlord, has in the land passes to the State or corporation in whose behalf the right of eminent domain is exercised. The effect is an absolute extinguishment of the right and title of both in or control over the subject of demise. It is in effect eviction by paramount title, coupled with a conveyance by the owners of their respective interest, and, therefore, the liability of the tenant to pay rent ceases. 11 And in any action brought by the landlord for the rent accrued after the

termination of the estate by condemnation, the tenant may plead such extinguishment in defense.¹²

4. Condemnation Money—Apportionment. -So where the premises are all taken, the compensation must be apportioned between the landlord and tenant. The lessor's interest is the reversion with the rents added. The tenant's interest in the estate is the value of the term, subject to the rents, and each must receive compensation. The money stands in lieu of the land taken, to be apportioned upon the several interests in the premises. If the value of the leasehold estate exceeds the rental, the tenant will be entitled to the If it does not exceed the rent, he will receive no compensation. The appropriation of part of the estate for a public use leaves the tenant in the position of being deprived of a part of his property, while he still remains liable to pay rent for the whole of it, and to that extent obviously does him an appreciable injury, which should be considered by the jury in estimating the decreased market value of the remaining portion of the demised premises. As the tenant's estate is entirely distinct from the lessor's and both estates being of value and vested, they must be protected by the constitutional provision that property cannot be taken without due process of law; hence, each must be awarded in money an amount equivalent to the value of that which is taken from him; in estimating the decreased value of the estate remaining to the tenant, compensation must be awarded him for the rent to be paid on that part taken and the value of the term for the portion condemned, provided the value exceeds the rental. The jury should be allowed to consider all the circumstances affecting the market value of that part of the leasehold estate remaining after a part has been taken. The lessee cannot maintain an action against the lessor to recover from him a certain portion of the compensation allowed the latter. on the ground that it was intended for the purpose of putting the property in a tenantable condition, provided it be a house injured by the condemnation proceedings, nor on the ground that his leasehold is greatly damaged. The lessee must see to it that his injury is

¹² Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 211; Foote v. Cincinnati, 11 Ohio St. 408; Stubbins v. Evanston, 136 Ill. 37.



⁷ Taylor's Land. & Ten. 507.

⁸ Co. Litt. 337 b.

⁹ Foote v. Cincinnati, 11 Ohio St. 408.

¹⁰ Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 211.

¹¹ Parks v. Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 211; Foote v. Cincinnati, 11 Ohlo St. 408; Stubbins v. Evanston, 186 Ill. 37, 11 L. R. A. 839 and note; Corrigan v. Chicago, 144 Ill. 587, 21 L. R. A. 212, and note. See, also, Montayne v. Wallahan, 84 Ill. 355; Emmes v. Feeley, 132 Mass. 346; O'Brien v. Ball, 119 Mass. 28; Harrison v. Myer, 92 U. S. 111; Barclay v. Pickels, 38 Mo. 143.

provided for when damages are awarded the lessor. 18 If the covenant to pay rent is not affected by the condemnation, the lessor will be entitled as compensation, only to the present value of his reversion which he holds subject to the term created by his lease; and the tenant continues personally liable; but losing his estate and right to enjoy it, he will be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents in futuro; or he should receive the value of his term subject to the rents, and such further sum as will be considered a present equivalent for the rent thereafter to be paid,14 because the landlord's title is absolutely extinguished in the leased estate, and he cannot, therefore, enforce the contract for the payment of rent after the extinguishment of his estate. 15 This doctrine is the overwhelming weight of authority. The taking of a part of the premises does not operate as an apportionment of the rent, because the condemnation and appropriation of land is not the act of the lessor, and is not an eviction by him, so the rent cannot be apportioned.

5. The Minority Doctrine.—A contrary doctrine has been accepted by some courts, and it is held that the exercise of the sovereign power of eminent domain, by which a portion of the demised premises is taken, operates as an apportionment of rent, and dissolves the relation of landlord and tenant pro tanto; this undoubtedly is the better rule. 16 Because the condemnation of part of the premises discharges it from a proportionate part of the rent, and extinguishes that rent accordingly. And the apportionment must be made by a jury who will determine whether anything, and how much, is due, and have reference in making their estimate, to the real value of what is left to the tenant, and not to the quantity.17 When the lessor

B Turner v. Williams, 10 Wend. (N. Y.) 140; Brooks v. Boston, 19 Pick. (Mass.) 174; Gluck v. Baltimore (Md.), 27 Chicago L. News, 391.

¹⁴ Corrigan v. Chicago, 144 Ill. 587, 21 L. R. A. 212 and note. So if the whole land be taken for public use, which has been leased, the rent thereafter ceases, Corrigan v. Chicago, 144 Ill. 587; Barclay v. Pickels, **28 Mo. 143**; Cuthbert v. Kuhn, 8 Whar. (Pa.) 357.

Lampson v. Clarkson, 118 Mass. 848; Corrigan v. Chicago, 144 Ill. 537. See, also, Montayne v. Wallahan, & Ill. 355; Harrison v. Myer, 92 U. S. 111; O'Brien v. Ball, 119 Mass. 28; Emmes v. Feeley, 132 Mass. 346.

E Commissioners v. Johnson, 66 Miss. 248. See, also,

o¹s Ab, 236.

Biddle v. Hussman, 28 Mo. 597.

ceases to have any interest in the property, the rent becomes annihilated. And hence, a total or partial appropriation abates the rent either wholly, or in part, as the case may be.18 Mr. Lewis says, "undoubtedly the conclusion which is practically the most satisfactory, and which can be applied with the least injury to the parties is that the taking operates to extinguish the obligation to pay rent, in whole or in part, as the case may be." But this doctrine it is argued is not consonant with other law existing between landlord and tenant and, therefore, is objectionable on this point alone, if no other objection existed, and has not been adopted by the courts in general. Because the act of the State does not constitute an eviction by the landlord, and therefore, the tenant necessarily continues liable for the rent, and has full recourse against the State for all damages he sustains.

6. Application of the Doctrine That the Tenant must Repair. -The rule is that the landlord is not liable to the tenant for not repairing the premises unless he covenants so to do.20 And a covenant is never implied that the lessor will make them. 21 So the destruction of buildings and improvements upon the land demised does not relieve the tenant from the obligation to pay rent.22 The tenant is bound to continue to pay rent during the term, even though the buildings have burned down, unless he protects himself by an express covenant against liability in this matter.28 The same rule applies it is held where a leased building is injured by condemnation proceedings. The lessor is under no covenant to make repairs, and the lessee must repair the building. And whether he repairs or not he must pay the lessor full rent during the remainder of the term; the rent is not abated pro tanto. The rent is-

18 Barclay v. Pickels, 88 Mo. 148. See, also, Lewis' Eminent Domain, 483.

19 Lewis' Eminent Domain, 483. See 29 Am. L. Review, 451, leading and valuable article by Joseph H. Taulane.

20 Burns v. Fuchs, 28 Mo. App. 279; Cantrell v. Fowler, 82 S. Car. 589; Weinstein v. Harrison, 66 Tex. 546; O'Connor v. Gourand, 14 Daly (N. Y.), 64; Mullen v. Rainear, 45 N. J. L. 520.

²¹ Sheets v. Selden, 7 Wall. (U.S.) 423; Kramer v. Cook, 7 Gray (Mass.), 550; Mayer v. Mitchell, 58 Md. 175.

22 Taylor v. Caldwell, 3 Best & Smith, 826; Leeds v. Cheetham, 1 Sim. 146; Lott v. Dennes, 1 El. & El. 474.

25 Moffatt v. Smith, 4 N. Y. 126; Fowler v. Bott, 6 Mass. 68; Bussman v. Gauster, 72 Pa. St. 285.

sues out of the real estate whether it be land or buildings incorporated in the land. By the destruction of part of the realty, either by fire or by condemnation proceedings, the tenant's liability to pay full rent is not modified in the least.

7. Destruction of the Subject-Matter.—If the subject-matter is destroyed by fire or otherwise, it terminates the relation of landlord and tenant, thus, where the tenant leases only the building, its destruction by fire terminates his liability to pay rent.24 So when a tenant has leased the upper story of a building or rooms therein, and the building is destroyed by fire or by other agencies, his obligation to pay rent ceases, because he cannot enjoy the premises in any manner thereafter nor can he rebuild. As he cannot occupy the space of the demised story or rooms, the landlord has no more claim upon him.25 The same rule applies as to condemnation, when the entire premises are taken. The tenant cannot occupy the premises or any portion of them, and his obligation to pay rent ceases. And as a lease is now only a contract for the possession and use of real estate, when the tenant is deprived of the demised premises by sovereignty, and the lessor has received full compensation for his estate, there is no reason why the tenant should not be relieved from all obligations to pay further rent. And whatever damages the tenant has received will entitle him to a just compensation.26 Upon the plainest principles of justice, whatever expense the tenant has been obliged to pay, or whatever loss the condemnation has caused him, as estimated by a jury, entitle him to compensation. And if the entire estate is not taken, but the remainder is of no value to the tenant, it is equivalent to condemning the whole and will so be considered by a jury and the tenant will be absolved from paying further rent; and the condemnation money must be for the entire estate, and an apportionment made according to the relative rights of the parties.

8. Future Rents—Landlord's Remedy.—
If the landlord's remedy to collect his rents will be impaired or defeated on account of the insolvency of the tenant, or otherwise, a court of equity may interfere to prevent the

payment of the damages recovered in a proceeding for condemnation under eminent domain, into the hands of the tenant, and appropriate so much of the fund as may be necessary to the payment of the rents due or to become due to the ·landlord.27 Or as the future rents belong to the landlord, it is proper in a court administering equity, with all the parties before it, to award the future rents to the landlord to whom they would ultimately go.28 Where the whole estate is taken, the proper proceeding is to award the landlord and the tenant the present value of the interest coming to each. And where a partial taking occurs, it will be better to award the landlord the present value of the future rents of that portion condemned, thus eliminating from the contract that portion condemned, it having, in fact, ceased to exist as between the parties.

9. Conclusion. — Under the present conception a lease is only a contract for the possession and use of real property. this doctrine a partial appropriation of the land should abate the rent pro tanto. portion taken ceases to exist as to the landlord and tenant; their titles have been divested by sovereignty for value received. A portion of the subject-matter of the lease has been extinguished; the estates to this part formerly held by the tenant and the landlord have been transferred, and why should the tenant pay rent on real property, to the landlord who has no title to it. The exercise of the sovereign power of eminent domain, by which a portion of the real estate demised is taken, operates in fact as a destruction of part of the subject-matter between the parties, and dissolves the relation of landlord and tenant pro tanto.29 The conclusion forces itself that taking leased property under eminent domain, operates to extinguish the obligation to pay pent, in whole or in part, as the case may be; this is the logical construction, though the majority of the courts refuse to accept it. Whenever a part of the estate is annihilated by sovereignty, the relation of landlord and tenant should D. H. PINGREY. cease as to that part.

Bloomington, Ill.

²⁹ Commissioners v. Johnson, 66 Miss. 248; Biddle v. Hussman, 23 Mo. 597.



²⁴ Taylor's Land. & Ten. 520.

²⁵ Graves v. Berdan, 26 N. Y. 498.

Stubbins v. Evanston, 186 Ill. 37; Corrigan v. Chicago, 144 Ill. 537.

²⁷ Stubbins v. Evanston, 136 Ill. 37.

²⁸ Dyer v. Wightman, 66 Pa. St. 425.

PARQL EVIDENCE — ADMISSIBILITY TO EXPLAIN A RESERVATION IN A DEED.

BEVER V. BEVER.

Supreme Court of Indiana, November 8, 1895.

Parol evidence is admissible to show that the reservation in a deed of a life estate to the grantors was made to secure payment of the unpaid purchase price payable in support, and by allowing the grantors to reside on the premises.

Monks, J.: This action was brought by appellant against appellee. The complaint is in two paragraphs, the first of which was to recover possession of real estate, with damage for its detention, and the second to quiet title thereto in appellant during her life. Appellee filed a general denial, and the cause was tried by a jury, and a special verdict returned, upon which, over a motion by appellant for a judgment in her favor, and over a motion for a new trial, judgment was rendered in favor of appellee, to which appellant excepted.

The special verdict, so far as necessary to determine the questions presented on this appeal, was as follows: "On the 6th day of August, 1890, Henry Bever, Sr., was the sole owner in feesimple of the real estate in controversy. Appellant was his wife and appellee his son. Henry Bever, Sr., was old and feeble, about 78 years old, and was desirous of making a division and distribution of his estate. He had six children, including appellee. He had made no advancement to appellee or his daughter Mary, but had advanced to each of his other children large sums of money. Said Bever, Sr., was indebted to appellee in the sum of \$2,400 for work and labor. On August 6, 1894, Henry Bever, Sr., sold said real estate to appellee for \$11,200; that, as a payment on the purchase money, \$2,200 as an advancement and \$2,400 for said indebtedness was allowed. Bever, Sr., to equalize all his children with the \$2,200 advanced in said land to appellee, executed his notes secured by mortgage on said real estate, payable to his said children, amounting in all to \$3,439.50, which appellee assumed and agreed to pay as a part of the purchase money for said real estate, and also agreed to pay \$1,200 cash to said Mary Bever, thereby making her advancement, with the note executed to her, \$2,200. It was further agreed, as a part of said purchase price of said real estate, that appellee should support said Henry Bever, Sr., and his wife, the appellant, so long as either of them should live, and it was further agreed, as a part of said sale and purchase, that said Bever, Sr., and his wife should occupy and have the use of the residence on said premises. On August 6th said Henry Bever, Sr., and his wife executed to appellee a warranty deed conveying said real estate to him in fee-simple, except that after the granting clause in said deed, and after a description of the premises, there was inserted the following, to wit: 'The grantors herein except and expressly reserve from this grant a life estate into and upon

all said real estate in favor of said Henry Bever and Mary Bever, and the said Henry Bever and Mary Bever hold, retain, and reserve a life estate during their natural lives in their favor upon all said real estate and out of the same.' The provisions contained in said deed excepting and reserving a life estate was inserted, and such life estate was reserved by said grantors solely for the purpose, and with the understanding and agreement, that the same was to secure the grantors in the possession of said residence, and to secure the performance by appellee of his agreement to support the said grantors; and it was further agreed at the said time, by and between said grantors and said grantee, that the whole estate in fee-simple, including said life estate, should pass and be transferred to said grantee, except that the legal title to the real estate mentioned in said deed should remain in said grantors as security, as aforesaid; and it was further agreed by and between said grantors and grantee that the possession of said premises, except the residence, should be turned over and surrendered to said appellee, the grantee, and should continue in his possession unless he should fail to perform said agreement, and that he should have the use, proceeds, rents, and profits of said real estate during the life-time of said grantors, so long as he should perform his contract, without the payment of any rent. On the 6th of August the grantors placed appellee in full possession of said real estate, except said residence, and appellee immediately took possession, and has ever since said time remained in, and now is in, exclusive possession of said premises, and is using the same for farming purposes. In the fall of 1890 appellee placed upon said premises a house of the cost and value of one thousand dollars, and made other lasting and valuable improvements, all with the consent and knowledge of the grantors, and at his own expense. Appellee has from the date of said deed paid all the taxes on said real estate, including the taxes due in the spring of 1894. The grantors have never paid, or offered to pay, the same to him. Henry Bever, Sr., died May 18, 1893. From the date of said deed appellee furnished reasonable support to grantors, and gave them all the support that they or either of them required of him, and, ever since the death of his father, appellee has furnished appellant reasonable support, and has furnished to her all the support she required or requested. Since November, 1893, and ever since the commencement of this action, appellee has furnished to the appellant, and she has received from him, her support, including groceries, provisions, money, and clothing, firewood, and such other articles as she needed, and ever since the death of her husband, and up to the time of this trial, the plaintiff has called upon the appellee for her support, and the same has been furnished by appellee to appellant, and has been received by her, under and in pursuance of said agreement by appellee to support said grantors during their lives. Appellee has at all times been ready and willing to perform his said contract, so made with Henry Bever, Sr., and has kept and performed the same. The house which was on said real estate at the date of said deed has ever since been occupied by the grantors. In November, 1893, appellant, by one Pursely, her son-in-law and agent, ordered appellee to quit the possession of said premises, which he refused to do, upon the ground that he was the owner thereof. Afterwards appellant consented that appellee remain in possession of said real estate, and directed him to put in a crop, which he did."

Appellant insists that the court erred in rendering judgment on the special verdict in favor of appellee; "that the deed reserved her a life estate, and the parol agreement set out in the special verdict, and made before or contemporaneous with the execution of the deed, cannot enlarge, diminish, or vary the terms of the deed, or render inoperative and defeat the terms of this life estate; that such findings, contradicting the terms of the reservation in the deed, should have been disregarded, and judgment rendered for appellant."

It is the general rule that, in the absence of fraud or mistake, parol agreements made before or contemporaneously with a written contract cannot be given in evidence to contradict, vary, or modify the writing. Coy v. Stucker, 31 Ind. 161; Hosteter v. Auman, 119 Ind. 71, 20 N. E. Rep. 506. In Philbrook v. Enswiler, 92 Ind. 590, this court approved the rule in this language: "Nothing is better settled than that, where two parties have entered into a written contract, all provisions, negotiations and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement. King v. Insurance Co., 45 Ind. 43." It has also been held by this court that by the execution of a deed the preliminary contract is executed, and any inconsistencies between its original terms and those in the deed are to be explained and settled by the deed alone. Philbrook v. Enswiler, supra; Cole v. Gray, 139 Ind. 396, 38 N. E. Rep. 856. A deed, however, as a general rule, does not state the entire contract, and such is not the purpose of its execution. It is the evidence of the consummation of a part of some contract previously made. It is not the purpose of a deed to state how, when, or in what manner the consideration shall be paid. Davis v. Hopkins (Colo. Sup.), 32 Pac. Rep. 70; Trayer v. Reeder, 45 Iowa, 273. It is also settled law that the real consideration of a deed may be shown by parol evidence, although it be different from the consideration stated in the deed. Hays v. Peck, 107 Ind. 389, 8 N. E. Rep. 274. Under a deed of general warranty, it may be proven by parol evidence that the grantee assumed and agreed to pay any lien or incumbrance as a part of the consideration, when the same is not mentioned in the deed. Carver v. Louthain, 38 Ind. 530; McDill v. Gunn, 43 Ind. 315. It is equally well settled

that a deed absolute on its face may be shown by parol evidence to have been executed only as a mortgage. Ashton v. Shepherd, 120 Ind. 69, 22 N. E. Rep. 98; Tuttle v. Churchman, 74 Ind. 311; Crane v. Buchanan, 29 Ind. 570; Chase's Case, 17 Am. Dec. 300; Hutzler v. Phillips (S. C.), 4 Am. St. Rep., note on page 707 (1 S. E. Rep. 502); Stew. Mortg. § 38. This court said in Hanilon v. Doherty, 109 Ind. 37, 9 N. E. Rep. 782: "It is a familiar rule of equity that a deed, although absolute on its face, is nothing more than a mortgage when executed to secure an existing debt. No matter what form a transaction may assume, if it appears that the instrument was executed to secure a subsisting debt, it will be adjudged to be a mortgage." See 4 Am. St. Rep., note, pp. 697 -708 (1 S. E. Rep. 502). The grantor may in the deed, by express reservation, create an equitable mortgage to secure the unpaid purchase money whether payable in money or otherwise. The reservation of such lien is equivalent to a mortgage taken contemporaneously with the deed, and gives the purchaser the right of redemption. Lucas v. Hendrix, 92 Ind. 54, and cases cited; Harvey v. Kelly, 41 Miss. 490; Davis v. Hamilton, 50 Miss. 213; Moore v. Lackey, 53 Miss. 85; Deason v. Taylor, Id. 700; Heist v. Baker, 49 Pa. St. 9; Markoe v. Andras, 67 Ill. 34; Carpenter v. Mitchel, 54 Ill. 126; Dingley v. Bank, 57 Cal. 467; 4 Am. St. Rep., note on page 706 (1 S. E. Rep. 502); 6 Am. & Eng. Enc. Law, 682, note 4; 28 Am. & Eng. Enc. Law, 184-189, and notes; 1 Ping. Chat. Mortg. § 320; 1 Jones, Mortg. §§ 228, 229; Stew. Mortg. § 37, notes 10-12. This court held in Lucas v. Hendrix, supra, that a warranty deed in the statutory form, containing a provision that upon the payment of a sum of money to the grantor the grantee shall be seised in the fee-simple, and that payment may be compelled by suit creates an equitable mortgage in favor of the grantor. In Carr v. Holbrook, 1 Mo. 240, it was held that a deed made for land, to be absolute on the payment of certain notes, but in default of payment to be void, was to be considered a mortgage. Pugh v. Holt, 27 Miss. 461, is to the same effect.

It is clear from these authorities that the grantor in the deed in controversy might have inserted a provision in the deed that a lien was reserved on the real estate to secure the payment of the unpaid purchase money, whether payable in money or support and maintenance of the grantors, and the same would have been an equitable mortgage on the entire estate. Upon the same principle, if it had been written, after the reservation of the life estate in the deed executed in this case, that said life estate was reserved to secure the payment of the unpaid purchase money, however payable, the same would have been an equitable mortgage on such life estate, the same, in effect, as if the whole estate had been conveyed to appellee, and he had executed a mortgage conveying said life estate to the grantors, to secure the said unpaid purchase money. 4 Am. St. Rep. 706, note (1 S. E. Rep. 502), and authorities, supra.

This brings us to the final question, may it be shown by parol evidence that the reservation of the life estate was made to secure payment of the unpaid puchase money, payable in support, and allowing grantors to reside on the premises? If a deed absolute in form may be shown by parol evidence to have been executed as a mortgage, it as conclusively follows that a reservation in a deed may be shown by parol evidence to have been executed as a mortgage. The conclusion we have reached disposes of the question presented in regard to the parol evidence admitted over appellant's objections. Considering the reservation as an equitable mortgage, the right of possession under the deed is in appellee. Parker v. Hubbel, 75 Ind. 580; Chitwood v. Trimble, 2 Baxt. 78. The parties have so construed the deed. Possession was given by the grantors and taken by appellee when the deed was executed, and has been held until the commencement of this action by appellee, who has made improvements and paid taxes and kept the premises in repair with the full knowledge of the grantors, and without objection from them. Johnson v. Gibson, 78 Ind. 284, and cases cited; Lyles v. Lescher, 108 Ind. 382, 9 N. E. Rep. 365; Dwenger v. Geary, 113 Ind. 122, 14 N. E. Rep. 903.

It follows that the court did not err in rendering judgment on the verdict in favor of appellee. The case of Ikerd v. Beavers, 106 Ind. 483, 7 N. E. Rep. 326, cited by appellant, is not in point here, as neither party to this case is seeking to enforce specific performance of any contract or to set aside a contract. There is no available error in the record. Judgment affirmed.

NOTE .- Parol Evidence to Vary Deed .- The general rule that parol evidence is inadmissible to contradict, alter, add to or vary a written instrument applies to a deed as an entirety and to its several parts. Jackson v. Sternberg, 20 Johns. (N. Y.) 49; Tobin v. Gregg, 34 Pa. St. 446; Kelley v. Saltmarsh, 146 Mass. 585; Lowdermilk v. Bostick, 98 N. C. 299; Logan v. Bond, 13 Ga. 192; Sage v. Jones, 47 Ind. 122; Lincoln v. Parsons, 1 Allen (Mass.), 388; Spurrier v. Parker, 16 B. Mon. (Ky.) 274; Hall v. Eaton, 139 Mass. 217. Evidence is not admissible to show that the land conveyed did not contain the quantity of acres expressed in the deed. Howes v. Barker, 3 Johns. (N. Y.) 506, or to contradict the certificate of acknowledgment in a deed (Greene v. Godfrey, 44 Me. 25), or to vary or contradict a plan referred to in a deed and made a part of it. Renwick v. Renwick, 9 Rich. L. (S. Car.) 50. Parol evidence is inadmissible to insert a reservation or limitation (Lear v. Durgin, 64 N. H. 618; Rathburn v. Rathburn, 6 Barb. (N. Y.) 98; Noble v. Bosworth, 19 Pick. 314), or to insert a condition (Miller v. Fletcher, 27 Gratt. (Va.) 403; Warren v. Miller, 28 Me. 108), or to enlarge or diminish the extent of the grant (Holcomb v. Mooney, 13 Oreg. 503), unless where monuments of boundary were erected at the execution of the deed. Reed v. Shenck, 2 Dev. L. (N. Car.) 415; Massengill v. Boyles, 4 Humph. (Tenn.) 205. The description of land in a deed which seems certain and without ambiguity, for anything appearing on the face of the deed, is not rendered uncertain by extrinsic facts and parol evidence is not admissible to contradict such description. Claremont v. Carleton, 2 N. H. 369. A deed purported to convey lot nine, block twenty-eight. There was no such lot in existence. It was held that parol evidence was inadmissible to show that lot twenty-eight, block nine, was meant. Ritchie v. Pease, 114 Ill. 353. Evidence that a grantor about the time of executing a deed of land bounded on a way built a wall and established bounds at the edge of the way, is inadmissible to prove that the way did not pass by the deed. Fisher v. Smith. 9 Gray (Mass.), 441. A grant of a right of way across land does not authorize the grantee to enter at one place, go partly across, and come out at another place on the same side of the lot; and parol evidence to show that such was the intention of the grant is inadmissible. Comstock v. Van Densen, 5 Pick. 163; Jordan v. Ohio, 38 Me. 429; Farrar v. Hinch. 20 Ill. 646. It has been held in Pennsylvania (Backenstoss v. Stahler, 33 Pa. St. 251; Harbald v. Kuster, 44 Pa. St. 892); North Carolina (Flint v. Conrad, 93 Amer. Dec. 588), and Vermont (Merrill v. Blodgett, 34 Vt. 480), that it may be shown by parol that the growing crops were reserved though there is no exception in the deed. But this seems to be contrary to the weight of authority. Gibbins v. Dillingham, 10 Ark. 9; Smith v. Price, 39 Ill. 28; McIlvaine v. Harris, 20 Mo. 457; Winterwort v. Light, 46 Barb. (N. Y.) 278.

In Indiana it is held that evidence of a parol reservation of the crop at the time of the sale of the land is admissible. Harvey v. Million, 67 Ind. 90, overruling Chapman v. Long, 10 Ind. 465. Parol evidence is inadmissible to control their covenants. Johnson v. Walker, 60 Iowa, 315. See, also, Brooks v. Maltbie, 2 Stew. & P. (Ala.) 96; Phillips v. Costley, 40 Ala. 486; Young America Engine Co. No. 6 v. Sacramento, 47 Cal-594; Aguirre v. Alexander, 58 Cal. 21; Hanby v. Tucker, 28 Ga. 132, 68 Am. Dec. 514; Sawyer v. Vories, 44 Ga. 662; Smith v. Odom, 63 Ga. 499; Emor v. Thompson, 46 Ill. 214; Winn v. Murchead, 52 Iowa, 64; Pride v. Lunt, 19 Me. 115; Whitmore v. Learned, 70 Me. 276; Morrill v. Robinson, 71 Me. 24; Goodrich v. Longley, 4 Gray (Mass.), 879; Warren v. Cogswell, 10 Gray (Mass.), 76; Stewell v. Buswell, 135 Mass. 340; Beers v. Beers, 22 Mich. 42; Caldwell v. Layton, 44 Mo. 220; King v. Fink, 51 Mo. 209; Dean v. Erskine, 18 N. H. 81; Proctor v. Gilson, 49 N. H. 62; Todd v. Philhower, 24 N. J. L. 796; Jackson v. Roberts, 11 Wend. (N. Y.) 422; Kenny v. Aitken, 9 Daly (N. Y.), 500; Jackson v. Hart, 12 Johns. (N. Y.) 77, 7 Am. Dec. 180; Jackson v. Foster, 12 Johns. (N. Y.) 488; Greenvault v. Davis, 4 Hill (N. Y.), 643; Taylor v. Baldwin, 10 Barb. (N. Y.) 582; Herring v. Wiggs, Term (N. Car.), 24; Wade v. Pelliter, 71 N. Car. 74; Bonham v. Craig, 80 N. Car. 224; Johnston v. Haines, 2 Ohio, 55; Duff v. Wynkoop, 74 Pa. St. 300; Ryan v. Goodwin, 1 McMull. Eq. (S. Car.) 451; Norwood v. Byrd, 1 Rich. (S. Car.) 135, 42 Am. Dec. 406; Pratt v. Phillips, 1 Sneed (Tenn.), 543, 60 Am. Dec. 162; Bigham v. Bigham, 57 Tex. 238; Butler v. Gale, 27 Vt. 739.

Late Cases on the Subject.—Where an agreement for the sale of land states the dimensions, but the land cannot be identified unless by reference to a plat of a much larger tract, which plat appears in the agreement, oral evidence is admissible to ascertain the relation of the parties to any land shown on the plat which would satisfy the terms of the agreement. Baker v. Hall (Mass.), 33 N. E. Rep. 612. Parol evidence is admissible to establish identity and possession under a defective or ambiguous description of land, in an act of sale, only where there is enough in the description to leave the title resting substantially

on writing, and not on parol. Kernan v. Baham (La.), 13 South. Rep. 155. Parol evidence is admissible to apply a written description in a contract of sale to certain land, though not to describe the land intended to be sold. Peart v. Brice (Pa. Sup.), 25 Atl. Rep. 537, 152 Pa. St. 277, 81 W. N. C. 336. Lands described in a contract of exchange may be identified by parol evidence, where the memorandum is sufficient to show the subject-matter. Ham v. Johnson (Minn.), 52 N. W. Rep. 1080. Where an agreement for the sale of land states the dimensions, but the land cannot be identified unless by reference to a plat of a much larger tract, and the land shown on the plat was once owned by one E, the words, "now or formerly of" E, which are marked on a single parcel, do not raise an ambiguity, as they indicate that the parcel is a monument for the identification of other land which is under description. Baker v. Hall (Mass.), 38 N. E. Rep. 612. Where there is no ambiguity in the description contained in a deed, and none is shown when the description is applied to the land, parol evidence is inadmissible in an action of ejectment between two grantees to show the intention of the common grantor and plaintiff at the time of the execution of the deed. Muldoon v. Deline, 31 N. E. Rep. 1091, 135 N. Y. 150. Where a deed purports to convey land on which a log chute is situated, and doubt arises as to which of two log chutes is meant, evidence of the location and use of both chutes is admissible. Thacker v. Howell (Ky.), 26 S. W. Rep. 719. In an action to recover for breach of contract to buy land, it was described in the petition as "Lots 28 and 31." A letter of defendant was introduced to show the contract relied on by plaintiff, stating that defendant would pay plaintiff specified amounts for "top block No. 1" and "top block No. 2." Held, that the letter was admissible, though the land described therein did not appear therefrom, or by reference to any other writing, to be the same as that described in the petition, it being competent to show such fact by parol evidence. Tinsley v. Dowell (Tex. Civ. App.), 24 S. W. Rep. 928. A deed of land known as the "W. Homestead;" 200 acres, more or less; bounded by the lands of certain persons named, "and of others,"-may be explained by the grantor so as to identify the land, and show the names of the "others," adjoining owners. Rapley v. Klugh (S. C.), 18 S. E. Rep. 680. Parol testimony by the grantor to contradict his deed and to vary the description of the lands thereby conveyed by him is inadmissible. Harding v. Wright (Mo. Sup.), 24 S. W. Rep. 211. Where plaintiff accepted a quitclaim deed of land, title to which has failed, he cannot, in an action to recover the price, show a parol agreement that he was to have a warranty deed. Cartier v. Douville, 56 N. W. Rep. 1045, 98 Mich. 22. When a deed to land conveys "all right" the grantor had to water from a spring on the granted premises, parol evidence is admissible to show that the only interest claimed by the grantor was that of a licensee. Coffrin v. Cole (Vt.), 31 Atl. Rep. 313. Where a deed purports to convey all the interest which the grantor had and claimed in and to a part of certain land, evidence is admissible to show what part he claimed. Curdy v. Stafford (Tex. Civ. App.), 27 S. W. Rep. 823; reversed in (Tex. Sup.), 30 S. W. kep. 551. Parol evidence is admissible to identify land described in a partion decree as that "known as the property of R. deceased." Calloway v. Henderson (Mo. Sup.), 32 S. W. Rep. 34. Where a deed designated certain monuments as the corners of the tract conveyed, in addition to giving the length of each side, the former description will prevail; and in tres-

pass, parol evidence is admissible to point out such monuments. Stinchfield v. Gillis (Cal.), 40 Pac. Rep. 98. Where the description in a deed is free from ambiguity, parol evidence is not admissible to show that the premises in controversy were intended to be included therein. Elofrson v. Lindsay (Wis.), 68 N. W. Rep. 89. Extrinsic evidence is not admissible to show acquiescence in a different location than that described in a deed, where the description is definite and unambiguous. Elofrson v. Lindsay (Wis.), 63 N. W. Rep. 89. A lease which specifies that it is to embrace as many as 50 lots of land within certain described boundaries may be applied by parol evidence to particular lots within those boundaries, notwithstanding the boundaries may comprehend more than 50 lots. Gress Lumber Co. v. Coody, 21 S. E. Rep. 217, 94 Ga. 519. A description of lands in a deed as "lying on the west side of S street, and north of M street, followed by courses and distances from a stone" on S street, around a parallelogram to the place of beginning, without indicating whether the starting point is at the intersection of S and M streets or at a more remote point, is not so vague and uncertain on its face as to require the exclusion of proof alieunde to locate the land by fitting the description to the lot claimed in the deed. Hartsell v. Coleman (N. C.), 21 S. E. Rep. 392. Where the description in a deed was "a certain tract of land in this State, lying about 12 miles above F. containing about 500 acres." parol evidence was admissible, in trespass to try title, in support of the description of the land intended to be conveyed. Cox v. Rust (Tex. Civ. App.), 29 S. W. Rep. 807. In an action by a holder of a tax deed to recover a lot conveyed by it, it appeared that in the city plat the lot was described as "lot 5, block 144, C's addition to the city of D," and that it was described in the tax list and in plaintiff's deed as "lot 5, block 144, East D, A County, Col." Held that parol evidence was admissible to show that the two descriptions applied to the same property and that the property was as well known by one description as by the other. Sullivan v. Collins (Colo. Sup.), 39 Pac. Rep. 334.

BOOK REVIEWS.

COOLEY'S ELEMENTS OF TORTS.

In our last issue we gave an extended review of the above work, which was erroneously entitled "Cooley on Torts," while the volume reviewed is Cooley's Elements of Torts. As this book is not and does not purport to be a new edition of Judge Cooley's larger work on torts, the heading of the review was misleading. We make this statement in order to correct any erroneous impression, which may have arisen. Cooley's Elements of Torts is published by Callaghan & Company, Chicago.

BALLARD'S ANNUAL OF THE LAW OF REAL PROPERTY.

This is volume three of a very useful series of books, to which we have heretofore called attention. It is a complete compendium of real estate law, embracing all current case law on that subject carefully selected, thoroughly annotated and epitomized. It is a well printed volume of nearly one thousand pages. Published by the Ballard Publishing Co., Crawfordsville, Ind.

JETSAM AND FLOTSAM.

INTERNATIONAL LAW—ENFORCEMENT OF PENAL STAT-UTES IN FOREIGN COUNTRIES.

The Supreme Court of Texas has recently decided a very interesting point of international law, holding, in Mexican Natl. R. R. Co. v. Jackson, 32 S. W. Rep. 230, that as the laws of Mexico, while making negligence resulting in injury to another a penal offense, also give the injured person a right of action, civil in its nature, the courts of Texas, by enforcing a right of action for personal injuries caused by negligence which accrued in Mexico, do not undertake to enforce a penal law of a foreign country, and therefore do not contravene that principle of international law which forbids the enforcement of such laws by countries other than that of their enactment.

There are probably few rules of law less understood and of more uncertain operation than this one. A general confusion of the technical sense of the word "penal" with its inexact popular usage seems to be almost universal. Within the last few years, the two highest judicial tribunals of the world, the Supreme Court of the United States and the judicial committee of the privy council, have united in condemning this erroneous habit, and have attempted to clearly define the limits of the rule. In Huntington v. Attrill (1893), App. Cas. 150, the latter court, reversing the decision of the Ontario Appeal Court, 18 Ont. App. 136, which affirmed the decree of the court below, 17 Ont. Rep. 245, held that an action to recover adebt due by a corporation from a director thereof, under a statute (Laws N. Y. 1875, ch. 611, § 21), providing that "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," while "penal" in the loose popular sense of the word, was not so in its international sense, and could be maintained in a foreign jurisdiction. The true doctrine is thus explained by Lord Watson: "The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public, are local in this sense, that they are cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the courts of any other country. . . The phrase 'penal actions' which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation, the word 'penal' may embrace penalties for infractions of the general law which do not constitute offenses against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The expressions 'penal' and 'penalty,' when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceeding for the recovery of penalties, whether exigible by the statute in the interest of the community, or by private persons in their own interest. · · · A proceeding, in order to come within the scope of the rule, must be in the nature of amit in favor of the State whose law has been intringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offenses against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute in its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an actio popularis, pursued, not in his individual interest, but in the interest of the whole community."

This decision was followed, and its reasoning adopted, by the Supreme Court of the United States, in Huntington v. Attrill, 146 U. S. 657, reversing 70 Md. 191, and overruiting First Nat. Bank v. Price, 33 Md. 487; Halsey v. McLean, 12 Allen, 438; Derrickson v. Smith, 27 N. J. L. 166, and it may now be considered to be the settled rule in such cases, that no action will be regarded as penal in such a sense as to forbid its maintenance in a foreign jurisdiction, unless it rests upon an offense against the majesty of the State, and not merely against the rights of a private individual and that even if the two exist side by side, the latter will be enforceable in a foreign court, though the former will not.—American Law Register and Review.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except these that are Published in Full or Commented upon in our Notes of Recogn Decisions.

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- 1. ADMINISTRATION—Executors and Administrators—, Liability for Interest.—The executor in this case used a part of the trust fund coming to its possession as executor in its own private business of a loan and trust company, but kept no separate accounts of the investments made from the trust fund, or of the interest or profits received or made by reason of such use: Held, that it was properly charged, upon a settlement of its accounts as executor, with interest on so much of the trust fund so used by it at the rate of 7 per cent. per annum.—ST. PAUL TRUST CO. V. KITTSON, Minn., 65 N. W. Ren. 74
- 2. ADMINISTRATION—Liability of Administrator.—An executor or administrator cannot bind the estate or make it liable on any promissory note he may make, and the only effect of any such note is to bind himself personally.—GERMANIA BANK OF ST. PAUL V. MICHAUD, Minn., 65 N. W. Rep. 70.
- 8. APPEAL Damages. Rev. St. 1893, ch. 110, § 74, which provides that when appeals from judgments for the recovery of money are dismissed for want of prosecution, or for failing to file authenticated copies of records, as required by law, the court shall enter judgment against the appellants for not less than 5 per cent. nor more than 10 per cent. damages on the amount recovered in the inferior court, does not apply to an appeal from a decree of foreclosure prosecuted by a defendant who is not personally liable for the debt, since as to him it is not a decree "for the recovery of money."—HAMBURGER CO. v. GLOVER, Ill., 42-N. E. Rep. 46.
- 4. APPEAL—Final Judgment.—A judgment of the appellate court, modifying a decree and remanding the case for further proceedings, the nature of which depends on the option given complainant to amend his bill or allow it to be dismissed, is not appealable, not being a final judgment. GADE V. FOREST GLEN BRICK & TILE CO., Ill., 42 N. E. Rep. 65.
- 5. APPEAL—Objections Raised too Late.— Where a judgment of nonsuit is reversed on appeal, defendant on a second appeal cannot for the first time attack the sufficiency of the complaint, it being the same as that on former trial.—DENNIS v. KASS & Oo., Wash., 42 Pac. Rep. 540.
- 6. APPEAL FROM INTERLOCUTORY ORDER.—An appeal from an interlocutory order of the court of common pleas, or a judge thereof, dissolving a provisional injunction allowed in an action, does not transfer the case to the appellant court for trial on the issues joined by the pleadings. The jurisdiction of the appellate court on such appeal is limited to the hearing and decision on the motion to dissolve, although the ultimate relief demanded in the action is a permanent injunction of like purport with the provisional one which was dissolved.—TRUSTEES OF SWAN TP. v. McC-CLANNAHAN, Ohlo, 42 N. E. Rep. 34.
- 7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment in terms preferred rent due on the land of the assignor, who owned no land, except his homestead, which was not assigned, and who owed no rent, except the rent for one month of the store building in which he did business, and for which he had a lease for a term of years: Held, that the assignment did not, in fact, prefer the rent due for the store building, and it was not void because of such preference, under Sanb. & B. Ann. St. § 1698a.—KILLMAN v. GREGORY, Wis., 65 N. W. Rep. 58.
- 8. ATTACHMENT—Exemptions—Partnership Property.
 —Partnership property cannot be claimed and held by a member of the firm as exempt from execution.—
 GREEN V. TAYLOR, Ky., 82 S. W. Rep. 945.
- 9. BAILMENT—Bailee for Hire—Degree of Care.— A dressmaker who receives goods to be made into a dress is a ballee for hire, and must exercise reasonable care and skill in determining whether the cloth should be made up wrong side out.—LINCOLN V. GAY, Mass., 42 N. E. Rep. 95.
- 10. BANKS AND BANKING-Negotiable Instruments .-

- A national bank agreed to act as agent of a private banker in paying his checks through the clearing house. The private banker having failed, the bank refused to act for him any longer, but afterwards paid and had indorsed to it one of his checks, which it had guaranteed: Held, that such payment was made as guarantor, and not as agent, and that the bank had the rights of an indorsee of the check.—Voltz v. National Bank of Illinois, Ili., 42 N. E. Rep. 69.
- 11. BROKER-Right to Commissions.—An agent cannot recover commissions for the sale of a boat, where he does not disclose that the company in which he is interested is the actual purchaser, and that the nominal purchaser, who is interested in a contract with the seller dependent on the making of the sale, has offered to give the company a certain amount towards the purchase.— HUMPHREY V. EDDY TRAMSP. Co., Mich., 65 N. W. Rep. 13.
- 12. Carriers of Goods—Interstate Commerce.—A common carrier transporting freight under a contract for its shipment from one point to another in the same State, and for its delivery on arrival at the latter point to another carrier for transportation out of the State, is engaged in interstate commerce.—Houston Direct Nav. Co. v. Insurance Co. of North America, Tex., 82 S. W. Rep. 889.
- 18. CARRIERS OF PASSENGERS-Ejection of Passengers. -One who enters a railway train for the purpose of becoming a passenger thereon, but who has no ticket for his passage, and who refuses, when properly demanded by the conductor, to pay the legal fare, becomes a trespasser, and it is his duty, when so requested, to voluntarily leave the train, when it has been stopped at a proper place for that purpose; and a refusal so to do justifies the servants of the railroad company in using such reasonable force to eject him as, under the circumstances, seems to be necessary. The company is not liable in damages for injuries sustained by such person in his being so put off the train when they were not willfully inflicted, when improper methods were not used, and when the wrongful resistance of such person directly contributed to the injuries .- Atchison T. & S. F. R. Co. v. Brown, Kan., 42 Pac. Rep. 588.
- 14. CEMETERIES—Association Distribution of Surplus Funds.—The charter of a cemetery association provided that land bought by it for cemetery purposes should be held by it in trust for purposes of interment forever, and that, from the funds obtained from sale of lots, the association should first pay the purchase price of the land and then appropriate a sufficient sum to keep the grounds in repair and good order: Held, that after the association had paid for its land, and had appropriated for its repair and care a sum not alleged to be inadequate, it might distribute the remainder of its funds among its members.—BOURLAND V. SPRINGDALE CEMETERY ASS'N, Ill., 42 N. E. Rep. 86.
- 15. CHATTEL MORTGAGE Lien—Tender.—The lien of a chattel mortgage is discharged by valid tender of the amount due for which the mortgage is security.—HELPHREY V. STROBACH, Wash., 42 Pac. Rep. 587.
- 16. Conflict of Laws—Contract—Usury.—Officers of defendant, a corporation of Tennessee, negotiated a loan with complainant while in Connecticut, it being agreed that it should be secured by mortgage on lands in Tennessee; the money to be paid on arrival of the proper papers in New Jersey, the residence of complainant. The note payable in New Jersey, and the mortgage, were executed by defendant's officers while in a fourth State: Held, that the question whether the note was usurious was determinable by the laws of New Jersey.—HUBBLE v. MORRISTOWN LAND & IMP. Co., Tenn., 82 S. W. Rep. 965.
- 17. CONSTITUTIONAL LAW Improvements of Highways.—Act March 15, 1893 (Laws 1893, p. 801), providing for the location and construction of new roads and the improvement and maintenance of old ones, and that the assessment of damages and benefits shall be made



in at parts proceedings, so far as it relates to new roads, violates Const. art. 1, § 16, prohibiting the taking of private property without compensation ascertained by a jury, unless waived.—SENGE V. BOARD OF COM'RS OF WHATCOM COUNTY, Wash., 42 Pac. Rep. 552.

18. Constitutional Law — Legislative Powers.—Act Feb. 2, 1854, provided that when a legislative officer of the city of Philadelphia should die, or be incapable of fulfilling the duties of his office, his place should be filled by a joint vote of the city councils until the next city election, and the qualification of the successor in office: Held, that a subsequent act, providing that the words "next city election" should be construed to mean the election at which the voters would elect a successor in office had no vacancy occurred therein, was unconstitutional, as seeking to compel the courts to construe the previous act in a way contrary to its letter and spirit.—Commonwealth v. Warwick, Penn., 33 Ati. Rep. 273.

19. Constitutional Law-Statutes — Construction.—
Const. Amend. art. 7, § 1, authorizes registry voters to vote at town meetings on all questions, except on the election of a city council, and propositions for imposing a tax or expending money. P. L. ch. 447, provides that school districts may be abolished "at any town meeting," and that thereupon the school property of the several districts shall vest in the town, and a tax be levied to pay each district for the property taken: Held, that such law was not unconstitutional in authorizing registry voters to vote on a proposition imposing a tax or expending money.—INRESCHOOL COMMITTEE OF TOWN OF JOHNSTON, R. I., 33 Atl. Rep. 389.

20. CONTRACT — Agent — Personal Liability.—A husband negotiating a lease of his wife's land is not liable to the proposed lessee for failure of the wife to execute the lease, where the lessee was aware that the husband was merely acting as adviser to his wife as to the terms she should require.—BAER v. BONYNGE, N. Y., 42 N. E. Rep. 81.

21. CONTRACT — Performance.—Where one party to the contract, before the time for performance by the other has arrived, consents on his request to extend the time of performance, until he gives notice of withdrawal he is estopped to consider the latter in default though meanwhile the contract time has elapsed.—THOMSON V. POOR, N. Y., 42 N. E. Rep. 13.

22. CONTRACT IN RESTRAINT OF TRADE — Damages.—
The contract by which defendant, on selling to plaintiff his business, covenanted, "under a penalty" of a
certain amount, not to engage in competition with
him, having been drawn by plaintiff's attorney, and
signed by defendant without reading, will be held to
provide a penalty, and not liquidated damages, in the
absence of strong evidence to show a contrary intention.—Smith v. Brown, Mass., 42 N. E. Rep. 101.

23. CONVERSION — Demand.—A complaint alleging that defendants, being in possession of property, converted the same to their own use, need not allege demand and refusal.—DAGGETT v. GRAY, Cal., 42 Pac. Rep. 563.

24. CORPORATION — Insurance Companies.—Where an insurance company incorporated under the laws of this state issued a fire insurance policy to parties in another State, insuring fixed property in that State, such corporation is subject, in an action upon such policy, to the laws of that State as to the service of process upon such corporation.—GUDE v. DAKOTA FIRE & MARINE INS. Co., S. Dak., 65 N. W. Rep. 27.

25. CORPORATIONS — Liability of Stockholders. — The books of a corporation furnish evidence as to what persons are entitled to the rights and privileges of stockholders, and as to whom creditors may look for payment in the event of the insolvency of the corporation, and creditors of the corporation are presumed to have relied upon the books.—UNITED STATES WIND-ENGINE & PUMP CO. V. DAVIS, Kan., 42 Pac. Rep. 590.

38. CORPORATION — Service of Process.—In an action against a private corporation the return of the sheriff

must affirmatively show that service was made upon an officer of an agent of the corporation specified in the statute as one upon whom service may be made.— Mars v. Oro Fino Min. Co., S. Dak., 65 N. W. Rep. 19.

27. CRIMINAL EVIDENCE—Embezzlement.—Where the by laws of a corporation provide that the secretary, besides certain specified duties, shall perform such other duties as the directors require, on prosecution of the secretary for embezzlement, evidence of usage and custom are admissible to show that the money came to his possession by virtue of his employment.—STATE v. Silva, Mo., 32 S. W. Rep. 1007.

28. CRIMINAL EVIDENCE — Impeaching Prosecuting Witness.—Where, on prosecution for bastardy, the prosecuting witness testifies that the defendant is the father of the child, which defendant denies, and on cross examination she testifies that she never had intercourse with any other man, evidence of intercourse with other men at or about the time she testified that the child was begotten is admissible to impeach her.—STATE v. PERKINS, N. Car., 23 S. E. Rep. 274.

29. CRIMINAL EVIDENCE — Lottery — Constitutional Law.—The constitutional provision that no one shall be compelled to testify against himself in a criminal case does not render inadmissible in evidence, in a prosecution for establishing a lottery, tickets and lottery material of the accused unlawfully selzed by an officer without authority from the court. — STATE V. POMEROY, Mo., 32 S. W. Rep. 1002.

80. ORIMINAL EVIDENCE — Malicious Shooting. — On trial for maliciously shooting at D, without wounding him, evidence that defendant, after his arrest, and when told that he had shot at D, and had shot Mrs. D, stated that he was sorry that he did not "get" them both, was admissible, though irrelevant as to Mrs. D, since the statement was not severable, so as to show regret merely for not shooting D.—Cooswell v. Commonwealth, Ky., 32 S. W. Rep. 935.

31. CRIMINAL LAW—Appeal—Death of Stenographer.—The fact that the stenographer who took the evidence in a criminal case died before he could transcribe it does not warrant the reversal of a conviction, as due diligence required defendant's counsel when discovering that the stenographer was dangerously ill, to have preserved the evidence in some other way, either by memory or by calling on the witness who testified on the trial.—STATE v. THOMPSON, Mo., 32 8. W. Rep. 975.

32. CRIMINAL LAW—Appeal Bond.—An appeal bond in a criminal case, which binds defendant to "abide the judgment of the court of appeals," instead of the judgment of "the court of criminal appeals," is fatally defective.—IRVIN v. STATE, TEX., 22 S. W. Rep. 899.

83. CRIMINAL LAW—Assault with Intent to Rape.—Rev. St. 1889, § 8490, fixes the maximum punishment for assault with intent to rape at five years' imprisonment in the penitentiary, but fixes no minimum imprisonment. Section 3955 provides, generally, that no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years: Held, that such sections are not conflicting, and that the minimum punishment for assault with intent to rape is imprisonment for two years.—STATE v. SCHOLL, Mo., 32 S. W. Rep. 969.

84. CRIMINAL LAW — Burglary.—Under Laws 1893, ch. 63, making the possession of burglars' tools adapted to break open places of deposit, in order to take thereform any money or property, with intent to use them for such purpose, an offense, an information alleging possession with the intent to break open places of deposit in general, and take property therefrom, without specifying any particular place or property, is sufficient.—Scott v. State, Wis., 65 N. W. Rep. 61.

35. CRIMINAL LAW — Conviction of Lower Crime.—A person indicted for and convicted of murder in the second degree cannot complain that the evidence showed that he was guilty of murder in the first degree.—STATE V. SCHIELLER, Mo., 32 S. W. Rep. 976.





- 36. CRIMINAL LAW Embezzlement by Partner.—It is no defense to a prosecution for the embezzlement of goods consigned on commission that defendant paid over the money arising on a sale thereof to his partner.—STATE V. CROSSWHITE, MO., 32 S. W. Rep. 991.
- 37. ORIMINAL LAW False Pretenses.—In a prosecution for obtaining money by false representations as to the value of the mortgage security given, to prove that the lender did not rely on the mortgage, evidence as to the financial condition of an indorser thereon at the time of the maturity of the note is inadmissible.— Van Buren v. People, Colo., 42 Pac. Rep. 599.
- 38. CRIMINAL LAW Forgery—Indictment.—Rev. St. 1889, § 3634, provides that every person who shall sell any forged instrument for any consideration, etc., shall be guilty of forgery: Held, that an indictment failing to allege that the forged instrument was sold for a consideration was insufficient.—STATE v. HESSELTINE, Mo., 32 S. W. Rep. 983.
- 89. CRIMINAL LAW—Incest Indictment.—An indictment for incest, alleging that defendant had carnal knowledge of F, and was the father of F, need not allege that F was a female, or the daughter of defendant.
 —WAGGOMER V. STATE, Tex., 82 S. W. Rep. 896.
- 40. CRIMINAL LAW Indictment—Variance.—A variance between the purport and tenor clauses of an indictment for forgery, as to the persons by whom the forged instrument was executed, is fatal.—CAMPBELL v. State, Tex., 32 S. W. Rep. 899.
- 41. CRIMINAL LAW-Introduction of Evidence.—Under Code Cr. Proc. art. 661, permitting testimony to be introduced at any time "before the argument of the case is concluded," if it appears necessary, it is reversible error to admit evidence after conclusion of the arguments.—WILLIAMS V. STATE, Tex., 32 S. W. Rep. 892
- 42. CRIMINAL LAW-Larceny-Ownership of Property.

 —In a prosecution for the larceny of a cow, evidence that the person alleged to have been the owner had the exclusive management and control of it, is sufficient proof of ownership, though another person was the actual owner of the cow.—LEDBETTER V. STATE, Tex., 82 S. W. Rep. 908.
- 43. CRIMINAL LAW— Lotteries —Possession.— Policy slips found on defendant's person after his arrest are admissible in a prosecution brought under 8t. 1895, ch. 419, for having such slips in his possession for sale though the original arrest was made for another offense.—COMMONWEALTH V. GORMAN, Mass., 42 N. E. Rep. 94.
- 44. CRIMINAL LAW—Rape—Punishment.—Under Rev. St. 1889, § 4280, providing that, "where the jury find a verdict of guilty and fall to agree on the punishment or do not declare such punishment by their verdict," the court shall assess the punishment, the court can assess the punishment only on failure of the jury; and it was error to charge on trial for rape that, if defeudant was found guilty, "you will assess his punishment at death, or imprisonment in the penitentiary," etc.—STATE v. GILBREATH, Mo., 32 S. W. Rep. 1026.
- 45. CRIMINAL LAW—Robbery-Indictment. Under Rev. St. 1889, § 3530, defining robbery in the first degree as taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of immediate bodily injury, an indictment which charges that the act was done violently, and against the will of the person robbed, is sufficient, without alleging a putting in fear.—STATE V. LAWLER, Mo., 32 S. W. Rep. 979.
- 46. CRIMINAL TRIAL—Larceny Good Character Possession of Stolen Goods.—A charge that, in order to convict, the evidence should be so convincing as to lead the mind to the conclusion that the accused "cannot be guiltless," is properly refused. WEBB v. STATE, Ala., 18 South. Rep. 491.
- 47. DEED—Action on Covenant of Warranty.—In a suit against a warrantor on covenants in a deed where in the plaintiff claims that he was evicted from the

- property in question because he had yielded the posession thereof to a paramount title, it is incumbent on him to show, not only that he yielded possession of the property to what he supposed or was claimed to be the paramount title, but that the title to which he had thus yielded was in fact paramount to the title of any one else.—WALKER V. KIRSHNER, Kan., 42 Pac. Rep. 596.
- 48. DEED Conveyance of Water Right. A deed containing no reference to a ditch which supplies water to the land conveys no interest in the ditch.— CHILD V. WHITMAN, Colo., 42 Pac. Rep. 601.
- 49. DEED—Parol Evidence.—Parol evidence is inadmissible to show that a deed absolute, and admitting the receipt of the money consideration expressed, was in fact a deed on condition subsequent, that the grantee should support the grantor for life, and thereby render the estate liable to forfeiture for failure of the grantee to comply with the condition.—Byars v. Byars, Tex., 32 S. W. Rep. 925.
- 50. DEED AS MORTGAGE Evidence. An absolute deed should not be held to be a mortgage, where the title conveyed is not one on which a loan could be readily obtained, a valuable consideration is shown, and the evidence as to the deed being given merely as security is conflicting.—MAY V. MAY, Ill., 42 N. E. Rep. 56.
- 51. DOWER—Inchoate Right—Action by Wife.—Where land in which a wife has an inchoate right of dower is conveyed by the husband and one personating the wife by duly recorded deed releasing dower, the wife may sue in her own name to set aside the deed.—CLIFFORD v. KAMPFE, N. Y., 42 N. E. Rep. 1.
- 52. DRAINAGE Sewer Nuisance. Where a village constructs a sewer that empties the village sewage into a natural water-course outside the village limits, the owner of the land across which such water-course runs cannot enjoin the construction and use of such drain, unless it is proved to be a nuisance.—ROBB ▼. VILLAGE OF LA GRANGE, Ill., 42 N. E. Rep. 77.
- 53. ELECTIONS Marking Ballots. When a cross is made in the circle at the head of a party ticket, and no name thereon erased, crosses at the left of the names of candidates thereon are without effect, and should be disrégarded.—MCKITTRICK V. PARDEE, S. Dak., 65 N. W. Rep. 23.
- 54. ELECTION CONTEST—Second Recount—Ballots.—A recount in a contested election case should not be rejected merely because the ballots were not placed in the vault in the county clerk's office, and there was possible opportunity to tamper with them; but, as between the canvass by the election officers and the ballots themselves, the ballots were the best evidence, provided they have been kept in the manner required by law, and have not been tampered with.—Hone v. Williams, Mo., 32 S. W. Rep. 1016.
- 55. EVIDENCE Books of Account.—The payment by a surety of the debtor's obligation may, for the purpose of showing indebtedness of the deceased debtor to the surety, be proven by entries on the books of the creditor in his handwriting, he being dead.—Sands v. Hammel, Ala., 18 South. Rep. 459.
- 56. EVIDENCE Expert Testimony.—The refusal to permit a witness who has testified that he is a professor of civil engineering, and has made the law of moving bodies a study, and can tell how far a train will move by its momentum, to testify as an expert as to the distance such train would travel, in order to contradict the testimony of other witnesses testifying from practical experience, will not be disturbed on appeal.—BLUE V. ABERDEEN & W. E.R. Co., N. C., 28 S. E. Rep. 275.
- 57. FRAUDS, STATUTE OF Parol Contract.—A parol contract between the owners of separate tracts of land, by which they agree to sell them, and divide the profit equally, is void under the statute of frauds, as being an agreement to convey an interest in land.—GOLDSTEIN V. NATHAN, Ill., 42 N. E. Rep. 72.

- 58. FRAUDULENT CONVEYANCE—Trust Deed.—A trust deed by a corporation to a bank will not be set aside as in fraud of oreditors on the ground that two of the notes secured by such deed were executed by directors as individuals, where it appears that the whole debt secured was a corporate debt, and that the notes were so executed to avoid violating a law forbidding the bank to loan more than a stated sum to one individual or corporation.—ALLEN v. DAYTON HOTEL CO., Tenn., 32 S. W. Rep. 962.
- 59. HIGHWAYS—Prescription.—The building of a fence by the owner across a roadway through his land, and the maintenance thereof until it was removed by the sheriff on an order of court, will interrupt the running of the statute of limitations in favor of the county.— CUNMINGHAM V. SANSABA COUNTY, Tex., 52 S. W. Rep. 99.
- 60. HUSBAND AND WIFE Community Property.—Where a husband told his wife, who was about to engage in the business of keeping boarders, that whatever money she made should be her separate property, and afterwards paid his own board, personal property purchased by the wife with the profits of the business, and taken possession of by her with the husband's consent, is not subject to his debts accruing after such property was obtained.— YAKE V. PUGH, Wash., 42 Pac. Rep. 528.
- 61. HUSBAND AND WIFE—Insurance on Life of Husband—Premiums.—Where the premiums of an insurance policy on the life of a husband, payable "as directed by will," are paid out of the community estate, the wife is, on death of the husband, entitled to one-half the proceeds of the policy, though his will makes the entire proceeds payable to his own estate.—MARTIN v. MORAN, Tex., 32 S. W. Rep. 964.
- 62. HUSBAND AND WIFE—Possession by Husband of Wife's Land.—Where a husband and wife live on her land, and he does such acts merely as grow out of the marital relations, and which must exist in every case where a husband lives with his wife in her home on her land, he does not have such possession as will constitute a covenant for quiet enjoyment, etc., contained in their deed of such land, a covenant by him running with the land which inures to the covenantee's grantee.—MYGATT v. COE, N. Y., 42 N. E. Rep. 17.
- 63. IMJUNCTION—Contempt of Court.—An injunction which forbids the defendant from corresponding in any manner with complainant's customers is violated by defendant if he writes to such customers, even though he does so in answer to letters written to him by them.—LOVEN V. PEOPLE, III., 42 N. E. Rep. 82.
- 64. INJUNCTION—Ejectment.—An injectment suit by a county will not be enjoined because of a contract whereby the county gave the defendant in ejectment possession of the land, where such contract is valid in form, and is questionable only as being possibly contrary to an express statutory prohibition, since the contract, if void, should not be enforced in equity, and, if valid, constitutes an adequate defense to the action of ejectment.—Cook County v. City of Chicago, Ill., 42 N. E. Rep. 67.
- 65. INSURANCE—Conditions—Waiver.—Where a policy is taken in the name of a trustee on the advice of the agent of the insurer, the agent being aware at the time that the property is held in trust, and that the premium is paid by the cestus que trust, the insurer cannot claim a forfeiture of the policy under a condition avoiding the same unless the interest of the insured is unconditional and sole ownership, though the policy provides that no condition thereof can be waived by an agent except in writing indorsed on the policy.—
 RRODE BLAND UNDERWRITERS' ASS'N V. MONARCH, Ky., 32 S. W. Rep. 959.
- 66. JUDGMENT—Res Judicata.— The joining, as detendants to a suit, persons not parties to a former suit, and who have no interest in the subject-matter, does not change the identity of the parties in the two suits so as to prevent a decision in the former from being

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- res judicata in the latter.—NEPPACH v. JONES, Oreg., 42 Pac. Rep. 519.
- 67. JUDGMENT ON PLEADING.—Where a petition states an equitable cause of action in favor of the plaintiff, but, because of the failure to allege certain facts therein, it appears that there is a defect of partie-plaintiff, and after a general demurrer thereto has been overruled an answer is filed, which supplies the allegations which should have been set out in the petition, held, that a motion by the defendant for judgment in its favor on the pleadings was properly overruled.—CHICAGO, ETC. B. CO. V. GERMAN INS. CO. OF FREEPORT, ILL., Kan., 42 Pac. Rep. 594.
- 68. LANDLORD AND TENANT—Assignment of Lease.—Where a lessee, with the landlord's consent, assigns the lease, but expressly covenants in the assignment that nothing therein shall alter his liability on the cevenants, including that for rent, he does not become a mere surety for payment of rent by the assignee, but is primarily liable therefor.—LATTA v. WEIS, Mo., 32 S. W. Rep. 1005.
- 69. LIBEL—Justification.—A publication in a paper, charging an attempt to bribe a State senator, is not privileged.—OWEN V. DEWEY, Mich., 65 N. W. Rep. 8.
- 70. LIMITATIONS—Covenants Warranty. —Where a grantor who has no title gives a deed of general warranty, limitation does not run in his favor till his grantee's title is assailed by assertion of a good title.—ALVORD v. WAGGONER, Tex., 52 S. W. Rep. 872.
- 71. LIMITATIONS—Fraud—Contract.— Defendant sold plaintiff a certain medicine compound and the good will of the business, and agreed not to sell any of the same medicine in a certain locality. Subsequently, he secretly engaged with another person in the sale of the same compound, under a different name: Held, that plaintiff's action for breach of the contract was one "for relief on the ground of fraud" (Code Civ. Proc. § 338), and the statute of limitations therefore did not begin to run against such action until after discovery of the fraud.—GREGORY v. SPIEKER, Cal., 42 Pac. Rep. 576.
- 72. Limitations—Mortgage.— A mortgage executed to plaintiff in consideration for the paymant by plaintiff of a debt due by the mortgagor, and assigned to plaintiff, interrupted the running of limitations on the debt.—Hampton v. France, Ky., 32 S. W. Rep. 960.
- 73. LIMITATION OF ACTIONS—Fraud.—The statutory limitation of the time within which "an action for relief on the ground of fraud" must be commenced only applies when the party against whom the bar of the statute is interposed is required to allege fraud in pleading his cause of action, or to prove fraud to entitle him to relief. BROWN v. CLOUD COUNTY BANK, Kan., 42 Pac. Rep. 593.
- 74. MASTER AND SERVANT—Assumption of Risk.—A servant assumes the ordinary risks incident to his employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.—Western Union Tell. Co. v. McMullen, N. J., 33 Atl. Rep. 884.
- 75. MASTER AND SERVANT Fellow-servant— Negligence.—A master, having furnished sufficient suitable material, is not liable for injuries to a servant resulting from the negligence of a fellow-servant in putting a defective plank into a scaffold, though the scaffold was erected before the injured servant entered the master's service.—O'CONNOR V. RICH, Mass., 42 N. E. Rep.
- 76. MECHANICS' LIENS Contract.—Where, in an action to foreclose mechanics' liens, it conclusively appears from the record that credit was given to the party in possession of the property under an option to purchase, and not to the owner of the property, such liens will not, on the failure of the party in possession, and to whom credit was given, to fulfill his contract, and avail himself of the option, be enforceable against

the owner or his property.—STEEL v. ARGENTINE MIN. Co., Idaho, 42 Pac. Rep. 585.

77. MECHANIC'S LIEN-Priorities.—Where a vendor's lien on land is released in favor of a mortgage to secure money for building on the land, and a mechanic's lien consequently attaches, the claimant knowing that the money loaned is to be used in erecting the building, the mortgage will, to the amount of the unpaid purchase price secured by the vendor's lien, be a first, the full amount of the mechanic's lien a second, the balance due on the mortgage a third, and the vendor's lien a fourth, lien on the land.—LEMING v. STEPHENS, Tenn., 52 S. W. Rep. 961.

78. MECHANIC'S LIEN—Waiver.—The plaintiffs became entitled to a lien on a house and curtilage, for materials furnished to the builders and used in the construction of the house. Afterwards, in order to secure the plaintiffs for the price of these materials and for other debts, the builders assigned to them all their rights under the contract between the builders and the owner for the erection of the house, and under other contracts, to hold until the debts were paid: Held, that by accepting the assignment the plaintiffs had not lost or impaired their lien for materials.—TALIAFERRO V. STEVENSON, N. J., 33 Atl. Rep. 388.

79. MECHANIC'S LIEN LAW — Constitutionality.—The mechanic's lien law, by providing in section 3 (Bev. St. 1894, § 7257), that a lien may be established on any property for work by filing within 60 days "after" the work is done or materials furnished, without requiring previous notice to the property owner that the work is to be done, does not deprive the owner of his property without due process of law.—Smith v. New-BAUER, Ind., 42 N. E. Rep. 40.

80. Mines—Liens.—The fact that a particular description by metes and bounds, of a mining claim, in a notice of a lien, is incorrect, will render the notice invalid.—Fernandez v. Burleson, Cal., 42 Pac. Rep. 566.

81. MORTGAGE — Cancellation of — Intoxication of Mortgagor.—A mortgage executed by one so intoxicated as to be without consenting capacity will be set aside.—HALE V. STERY, Colo., 42 Pac. Rep. 598.

82. MORTGAGE — Merger—Notice.—Where the holder of a conveyance that is in fact only a mortgage conveys to his wife, and fraudulently induces the mortgagor to convey to her also, he acting as his wife's agent, and being advised of all the equities of the mortgagor, his wife is not an innocent purchaser for value, nor does the mortgage merge in her title, since she is chargeable with notice to her husband and agent.—MILLER V. WHELAN, Ill., 42 N. E. Rep. 59.

83. MORTGAGES — Subrogations.—Where money is loaned to pay off a first mortgage on the representation of the borrower that the land is unincumbered except as to such mortgage, the lender will be subrogated to the rights of the first mortgage as against a second mortgagee, who was ignorant of the transaction, even after such first mortgage is paid and delivered up to the mortgagor, and such lender has foreclosed his mortgage and taken possession.—Union Mortgage Banking & Trust Co. v. Peters, Miss., 18 South. Rep.

84. MUNICIPAL CORPORATIONS — Contracts—Purchase of Waterworks.—Tacoma City Charter, § 52, authorizes the city, by ordinance, to provide for purchasing waterworks. Section 46 provides that no ordinance shall be amended except by a new ordinance, which shall contain the ordinance amended. An ordinance for the purchase of the waterworks and all personal property owned by a company was passed, and ratified by the vote of the citizens, such ratification being necessary because of the amount of the indebtedness to be incurred: Held, that the proposition, as ratified by the voters, in determining the property purchased from the company, controlled a schedule of the property conveyed, made by the company, and accepted by the city officials.—TACOMA LIGHT & WATER CO. V. CITY OF TACOMA, Wash., 42 Pac. Rep. 538.

85. MUNICIPAL CORPORATIONS — Contracts for Lighting Streets.—A complaint, in an action by a taxpayer to restrain a town from making a certain contract for lighting the streets of the town by gas, which merely alleges that the town is to pay three times as much for the gas used by it as individuals pay for gas used by them, does not show that the contract is fraudulent.—SEWARD v. TOWN OF LIBERTY, Ind., 42 N. E. Rep. 89.

86. MUNICIPAL CORPORATION—Fire Department—Negligence.—Members of a fire department are not servants of the city appointing them, but of the general public, so that the city is not liable for an injury to one of them through the negligence of another, though the city council may have selected the latter knowing he was incompetent; and it is immaterial that the city has a special charter.—SHANEWERK V. CITY OF FT. WORTH, Tex., 32 S. W. Rep. 918.

87. MUNICIPAL CORPORATION — Powers—Submission to Arbitration.—Unless restrained by positive enactment, municipal corporations may submit disputed claims to the arbitration of referees; and they are as much bound by such submissions, and the awards thereon, as are natural persons.—SMITH v. BOROUGH OF WILKINSBURG, Penn., 33 Atl. Rep. 371.

88. MUNICIPAL CORPORATION—Void Ordinance — Act of Police Officer.—Acity is not liable for the act of a police officer in making an arrest for a breach of the peace under a void ordinance.—TAYLOR v. CITY OF OWENSBORO, f.y., 82 S. W. Rep. 948.

89. NEGLIGENCE — Assumption of Risk.—Where an employee, while pushing a hand car on a trestle, the planks of which were laid crosswise, extending beyond the rails, was killed by being thrown from the trestle by the breaking of a plank just outside the rail, the question of his contributory negligence in stepping outside of the rail was properly submitted to the jury, though he was warned by his foreman, and cautioned by a fellow-workman, to walk inside the rails.—HOULIHAN V. CONNECTIOUT RIVER R. CO., Mass., 42 N. E. Rep. 106.

90. NEGLIGENCE—Independent Contractor.—One who employs another to furnish the materials and do a specific job as an independent contractor is not liable for injuries caused by the negligence of such contractor or his servants.—Carlson v. Stocking, Wis., 65 N. W. Rep. 58.

91. NEGOTIABLE INSTRUMENT—Accommodation Notes.—Where two parties exchange accommodation notes with the understanding that each shall hold the other harmless for notes discounted by him, one of them who has duly paid all notes given him by the other has a good defense on the notes given by him, as against one who is not an innocent holder for value.—WOLVERTON V. GEORGE H. TAYLOR & Co., Ill., 42 N. E. Rep. 49.

92. NEGOTIABLE INSTRUMENTS — Indorsement and Transfer.—The indorsee of a promissory note indorsed it "for discount and credit of himself." Before maturity, he took it out of the bank which discounted it for him, and passed it away with this special indorsement: Held, that the person to whom it was so passed acquired a valid title under such indorsement.—BROOK v. VAN NEST, N. J., 33 Atl. Rep. 382.

98. NEW TRIAL—Imposing Conditions.—The court, in granting a motion for a new trial, may, in its discretion, require the moving party to pay the other party's counsel fees and expenses necessarily incurred in such motion.—BROOKS V. SAN FRANCISCO & N. P. RY. Co., Cal., 42 Pac. Rep. 570.

94. PARENT AND CHILD—Support of Child.—A relative, to recover from a father for the care and support of his minor child, must show that the services were rendered at his request.—JACKSON V. MULL, Wy., 42 Pac. Rep. 603.

95. PARTNERSHIP—Assignment.—Where a partner, in contemplation of insolvency, absconds, a voluntary assignment by his copartners on finding the business insolvent is valid.—Voshmik v. Hartmann, Wis., 65 N. W. Rep. 60.

- 96. PLEDGE—Note as Collateral.—Under Rev. St. art. 372, providing that defendant, in an action on any written instrument, may plead failure of consideration as against a transferee, or "when defendant may prove a knowledge of such want or failure of consideration on the part of the holder prior to the transfer," defendant, in an action by a transferee on a note pledged to the transferror, as collateral to secure advances to defendant, who pleads that such advances were never made, and that the payee agreed not to transfer the note, and that plaintiff had notice of such facts before the transfer, has the burden of showing such notice.—WRIGHT v. HARTIE, Tex., 32 S. W. Rep. 885.
- 97. POWER OF ATTORNEY—Construction.—Defendants' grantors executed an irrevocable power of attorney to plaintiff's deceased husband, "to demand, sue for, recover, enter into, and take possession of" certain lands in Texas, and in consideration of such services as attorney the grantee was "to have and retain to himself one-half of all the lands described and contemplated in the power of attorney," etc. Deceased never acted under this power, and after his death the grantors conveyed the lands, as their own, to defendants: Held, that the instrument was an executory contract only, and, never having been acted upon, deceased acquired no interest in the lands.—Tayler v. Taul, Tex., 37 S. W. Rep. 866.
- 98. PROCESS—Summons by Publication—Judgment.—A judgment against a non-resident on service of summons by publication is void, where the record fails to recite that the court, prior to the publication, obtained jurisdiction of his property by attachment process. WILLAMETTE REAL-ESTATE CO. v. HENDRIX, Oreg., 42 Pac. Rep. 514.
- 99. Public Lands—Conveyances Adverse Possession.—A conveyance by one who has made a valid location and survey vests his grantee with the legal title, and a subsequent deed from the same grantor to another, after the patent has been issued, will not connect the grantee therein with the sovereignty of the soil, so as to make the three-years statute of limitations applicable to possession undersaid second deed.—Illies v. Ferrichs, Tex., 52 S. W. Rep. 915.
- 100. QUIETING TITLE—Burnt Record Act.—Under Rev. 8t. 1893, ch. 116, § 13, which declares that in suits under the burnt record act a sworn answer shall have no other or greater weight as evidence than the petition, such an answer is not evidence as in ordinary equity suits.—MILLER V. STALKER, Ill., 42 N. E. Rep. 79.
- 101. RAILROAD COMPANIES—Accident at Crossings—Negligence.—A judgment against a railway company for death of plaintiff's decedent, in a collision at a crossing, will be reversed where the only evidence of the care exercised by decedent was the testimony of a witness that he saw plaintiff when 27 feet from the track, driving in a slow walk; that, at the time, he was looking in the opposite direction from which the train was approaching; that he continued to so look up to the time he was struck by the train, unless for a short time when his view of decedent was obstructed by a building.—CINCINNATI, H. & I. R. Co. v. DUNCAN, Ind., 42 N. E. Rep. 37.
- 102. RAILROAD COMPANY—Assault by Depot Policeman on Passenger.—A railroad company, which employs a policeman at a depot to look after passengers, is liable to a passenger for loss of an eye, caused by the policeman striking him with a billy, the passenger having, after being roused from a drunken sleep, and started to his train. merely attempted to come back into the depot.—Texas & P. Ry. Co. v. Bowlin, Tex., 328. W. Rep. 918.
- 108. RAILROAD COMPANY—Fires.—In an action against a railway company for damages from fire communicated by its engine, where the evidence was that, five days before the fire shortly after the passage of defendant's train, a fire started in a stack, and that for five days fire and smoke were seen there, and that the are for which plaintiff claimed damages was supposed

- to have started from such first fire, but there was not evidence of such fact, a nonsult was proper.—STRATTON V. UNION PAC. RY. Co., Colo., 42 Pac. Rep. 602.
- 104. RAILEOAD COMPANIES—Fires—Possession—Title.
 —Possession is prima facte proof of title, in an action against a railroad company for negligently setting fire to property.—SPIRLOOK v. PORT TOWNSEND SOUTH R. Co., Wash., 42 Pac. Rep. 520.
- 105. RAILEOAD COMPANIES—Injuries—Throwing Mail Pouch.—Railway companies are liable for injuries to persons rightfully on its depot platform, who are struck by a mail pouch thrown from a rapidly moving train.—WILLIAMS V. LOUISVILLE & N. R. Co., Ky., 32 S. W. Rep. 984.
- 106. RAILEOAD COMPANIES— Negligence Contributory Negligence.—Contributory negligence is never a question of law unless the facts are such that all reasonable men must draw the same inference therefrom.—Eichhorn v. Missouri, K. & T. Ry. Co., Mo., 32 S. W. Rep. 998.
- 107. RAILROAD COMPANY Injury to Volunteer. -Plaintiff's husband was an employee of a coal company, and was engaged in loading coal from an elevated platform, through a chute to a car on defendant's tracks. The chute was so applied to the car that any abrupt movement of the latter would injure it. Defendant caused a "flying switch" to be made, with great speed, from the main track to the side track upon which the car was being loaded. Plaintiff's husband, whose duty it was to protect the chute, not appreciating the speed of the approaching cars, climbed on an intervening box car to set the brakes and intercept the collision with the coal car, and was thrown down by the colfision and killed: Held, that plaintiff was not prevented from recovering on he ground that he was a volunteer.—WETHERFORD M. W. & N. W. RY. Co. v. Duncan, Tex., 32 8. W. Rep. 878.
- 108. RAILEOAD COMPANIES— Officers— Limitations.—Where a by-law of a railroad company provided that the first vice president should have general charge of the passenger and freight traffic, and appoint and remove at pleasure the officers of those departments, and that was his sole source of authority, he had no power to appoint plaintiff for a fixed period as "general passenger and ticket agent," whose duty it was to take entire charge of all passenger matters.—MISSOURI, K. & T. RY. CO. V. FAULKNER, Tex., 32 S. W. Rep. 883.
- 109. RAILROAD COMPANIES—Parent and Child—Contributory Negligence.—In an action against a railroad company for causing the death of a child 21 months old, the evidence showed that the child and its parents lived in the station adjoining the track; that at the time of the accident the father was away from the station, attending to his business; that the mother left the child in one room of the station, while she went into another room to attend to another child, who was ill; and that during that time the child went out upon the track, and was killed by a passing train: Held, that the parents were not, as a matter of law, guilty of contributory negligence.—Chicago & A. B. Co. v. Logue, Ill., 42 N. E. Rep. 58.
- 110. RECEIVERS—Contract of the Insolvent.—A receiver of a corporation may refuse to carry out a contract entered into by the corporation, without being liable for damages for its breach, as otherwise liabilities of the corporation on executory contracts would become preferred claims.—SCOTT v. RAINIER POWER & RAILWAT4CO., Wash., 42 Pac. Rep. 531.
- 111. RECRIVERS—Receiver of Corporation—Authority to Appoint.—A court has no power, pending an action against a corporation, to displace the corporate management, and put in its place a receiver and the court, in the absence of a statute giving it such power.—FISCHERV. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 42 Pac. Rep. 561.
- 112. RES JUDICATA Material Issues.—Where issue has been joined on a material fact in an action, and

the issue judicially determined and carried into judgment by a court having jurisdiction of the action, the parties to such action are concluded by such finding until the judgment is reversed or set aside; and the fact thus established cannot be retried by the same parties in any subsequent action, whether the second action is upon the same or a different subject-matter from the first. In this respect it is immaterial that one of the actions may have been ex contractu, and the other ex delicto.—HIXSOW v. OGG, Ohio, 42 N. E. Rep. 32.

118. SALE BY INSOLVENT — Bona Fide Purchaser.—
Though a sale by an insolvent was prima facte fraudu
lent, a finding that the vendee purchased in good faith
will not be disturbed on evidence, though conflicting,
that the vendee had no knowledge of the vendor's insolvency, that the price agreed upon was the fair value
of the property, and that he afterwards offered to
make the deferred payments to the vendor's assignee.
—GRUMSKY V. PARLIM, Cal., 42 Pac. Rep. 575.

114. SALE OF CORPORATE STOCK-Fraud-Limitations. -Where defendant, in 1865, procured the sale of oil stock by false representations that oil lands belonging to the company were being tested with prospects of success, whereas they had been tested and found to be non-producing, the fact that plaintiff was a business man residing in the same city as the officers of the company, and could have found out by inquiry that the company had stopped work, and the fact that no dividends or assessments were made on the stock, and, as a result, plaintiff, in 1871, considered his stock worthless, will not start the running of limitation from such date against an action to rescind the sale, as from a discovery of the "facts constituting the fraud," within Code, § 882, subd. 5, limiting actions other than for money, based on fraud, to six years from the accrual of the action.-Higgins v. CROUSE, N. Y., 42 N. E. Rep. 6.

115. STATUTE — Construction of Statute — "Calendar Month."—The term "calendar month," whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.—McGinn v. State, Neb., 65 N. W. Rep. 46.

116. TELEGRAPH COMPANIES — Limiting Liability.—
The statutory obligation and common law liability of
a telegraph company to accept, safely transmit, and
promptly deliver a message is in no manner modified,
limited, or intrinsically affected by a regulation in all
respects reasonable, which requires the sender to present in writing a claim for damages within 60 days
after the message is filed with the company for transmission; nor does such regulation shorten the time
within which an action for damages may be commenced.—Kirley v. Western Usion Tel. Co., 8.
Dak., 65 N. W. Rep. 87.

117. TELEGRAPH COMPANY—Telegram—Negligence.—Though the sender of a telegram, in making special arrangements for the delivery of an answer, was negligent in failing to give the precise address of the sendee, but left a sum sufficient to pay for the delivery of such answer, the company will not be excused from negligence in delivering the message to another than the addressee, and failing to elicit an answer.—SHERRILL V. WESTERN UNION TEL. Co., N. Car., 28 S. E. Rep. 277.

118. TRADE MARK — Good Will.—A trade-mark is a notice indicating origin. It cannot exist—that is, be the subject of ownership—spart from a business, or the good will thereof.—ROYAL BAKING POWDER CO. v. RAYMOND, U. S. C. C. (111.), 70 Fed. Rep. 376.

119. TRESPASS—Defense.—In trespass, defendants are entitled to the benefit of the evidence brought out by plaintiff that they were agents of a city, and that it was in possession and had authority to enter the property, regardless of whether they had pleaded such a

defense.—TACOMA LIGHT & WATER Co. v. HUSON, Wash., 42 Pac. Rep. 536.

120. TRIAL — Evidence — Objection to Evidence.—
Though a mere general offer to prove certain facts is
an improper method of presenting offered evidence,
and should not be allowed except by consent of counsel, where the objection to such an offer is not on the
ground that the offer is an improper method, it will be
presumed that the method used was by consent.—BIDDICK V. KORLER, Cal., 42 Pac. Rep. 578.

121. TRIAL—Inspection of Documents.—The practice in the federal courts in relation to the inspection of papers for the purpose of siding a party in preparing for trial, as distinguished from inspection of papers "to be used on the trial," in respect to which an act of congress applies, is regulated by the practice prevailing in the State courts.—FRESCOLE V. CITY OF LANCASTER, U. S. C. C. (Penn.), 70 Fed. Rep. 337.

122. TROVER. — Where the title to goods sold remained in the vendor, the vendees can maintain trover for the conversion thereof by others, though at the same time there was an action pending by the vendors against defendants for the same cause.—ALDRICH V. HODGES, Mass., 42 N. E. Rep. 107.

123. TRUST DEED — Rights of Non-accepting Beneficiaries.—Where some of the beneficiaries in a trust deed refuse to accept its terms, and attach and convert the property conveyed by it, they cannot, in an action for such conversion by the trustee, assert any rights under the deed, or justify their taking to the extent of the interest intended by the grantor to be vested in the trustee for them.—WHITE V. STERZING, Tex., 22 S. W. Rep. 909.

124. WATERS — Navigable Waters — Harbor Lines.—Under Const. art. 15, § 1, providing for the establishment of harbor lines by the board of harbor commissioners, in navigable waters, in front of "cities," and section 3, providing that "municipal corporations" shall have the right to extend their streets over the intervening tide lands, the board has power to establish harbor lines in front of "towns," and therefore act March 21, 1895, providing for the disestablishment of harbor lines in front of "towns," is unconstitutional.—WILSON v. BOARD OF STATE LAND COM'RS., Wash., 42 Pac. Rep. 524.

125. WILL-Contest-Evidence.—On the contest of a will between the half-brother of decedent and a cousin, evidence of a feud between the father of testator and his brothers, in which testator was supported by the cousin, is inadmissible as showing a motive for providing more liberally for the cousin than for the half-brother.—Turner's Guardian v. King, Ky., 22 S. W. Rep. 941.

126. WILL — Provision for Children. — A will of a married woman who dies leaving a child, giving all of her property to her husband, and providing that, if he should marry again after her death, all her property is to belong to her child or children, does not provide for her child or children, within the meaning of 2 Hill's Code, § 1465, providing that the children must be named or provided for in the will in order to be valid as to such children.—PURDY v. DAVIS, Wash., 42 Pac. Rep. Rep. 520.

127. WILL—Trust Estate—Infant—Remainder-men.—Testatrix left land in trust for her son for life, with remainder to his children or their descendants living at his death, and, in default of such issue, to other specified devisees: Held, that the son's first-born took at its birth a vested estate in remainder, subject to open and let in after-born children; such vested remainder becoming a fee-simple in the children living at the death of their father.—LOSEY V. STANLEY, N. Y., 42 N. E. Rep. 8.

128. Witness — Credibility.—A witness may, for the purpose of affecting his credibility, be asked on cross-examination if he had not been indicted for embezzlement and perjury, though an indictment 10 years before might be objected to as too remote.—Linz v. Skinner, Tex., 32 S. W. Kep. 915.

Central Law Journal.

ST. LOUIS, MO., JANUARY 24, 1896.

The Supreme Court of the United States, in Moore v. Missouri, 16 Sup. Ct. Rep. 179, has declared constitutional the Missouri "habitual criminals" act, which is substantially like what is known as "second offense" statutes in many of the States. This statute provides that a formerly convicted criminal shall suffer a severer punishment for a second offense. The contention was made that such an act is open to the charge that it subjects the person twice to jeopardy for the same offense. But the court thought and held The case was on appeal from the otherwise. Supreme Court of Missouri, which tribunal came to the same conclusion. State v. Moore, 121 Mo. 514.

The late New York legislature passed an act taking away the limit of damages which may be recovered in suits for death by wrongful act. The New York Court of Appeals, in the case of Isola v. Weber, very properly hold that this statute is prospective only. The language of the act is "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation." At the trial in the lower court it was held that the statute could not operate retrospectively or affect causes of action accrued before it went into effect. The general term reversed this decision, and the court of appeals, on appeal, adopt the view of the lower court, declaring that the act cannot affect causes of action antedating its own existence.

That tender of a silver coin cannot be refused by reason of abrasion is settled by the recent decision of Jersey City & B. R. Co. v. Morgan, 16 Sup. Ct. Rep. 276, which involved the refusal of a ten cent piece offered in payment of car fare on a street railroad in Jersey City. The conductor refused the coin when tendered because he thought it was not worth par, having been worn by abrasion while in circulation. The passenger was ejected from the car and brought suit for damages. He recovered a judgment which Vol. 42—No. 4.

was affirmed by the Supreme Court of New Jersey, and this judgment has been affirmed by the Supreme Court of the United States in an opinion rendered by Mr. Chief Justice In affirming the judgment the Chief 430 L.J Justice referred to the law regulating the passage of defaced and abraded coins, and declared that there was no provision against the passage of silver coins which were abraded only by circulation, and that they were a legal tender as long as they bore the semblance of the coin. So long as a genuine silver coin is worn only by natural abrasion, is not appeciably diminished in weight and retains the appearance of a coin, duly issued from the mint, it is a legal tender for its original value.

In a recent issue we called attention to some late cases involving the question, of considerable public interest, as to the validity of rules made by boards of education compelling pupils in public schools to be vaccinated. The view of the courts was that such requirement was reasonable and valid.

To those cases must be added a very recent one by the St. Louis Court of Appeals—In re August Rebenack—wherein that court holds that a rule of a school board requiring all pupils to be vaccinated, to prevent the transmission of a contagious disease, is a reasonable requirement, and pupils may be expelled who refuse to observe it.

In the nature of things, says the court, it must rest with the boards of education to determine what regulations are needful for a safe and proper management of the schools and of the physical and moral health of the pupils intrusted to their care. If such regulations are not oppressive or arbitrary, the courts cannot, or should not, interfere. It was held in Vermont that a pupil may be expelled from school on account of absence, though the absence was one which his parent and spiritual adviser deemed necessary so that he might tend a religious exercise. Ferrytown v. Tyler, 48 Vt. 444. In the famous case of Board of Education v. Minor, 23 Ohio St. 211, it was decided that whether a child should or should not receive religious instructions in the public schools, rested, in the absence of constitutional mandates or restrictions, with the school trustees.

In Burdick v. Babcock, 31 Iowa, 562, it was held that any rule which was not subver-

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sive of the rights of the children or parents, or in conflict with humarity, and which tends to advance the objects of the law in establishing public schools, must be considered reasonable and proper by the courts.

NOTES OF RECENT DECISIONS.

PRINCIPAL AND AGENT-AUTHORITY TO Ex-ECUTE NOTE-PRESUMPTION.-In Connell v. McLoughlin, 42 Pac. Rep. 218, it is held by the Supreme Court of Oregon that an agent authorized to manage and dispose of a sash and door manufacturing plant has no authority to execute a note in the name of his principal in payment for lumber, it not appearing when the lumber was purchased or that it was for the benefit of the principal. The court cites and discusses Law v. Stokes, 32 N. J. Law, 249; Walsh v. Insurance Co., 73 N. Y. 5; Bickford v. Menier, 107 N. Y. 490; Brown v. Parker, 7 Allen, 337; Taber v. Cannon, 8 Metc. (Mass.) 456; Webber v. College, 23 Pick. 302; Paige v. Stone, 10 Metc. (Mass.) 160; Odiorne v. Maxey, 13 Mass. 177.

SALE-ACTION FOR PRICE-DAMAGES.-In White v. Solomon, 42 N. E. Rep. 104, defendant ordered an article of plaintiff, reciting: "In consideration of its delivery for me * * at the express office specified below, I promise to pay" \$35, \$10 on delivery at the express office, balance in monthly installments; it being agreed that on default plaintiff might take the article, any payments to be for use of the article. held that the article having been delivered to the express company, defendant having refused to accept it, it being thereafter left at plaintiff's place of business by the company, pursuant to one of its rules, without plaintiff's assent, and it being thereafter held subject to defendant's order, plaintiff could sue for the price, and was not limited to suing for damages for breach of the contract. Holmes, J., for the court, said:

There was evidence, and we must assume the judge who tried the case to have found, that the manikin was delivered, as agreed, to the express company, freight prepaid; that the defendant refused to receive it; that, in consequence, the express company, after a time, left the manikin at the plaintiff's place of business, in pursuance of a rule of the company, and with-

out the plaintiff's assent; and that it is held subject to the defendant's order. There had been no repudiation of the contract by the defendant before the delivery of the manikin at the express office.

The main question is whether the judge who tried the case ought to have ruled that "the plaintiff is not entitled to recover the price of the article in question, but must offer evidence to the court upon the question of damages for the alleged breach of said contract." A majority of the court is of opinion that this ruling properly was refused. We assume in favor of the defendant, but without deciding, that the title to the manikin did not pass by delivery at the express office; but that assumption does not dispose of the case. In an ordinary contract of sale, the payment and the transfer of the goods are to be concurrent acts; and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly solvendum in futuro), of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words, "in consideration of delivery," are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry. it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum. See the observations of Blackburn, J., in Martineau v. Kitching, L. R. 7 Q. B. 436, 455; Benj. Sales (4th ed.), 716, 717. When, as here, by the terms of the contract, every condition has been complied with which entitles the vendors to the whole sum, and if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot, by an act of his own repudiating the title, gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised. See Smith v. Bergengren, 153 Mass. 236, 238, 26 N. E. Rep. 690.

If the first payment of \$10 upon delivery were to be made upon delivery to the buyer, it well may be that, if the buyer refused to accept the manikin or to pay the \$10, the seller's only remedy would be for a breach. and that they could not leave the manikin at his house, and waive the payment against his will, with the result of making the whole sum due. But here the delivery is to be to an express company, and the provisions for payment of \$10, "upon delivery at the express office," must mean after the delivery; so that the delivery is the first act, and by itself, without more, fixes the rights of the vendors to the price, just as the transfer of the stock did in Thompson v. Alger, 12 Metc. (Mass.) 428, 444. Our decision is in accord with the following cases (we know of no decisions to the contrary): Safe Co. v. Emanuel, 21 Abb. N. C.



181; Brewer v. Ford, 54 Hun, 116, 120, 7 N. Y. Supp.
244; Id., 126 N. Y. 643, 27 N. E. Rep. 852; Carnahan v. Hughes, 108 Ind. 225, 9 N. E. Rep. 79. See further Burnley v. Tufts, 66 Miss. 48, 5 South. Rep. 627; Tufts v. Griffin, 107 N. Car. 47, 12 S. E. Rep. 68. But compare Tufts v. Grewer, 83 Me. 407, 22 Atl. Rep. 882; Swallow v. Emery, 111 Mass. 355, 357.

Field, C. J., dissented in the following opinion:

It is not easy, perhaps, to reconcile all our decisions upon the measure of damages in actions for goods bargained and sold or for goods sold and delivered; but the general rule is, I think, that where the title passes to the vendee by the contract, and the contract has been executed by a delivery, or by what is equivalent to a delivery, the vendee is liable to the vendor for the price; but where the title does not pass to the vendee by the contract, and he declines to receive and accept the goods sold, the damages are the injury suffered from the breach, which usually is the difference between the price agreed upon and the market value of the goods at the time and place of delivery. Collins v. Delaporte, 115 Mass. 159; Whitney v. Thacher, 117 Mass. 523; Schramm v. Refining Co., 146 Mass. 211, 15 N. E. Rep. 571; Tufts v. Bennett, 168 Mass. 398, 40 N. E. Rep. 172; Laird v. Pim, 7 Mees. & W. 474-478. This question, in a contract for the sale of stock in a corporation, was considered in Thompson v. Alger, 12 Metc. (Mass.) 428, 443. In that case the court held that the plaintiff was entitled to recover as damages the price agreed to be paid, and say: "The argument against such recovery is that this stock was never accepted by the defendant; that this, at most, was a mere contract to purchase; and that the defendant, having repudiated it, is only liable to pay the difference between the agreed price and the market value of the stock on the day of the delivery. Such would be the general rule as to contracts for the sale of personal property; and such rule would do entire justice to the vendor. He would retain the property as fully in his hands as before, and a payment of the difference between the market price and that stipulated would fully indemnify him. Such would have been the rule in this case if nothing had been done to change the relation of the parties. If, for instance, the defendant had repudiated the contract before any transfer of stock to him had been made on the books of the corporation, it might properly have applied here. But this is a case of somewhat peculiar character in this respect. The contract of the vendor to sell to the defendant 180 shares of railroad stock required a previous transfer of the shares on the books of the corporation. This, from the very nature of the case, was a previous act; and, when done, it passed the property on the books of the company to the defendant. This was done by the vendor as early as October 14, 1841, in respect to all the shares stipulated to be sold. At this time the defendant had not repudiated the contract. . . In this state of the case, as it seems to us, the true rule of damages is the contract price. The stock has been transferred to Alger on the books of the corporation, and the vendor, having done this, in the proper execution of the contract, and before it was repudiated by the defendant, may well insist upon this rule as the measure of damages." This rule of damages has been applied in this commonwealth to contracts for the sale of stock in corpoations where the vendor has before trial duly tendered the stock, or offered to transfer it, and has renewed the tender or offer in court at the trial. Thorndike v. Locke, 98 Mass. 840; Pearson v. Mason, 120 Mass. 58.

See Nichols v. Morse, 100 Mass. 528; Frasier v. Simmons, 139 Mass. 531, 2 N. E. Rep. 112.

If the contract in this case could be considered as an absolute contract of sale, it may be that the court could have found from the evidence such a delivery as, in accordance with our decisions, might be held to pass the title as between the parties. But then it might be necessary to consider whether, if the manikin was of value, it would not be necessary for the plaintiffs to keep the delivery good in some manner, as by storing it for the defendant at or near the place of delivery, or by tendering it to him at the trial, in order to enable the plaintiffs to recover the entire price. If the manikin had been sent by the plaintiffs from a distant foreign country, and, on the defendant's refusing to receive it, had been sent back to them with their assent, and retained by them there, it would seem more reasonable to permit the plaintiffs to recover their damages caused by the defendant's refusal than to recover the entire price agreed to be paid, and to leave to the defendant only the chance of obtaining possession of the manikin in such manner as he might be able. If, on the vendee's refusing to receive the property bought, it is resold by the vendor, after notice to the vendee, the damages recovered are, of course, the difference between the price agreed to be paid and the sum obtained by the vendor from the resale, if reasonable care is taken to obtain for the property all that it is worth.

It becomes necessary in the present case to consider the nature of the contract. The contract, I think, is in effect a contract for a conditional sale, and the intention is that the title shall not vest in the defendant until the price is paid. If the price is not paid according to the terms of the contract, the plaintiff is authorized to retake the manikin without being accountable to the defendant for any of the money paid by him on account of the price. If the plaintiffs exercise this right of retaking the manikin into their possession because the price is not paid, they have both the title and the possession, because they have never parted with the title. What, then, is the rule of damages under such a conditional contract of sale, when the vendee refuses to receive the article, and it is returned to and retained by the vendor? I think that the construction to be given to the contract is that, if the de. fendant does not pay the price according to the contract, the plaintiffs may retake the manikin from the possession of the defendant, and retain what he has paid on account of the price, or that they may leave the manikin in the possession of the defendant, and sue him for the installments of the price which remain unpaid. But the plaintiffs cannot collect the whole price, and also retake the manikin. They cannot hold the title to the property, and also recover the price of it.

But it is said that the plaintiffs have not retaken the manikin. The manikin has been returned to the plaintiffs, and is retained by them, subject, as they say, to the order of the defendant. It is retained in New York City, and, by retaining it there, I think it must be held that the express company returned it to them with their assent, and that the plaintiffs have ratified this action of the express company. The damages to be recovered when a vendee, in a conditional contract of sale, refuses to receive the property, and it is returned to the vendor by his assent, and is retained by him, seems to me analogous to the damages to be recovered when a vendee in an executory contract of sale refuses to receive the property. Morse v. Sherman, 106 Mass. 480-484; Tufts v. Bennett, ubi supra. See Tufts v. Grewer, 88 Me. 407, 22 Atl. Rep. では、「大きな大きないというできる。」では、「大きないできる。「ないできる。」では、「大きないできる。「ないできるないできる。」では、「ないできる。」できる。「ないできる。」できる。「ないできるないできる。」できる。「ないできる。」」できる。「ないできる。」できる。「ないできる。」できる。「ないできる。」できる。「ないできる。」できる。「ないできる。」できる。「ないできる。」」できる。「ないできる。」できる。「ないできる。」できる。「ないできる。」」できる。「ないできる。」できる。」できる。「ないできる。」」できる。「ないできる。

382. The title in each case remains in the vendor; and the damages, when the thing sold is a commodity usually bought and sold in the market, are generally the difference between the price agreed to be paid and the market value of the property at the time and place of delivery. In my opinion, such should be the rule in this case. I find nothing in the agreement which distinguishes the present case from the ordinary one where the vendee of property agrees to pay a part of the price on delivery, and the remainder of the price in installments after delivery.

CRIMINAL LAW—GAME OF CHANCE—WHAT CONSTITUTES.—In State v. DeBoy, 23 S. E. Rep. 167, decided by the Supreme Court of North Carolina, it was held that the putting up by several persons of money and deciding by the throwing of dice which of them should have a turkey, constitutes a game of chance. The court, however, is philanthropic enough to distinguish "progressive euchre." The court said:

If several parties each put up a piece of money, and then decide by throwing dice who shall have the aggregate sum or "pool," this is, unquestionably, a game of chance. The sum put up by each is his bet, and the pool gamed for is the stake. This is exactly what the parties did in this case. The only variation is that when the pool was raised it was exchanged for a turkey, which then stood in lieu of and became the stake, and, further, they chose to style the transaction a raffle; and it is contended that a raffle is a kind of lottery, and hence not a game of chance. But lotteries are a species of gambling, and because thereof the Supreme Court of the United States has held that they were immoral, and their circulars and tickets could be excluded from the mails. Technically, a person cannot be said to play at a lottery. The tickets are drawn out of a wheel. But in this case the parties played dice for the possession of the turkey, and success depended "on the hazard of the die." The defendant is liable both because he threw dice as agent for one of the players, and because he got up the game. In misdemeanors, all aiders, abettors and accessories are principals. The transaction was simply gaming with dice, with 10-cent bets, and for a turkey as the "pool." The case of State v. Bryant, 74 N. C. 207, merely hold that the transaction there described was a lottery, and the keeper thereof and the purchaser of tickets therein were not indictable for playing at agame of chance, under chapter 32, section 72, Battle's Revisal (now Code, section 1045), though the seller would be liable under Code, sections 1047, 1048. Another "gift enterprise" was held a lottery, and the holder of it liable to indictment under Code, section 1047, in State v. Lumsden, 89 N. C. 572, and such lottery was held to be a "game of hazard." There was no adjudication as to the liability of the purchasers of the tickets. Whatever defects there were in the law of gambling were intended to be cured by acts 1891, ch. 29, which makes it "unlawful for any person to play at any game of chance at which money, property or other thing of value is bet, whether the same be at stake or not, and those who play and those who bet thereon shall be guilty of a misdemeanor." This covers the present case, and all other forms of rafIt must be noted that this statute and this decision have no application to the long prevailing custom of "shooting for beef," shooting at turkeys and other similar trials of skill. It is true there each participant pays for the privilege, or so called "chance," of shooting for the prize; but there is no chance, in the sense of the acts against gambling. These are trials of skill, which the law has never discouraged, and not games of chance in any sense. Nor does the statute prohibit the social diversion in which the hostess of fers prizes for the most successful player at cards or other games. In such cases, though there are games of chance, the players bet nothing. They lose nothing if unsuccessful and pay nothing for the chance of winning.

EQUITABLE ASSIGNMENT.—The Court of Appeals of Colorado held in Silent Friend Min. Co. v. Abbott, 42 Pac. Rep. 318, that a promise to pay a debt out of proceeds of ore to be mined is not an equitable assignment of such proceeds. The court says:

The position of the plaintiffs is that the agreement to pay the balance of the purchase money out of the first proceeds of sales of ore amounted to an equitable assignment of those proceeds, or so much of them as might be necessary to satisfy the plaintiffs' claim; and that, therefore, they are entitled to proceed against the fund, and compel specific performance by the company of its agreement to pay out of that fund. Inasmuch as our decision turns upon the effect to be given to the language of that agreement, we quote the portion of the contract containing it. It is as follows: "In consideration of the premises, the said party of the second part agrees to pay to the said parties of the first part the sum of \$6,000 as follows, towit: \$3,000 upon the date of execution of this agreement, and the balance of \$3,000 from the proceeds of the sale of the first ore shipped from the said Silent Friend Mining Company's property." There are no words in this agreement which could operate to transfer, or which even indicate an intention to transfer, any specific fund, or an interest in any specific fund, to the plaintiffs. No right was conferred upon the plaintiffs to receive the money, except as it might be paid to them by the company. The ore belonged to the company. It extracted, shipped, and sold it, and, when it received the price of its ore, the money was its own. The agreement gave the plaintiffs no interest in the money as such. It was simply a promise by the company that, when it received the money, it would apply it in payment of the debt; and, until it should do so, no title in the money could pass to the plaintiffs. It failed in the fulfillment of its promise, the plaintiffs' remedy was by an action at law against the company for breach of contract.

As to what does, and what does not, constitute an equitable assignment of a fund, there has been considerable adjudication. In Bradley's Case, Ridg. t. Hardw. 194 (decided in 1744), the chancellor held that a promise to pay the plaintiff's demand out of a specific debt did not create a lien upon the debt, saying: "It is common for persons who have expectations from the deaths of their friends to promise to pay their debts out of such legacies; yet such promise will not bind such legacies specifically, notwithstanding such creditors might think they had a right to such an express lien by virtue of their forbearance." In Christmas' Adm'r v. Griswold, 8 Ohio St. 558, the agreement was that Christmas should pay Fassett

\$7,435 out of the first money he received from sales of certain lands, etc. The court said that the contract could not operate as an equitable assignment, and created no lien in favor of Fassett's estate upon Christmas' share of the proceeds of the lands; quoting the following from Hare & Wallace's notes to Leading Cases in Equity: "It is necessary, moreover, in order to constitute an assignment, either in law or equity, that there should be such an actual or constructive appropriation of the subject-matter assigned as to confer a complete and present right on the assignee, even when the circumstances do not admit of its immediate exercise. A covenant on the part of the debtor, to apply a particular fund in payment of the debt as soon as he receives it, will not operate as an assignment, for it does not give the part of the debtor, to apply a particular fund in payment of the debt as soon as he receives it, it will not operate as an assignment, for it does not give the covenantee the right to the funds, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual." The following is from the opinion of Mr. Justice Swayne, in Christmas v. Russell, 14 Wall. 69: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intention to transfer is manifested. Such intention and its execution are indispensable. The assignor must not retain any control over the fund, . . . any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee." Again, in Trist v. Child, 21 Wall. 441, the same learned justice delivered himself as follows: "It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific lien upon the fund, and binds it in the hands of the drawee: A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee; but a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund pro tanto, either by giving an order, or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor, without the further intervention of the debtor." In Canty v. Latterner, 31 Minn. 289, 17 N. W. Rep. 385, the contract was that Latterner should pay Canty a specified sum of money for his services as attorney for Latterner in a suit then pending, and agreed that Canty should receive the money from the Minneapolis &St. Louis Railroad, out of an amount due Latterner from the railroad, to be paid when the suit was settled. The court construed the contract as an equitable assignment, but based its decision upon the ground that the money was to go directly from the railroad company to Canty, and was not to be first collected by him, and then paid to Latterner; and, in order that its decision upon the facts before it might not be understood, the court added: "A distinction exists between such a case and an agreement that the promisor will pay out of a particular fund. In the latter case the agreement contemplates a continued right in the promisor to recover and hold the money, and that payment shall be made only through him." There are only decisions along the same lines, but those we have cited are sufficient for our purpose.

Counsel seems to be impressed with the idea that the adjudications have been, for the most part, in the same where the rights of third parties were involved, and that the decisions were in some manner affected

by that consideration. We do not find such to be the case. Their doctrine clearly is that an agreement like the one before us does not operate as an assignment at all. A claim otherwise valid and enforceable may be postponed or defeated by intervening outside rights, but here the plaintiffs had no claim whatever against the fund, and they mistook their remedy when they invoked the aid of a court of equity. The decree will be reversed. Reversed.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS AS TO PROPERTY BE-YOND THE STATE IN WHICH THE ASSIGNOR RESIDES AND MAKES THE ASSIGNMENT.

The race of creditors for the assets of an insolvent debtor has been the fruitful source of many intricate and difficult legal problems. The struggle of the debtor to keep his property from being consumed in expensive litigation, and to save it to satisfy his liabilities. has given rise to many plans and schemes of which, perhaps, the assignment for the benefit of all his creditors is the most general and the most honorable. And if the property is all in the State where the debtor resides and makes his assignment, and if the assignment is made in good faith, and conforms to the legal formalities and requirements, it is generally conclusive on all the parties. But a debtor's property may be scattered in a number of States other than the State in which the debtor resides and makes his assignment, and it may be real or personal property. The creditor may reside in, or may be a non-resident of, the State of the assignor. The object of this article is to examine the decisions and ascertain what rights the courts have given the creditors of the assignor as to his property situated beyond the State in which he resides and makes his assignment. It must not be overlooked in examining the cases that there is a distinction made between voluntary assignments and involuntary proceedings in bankruptcy.2 It must also be kept in mind that in some States the assignee is held to be simply the representative of the as-

¹ Burrill on Assignment, Sec. 302. See, also, Whipple v. Thayer, 16 Pick. (Mass.) 36, 26 Am. Dec. 626; Crampton v. Marble Co., 60 Vt. 291, 1 L. R. A. 120; Heidel v. Benedict (Minn.), 63 N. W. Rep. 490.

² Barth v. Backus, 140 N. Y. 230, 23 L. R. A. 47; Long v. Forrest, 150 Pa. St. 413, 23 L. R. A. 33, note; Willitts v. Waite, 25 N. Y. 577-584; McClure v. Campbell, 37 N. W. Rep. 348; Weider v. Maddox, 1 S. W. Rep. 168; Story on Conflict of Laws, Sec. 411.





signor,³ while in other States the assignee is declared to be the representative of the creditors.⁴ This distinction becomes very important when the assignee, under the assignment, seeks to obtain possession of property of the assignor situate in a State other than the one in which the assignor resides and makes the assignment, when the effort of the assignee comes in conflict with the atta chments of the creditors of assignor upon the property in opposition to the assignment and the rights of other creditors of the assignor thereunder.

It is the law that all the rights that the assignee has in any State other than the one in which the assignor resides and makes the assignment, to take property therein situated, are those rights that are given him by the courts by comity, because the laws of any State have no extraterritorial power.⁵ rule, subject to limitations and qualifications, an assignment valid in the State where it is made will pass the title to personal property wherever it is situated. The above rule is probably without exception as between assignor and assignee if the assignment is broad enough in describing the property assigned to include the property in another State, but in some States it is held that personal property cannot be taken out of the State by a foreign assignee to the prejudice of the creditors of the assignor therein residing and who are actively engaged in trying to subject such property to the satisfaction of their demands

* Henriche v. Wood, 7 Mo. App. 236; Roan v. Winn, 93 Mo. 503.

against the assignor.7 And in some States non-resident creditors of the assignor may have the same rights against a foreign assignee as residents of the State where the property is situated.8 Does not the constitution of the United States give this right? It is said that "substantial uniformity exists in respect to the doctrine that involuntary or compulsory transfers under bankrupt or insolvent laws do not affect real property in another State." And it is also said that the general rule of comity does not extend to real estate, as "the title and disposition of real estate are exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass. A deed or mortgage of real estate can only take effect in virtue of the law of the State where the land is situated. This is a principle of general law governing bankrupt as well as voluntary assignments."11 But, it seems, that the tendency of later decisions is to the effect, that, if the deed of a voluntary assignment is sufficiently formal to comply with the statute concerning the conveyance of land in another State, the deed will convey the land in the other State unless it in some way conflicts with the policy of the State in which the land is situated.12 It may

7 Halsted v. Straus, 32 Fed. Rep. 279; Schuler v. Isreal, 27 Fed. Rep. 851; Pierce v. O'Brien, 129 Mass. 814, 37 Am. Rep. 360; Fox v. Adams, 5 Me. 245; Felch v. Bugbee, 48 Me. 9; Faulkner v. Hyman, 142 Mass. 53, 6 N. E. Rep. 440; Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442; Bhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691; Story on Conflict of Laws, Secs. 412 and 414; In re Waite, 99 N. Y. 433, 2 N. E. Rep. 440; Hughes v. Lambertville & Power Co., 32 Atl. Rep. 69; Long v. Forrest, 150 Pa. 413, 23 L. R. A. 38 with full note.

8 Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442-444; Catlin v. W. Silver P. Co., 123 Ind. 477, 8 L. R. A. 62; Sheldon v. Blanvelt, 29 S. C. 453, 1 L. R. A. 685; Strickler v. Tinkham, 35 Ga. 179, 89 Am. Dec. 280; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Willitts v. Waite, 25 N. Y. 577-587; Moore v. Clunch, 70 Iowa, 206, 58 Am. Rep. 489; Schmdelhoz v. Cullom, 55 Fed. Rep. 885. But this right is denied non-residents in some States: Frank v. Bobbit, 155 Mass. 112; Thurston v. Rosenfield, 42 Mo. 474, 97 Am. Dec. 351; Matthews v. Lloyd, 89 Ky. 625; May v. First Nat. Bank, 13 N. E. Rep. 806; Reynolds v. Adden, 136 U. S. 350; Chaffee v. Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

9 XIV Amendment to Constitution of U. S.; Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442-445.

10 Long v. Forrest, 28 L. R. A. 44 Note; Osborn v. Adams, 18 Pick. 245; Waite v. Bingley, L. R. 21 Ch. Div. 674; Barnett v. Pool, 28 Tex. 517; Gibbs v. Logan, 23 W. Va. 208.

¹¹ Burrill on Assignments (4th. ed.), Sec. 304, p. 439 and cases cited; Danner v. Brewer, 69 Ala. 191.

12 Rogers v. Allen, 8 Ohio, 489; Shotwell v. Jewett,

⁴ Chapin v. Jenkins, 50 Kas. 385. In this case the court says: "We think that, under our statute, an assignee, as the representative of the creditors of the debtor, may defend in the interest of the creditors against a mortgage made in fraud of the creditors." The court cites a number of cases to sustain the doctrine.

In the matter of accounting of Charles Waite, 99 N. Y. 433; Green v. Van Buskirk, 7 Wall. (74 U. S.) 139; Life Association of Am. v. Levy, 33 La. Ann. 1203; Burrill on Assignments (4th ed.), Secs. 301 to 311.

⁶ Burrill on Assignments (4th ed.), Sec. 102; Smith's App. 104 Pa. St. 381; Whitman v. Mast & Co., 39 Pac. Rep. 649; Long v. Forrest, 150 Pa. St. 413, 23 L. R. A. 38, note; Grenn v. Van Buskirk, 7 Wall. (74 U. S.) 139-141; Birdseye v. Baker, 82 Ga. 142, 2 L. R. A. 99; Weider v. Maddox, 66 Tex. 372, 55 Am. Rep. 617, 1 S. W. Rep. 168; Walters v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607; Askew v. La Cygne Ex. Bk., 83 Mo. 366, 53 Am. Rep. 590; Coflin v. Kelling, 83 Ky. 649; Schuler v. Isreal, 27 Fed. Rep. 361; Kelly v. Crapo, 45 N. Y. 96; In re Paige & S. Lumber Co., 31 Minn. 136.

be the policy of the State to forbid preferences in the assignment.¹⁸ It may be the policy of the State to require resident creditors to be first paid before giving to the foreign assignee any prior rights to the property under the assignment.¹⁴

We can safely deduce from the foregoing propositions and authorities certain general rules concerning assignments that, with certain exceptions and restrictions, are, apparently, fairly well settled: First-The insolvent laws of any State have no extraterritorial effect, and are, therefore, not enforceable in another State, as a matter of right, as the proceedings thereunder are generally against the will of the bankrupt. Second-That whatever effect is given to the insolvent laws of one State in another State, it is simply the outgrowth of the rule of comity between different States, and when the rule of comity enforcing the insolvent laws of another State comes in conflict with the rights of the citizens, or the local policy of the laws of the State where the insolvent laws are sought to be enforced, then the rule of comity will not enforce the insolvent laws of another State to the prejudice of her own citizens, or against the policy of her own laws. Upon these two rules the various decisions of the different States are to a great extent harmonious. Third-A voluntary assignment, being in its nature a contract between the assignor and the assignee in which the wills or minds of the contracting parties voluntarily meet upon a definite proposition, which is the conveyance of property from the one to the other. is quite different from an involuntary assignment forced upon the assignor by proceedings in bankruptcy. And its enforcement in a State other than the State in which it is made

comes under a different rule, and that is: A voluntary assignment will in most States be enforced the same as any other contract made in one State and sought to be enforced in another, in so far as it appertains to personal property. And in most States, if the deed of assignment is broad enough in describing real estate situated in another State, and sufficiently formal in its phraseology and execution and acknowledgment to comply with the laws concerning the conveyance of real estate in the State wherein the land is situated, it will be enforced the same as any other legal conveyance of land; but on this rule the decisions are not harmonious, and the reasons given in the decisions of the various States are not all the same. And the distinction between voluntary and involuntary assignments has not been carefully kept in view; but the above rule is plainly deducible from the decisions of most of the States.

Yet there are other States that hold differently; some of them make little or no distinction between voluntary and involuntary assignments, some holding that the voluntary assignments will not be enforced to the prejudice of the citizens, or where it conflicts with the policy of its local laws; some of the States holding that resident and non-resident creditors may contest the assignment with equal rights, other States holding that the non-resident of the State where the assignment is sought to be enforced must not be a resident of the same State as the assignor. In short, where the decisions depart from the general rule they are very discordant and unsatisfactory. Of course, any voluntary deed of assignment sufficiently formal, as between assignor and assignee, will convey the property, be it real property or personal property, wherever it is situated. It is only where creditors contest the rights of the assignee to take the property under the assignment that the difficulties so frequently arise. But it must be kept in mind that if the assignee comes into possession of the property assigned by virtue of the assignment before creditors attach, it makes a very material difference as to the rights of creditors in the enforcing of their claims and demands in opposition to the assignment, even though the assignment contains provisions conflicting with the laws of the State wherein the prop-

9 Ohio, 180; Lamb v. Fries, 2 Pa. 83; Bentley v. Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671; King v. Glass, 73 Iowa, 205; Green v. Gross, 12 Neb. 117; Barth v. Backus, 104 N. Y. 230, 23 L. R. A. 47; Warner v. Jaffray, 96 N. Y. 248, 254, 48 Am. Rep. 616; Tompkins v. Adams, 41 Kas. 38.

18 Moore v. Church, 70 Iowa, 208, 59 Am. Rep. 489; Munson v. Fraser, 73 Iowa, 177; Gardner v. Commercial Nat. Bank, 95 Ill. 298; Tompkins v. Adams, 41 Kas. 88; Bryan v. Brispin, 26 Mo. 423, 72 Am. Dec. 219; Van Winkle v. Armstrong, 41 N. J. Eq. 402.

¹⁴ Heyer v. Alexander, 108 III. 385; Faulkner v. Hyman, 142 Mass. 53, 6 N. E. Rep. 440; Filkins v. Runnemacher, 81 Wis. 91; Kelly v. Crapo, 45 N. Y. 95, 6 Am. Rep. 36; Warner v. Jaffray, 96 N. Y. 248, 254, 48 Am. Rep. 616; Bryan v. Brispin, 26 Mo. 423, 72 Am. Dec. 219.



erty is situated.15 Attachment proceeding is the course generally employed by creditors of an assignor to subject property assigned by him, which is situated in another State, to the payments of their debts against him notwithstanding the assignment, and in the discussion of the questions arising under such proceedings with reference to the residence of the attaching creditors, the creditors have been divided into three classes: First, creditors residing in the State of the assignor in which he makes the assignment; second, creditors residing in another State but in the State in which the property sought to be taken under attachment is situated; third, creditors residing in any other State. With reference to creditors of the first class, it has been "held generally that the assignment will defeat their subsequent attachments of personal property in another State."16 But concerning the creditors of the second class the decisions are not harmonious, but the tendency of the later decisions in most of the States, is to the effect that the voluntary assignment, if sufficiently formal and legal under the laws of the State where made, will be enforced over a subsequent attachment by such creditors in his own State:17 but other States hold that such an assignment will not be enforced over a subsequent attachment to the prejudice of its citizens or where it is contrary to the policy of its local laws.18 And as to the third class of creditors some States make no distinction between them and its own citizens,19 while other States maintain

¹³ Cragin v. Lankin, 7 Allen (Mass.), 895; Hunt v. Lathrop, 7 R. I. 58; Schroder v. Tompkins, 58 Fed. Rep. 672; Whitewright v. Leavitt, 4 La. Ann. 351; Law v. Mills, 18 Pa. 185; Barnett v. Kinney, 147 U. S. 476; Ockerman v. Cross, 54 N. Y. 29; Reynolds v. Adden, 136 U. S. 349.

16 See note to Long v. Forrest, 23 L. R. A. 38, and cases cited; Woodward v. Brooks, 3 L. R. A. 702; Bacon v. Horne, 123 Pa. 452, 2 L. R. A. 355; Mowry v. Crocker, 6 Wis. 326; Train v. Kendall, 137 Mass. 366; Halstead v. Strauss, 32 Fed. Rep. 380; Egbert v. Baker, 58 Conn. 319; Moore v. Bonnell, 31 N. J. L. 90.

¹⁷ Woodward v. Brooks, 3 L. R. A. 702; Whipple v. Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Bacon Horne, 123 Pa. 452, 2 L. R. A. 855.

Woodward v. Brooks (Ill.), 3 L. R. A. 702; Kelly
v. Crapo, 45 N. Y. 86; May v. Wannemacher, 111 Mass.
202. See cases cited in note 7 supra.

19 Catlin v. Wilcox Silver Plate Co., 123 Ind. 477; Sheldon v. Blanvelt, 29 S. C. 453, 1 L. R. A. 685. See eases cited in note 8 supra; Mayberry v. Shisler, 1 Harr. (Del.) 349.

the assignments over their subsequent attachments.20

D. B. VAN SYCKEL.

Kansas City, Kansas.

²⁰ Butler v. Wendell, 57 Mich. 62, 58 Am. Rep. 329. See collection of cases in note to Bacon v. Horne, 2 L. R. A. 355.

INJUNCTION-STRIKES.

HAMILTON-BROWN SHOE CO. V. SAXEY ET AL.

Supreme Court of Missouri, Division No. 1, Nov. 26, 1895.

- 1. A court of equity may interfere by injunction to prevent persons from attempting by intimidation, threats of personal violence, and other unlawful means, to force employees to quit work and join in a "strike."
- 2. While equity will never interfere by injunction to prevent the commission of a crime, it may enjoin an act which threatens irreparable injury to the property of an individual, though such act may also be a violation of a criminal law.

PER CURIAM: This is an appeal from the final judgment of the Circuit Court of the City of St. Louis on a demurrer to the plaintiff's petition, which is as follows: "Plaintiff states that it is a corporation duly organized under the laws of the State of Missouri, and is engaged in the manufacture of shoes in the City of St. Louis, Missouri, at Twenty-first and Locust streets in said city, at which place its factory, for the purpose of its said manufacturing business, is located. And plaintiff says that it has in its employ in said manufacturing business, in its factory as aforesaid, between eight and nine hundred persons; that all of these persons are at work as operatives in some department or other of said factory; that of these employees as aforesaid a large number, to-wit: about two or three hundred, are women and girls, and a large number, to-wit: about two or three hundred, are young persons, many of them not being of age, and the balance of said operatives are adult men; that all of these persons are engaged in earning a livelihood at the business of this plaintiff aforesaid, and on the other hand this plaintiff requires the services of these persons to successfully carry on its business of manufacturing shoes as aforesaid. Plaintiff further states that all of these employees now in the employ of this plaintiff are desirous of continuing in the service of the plaintiff in its said business as aforesaid. Plaintiff further states that ten or fifteen days ago some of its employees, including all the defendants herein, except the defendants Thomas Beaty and P. J. McGarry, went out of the employ of this plaintiff on what is commonly called a 'strike,' claiming to have some grievance against this plaintiff, and which this plaintiff says was without any reasonable ground to rest upon, and thereupon attempted to inaugurate among

the employees of this plaintiff what is commonly called a 'strike;' that thereupon the said defendants, lately employees of this plaintiff, together with the defendants Beaty and McGarry and divers other persons, unlawfully and wrongfully combined and confederated together to terrorize, and thereby, by intimidation and threats, to prevent the other employees of this plaintiff from peaceably or otherwise prosecuting their work in plaintiff's factory; that thereupon all of the defendants hereto, together with their associates and confederates, whose names are at this moment unknown to this plaintiff, began and have constantly pursued in a course of threats of personal violence and intimidation and persuasion, for the purpose, by means of such intimidation and threats and fear, to prevent the other employees of this plaintiff from peaceably or otherwise prosecuting their work in plaintiff's factory; that all of the said defendants hereto, together with divers and sundry other persons, who are their associates and confederates, have constantly hung about the plaintiff's said factory at the place aforesaid, and upon the streets in close proximity, for the purpose of picketing the premises of this plaintiff, and by putting the employees of this plaintiff in fear of bodily injury, to thereby keep them from continuing their employment with this plaintiff, and also for the purpose of preventing other persons from entering the employ of the plaintiff; and the said defendants and their associates and confederates, as a part of their policy of threats and intimidation, and for the purpose of carrying on their unlawful combination, have gone to the homes of divers of the employees of this plaintiff at nighttime, and then and there undertaken to induce, by persuasion and by intimidation and threats, the employees of this plaintiff from further prosecuting their work in plaintiff's said factory. And the plaintiff charges that the said defendants therein named, and their associates and confederates, for a number of days, by the use of threats and personal violence, intimidation and other unlawful means, have been, and are now, undertaking to prevent the employees of this plaintiff from prosecuting their ordinary work, and are endeavoring to induce them, by the unlawful means aforesaid, to quit the employment of this plaintiff. And plaintiff says that by reason of the fact that a great many of its employees are women and girls and young persons, that the defendants aforesaid and their associates and confederates have succeeded in exciting in the minds of the plaintiff's said employees, or many of them, lear for their bodily safety, to such an extent that they cannot happily, as they have a right to do, prosecute their ordinary work; and plaintiff says, by reason of the premises, it cannot peaceably and successfully prosecute its said business. And plaintiff says it is without remedy at law, and can only be fully protected and relieved in a court of equity. Plaintiff therefore prays that the defendants, their associates and confederates, be enjoined by a temporary order of injunction, to be made

final upon the hearing of this cause, issued out of this court, from in any manner interfering with the employees of this plaintiff now in the employ of the plaintiff, and from in any manner interfering with any person who may desire to enter the employ of this plaintiff, by the use of threats, personal violence, intimidation, or other means calculated to terrorize or alarm the plaintiff's employees, in any manner or form whatever, and that said defendants and their associates and confederates aforesaid be restrained by the order of this court from undertaking, by the use of the means aforesaid, to induce or to cause any of the employees of this plaintiff to quit the employment of this plaintiff, and that the defendants aforesaid and their associates and confederates be enjoined from congregating or loitering about the premises of this plaintiff at the place aforesaid, and that they be required by the injunction of this court to go about their ordinary business, and to abstain from in any way interfering with the business of this plaintiff, and for such other and further and general relief as may to the court appear proper in the premises."

The case was tried before the Hon. L. B. Valliant, one of the judges of that court, who, on overruling the demurrer, delivered the following opinion:

"The amended petition states in substance that the plaintiff conducts a large shoe manufactory in this city, and has in its employ some eight or nine hundred persons, all of whom are earning their living in plaintiff's employment, and are desirous of so continuing; that the defendants, except two of them, were lately in plaintiff's employ, but have gone out of the same on a strike, and are now, with the other two defendants, engaged in an attempt to force the other employees of plaintiff to quit their work and join in the strike, and that to accomplish this purpose they are intimidating them with threats of personal violence; that among the plaintiff's employees who are thus threatened are about three hundred women and girls and two or three hundred other young persons; that the effect of all this on the plaintiff's business, if the defendants are allowed to proceed, would be to inflict incalculable damage. Upon filing this amended petition, and the plaintiff's giving bond as required by law, a temporary injunction issued, restraining the defendants from attempting to force the plaintiff's employees to leave their work by intimidation and threats of violence, or from assembling for that purpose in the vicinity of plaintiff's factory. The defendants have appeared by their counsel, and by their demurrer filed admit that all the statements of the amended petition are true; but they take the position that, even if they are doing the unlawful acts that they are charged with doing, still this court has no right to interfere with them, because they say that what they are doing is a crime, by the State law of this State, and that for the commission of a crime they can only be tried by a jury in a court having criminal

jurisdiction. It will be observed that the defendants do not claim to have the right to do what the injunction forbids them doing. Their learned counsel even quotes the statute to show that it is a crime to do so. But he contends that the constitution of the United States and the constitution of the State of Missouri guaranty them the right to commit crime, with only this limitation, towit: that they shall answer for the crime, when committed, in a criminal court, before a jury, and that to restrain them from committing crime is to rob them of their constitutional right of trial by jury. If that position be correct, then there can be no valid statute to prevent crime. But that position is contrary to all reason. The right of trial by jury does not arise until the party is accused of having already committed the crime. If you see a man advancing upon another with murderous demeanor and a deadly weapon, and you arrest him-disarm him-you have perhaps prevented an act which would have brought about a trial by jury, but can you be said to have deprived him of his constitutional right of trial by jury? The train of thought put in motion by the argument of the learned counsel for defendants on this point leads only to this end, to-wit: that the constitution guaranties to every man the right to commit crime, so that he may enjoy the inestimable right of trial by jury.

"Passing now to the question relating to the particular jurisdiction of a court of equity, we are brought to face the proposition that a court of equity has no criminal jurisdiction, and will not interfere by injunction to prevent the commission of a crime. These two propositions are firmly established; and as to the first, that a court of equity has no criminal jurisdiction, there is no exception. As to the second, that a court of equity will not interfere by injunction to prevent the commission of a crime, that, too, is perhaps without exception, when properly interpreted, but it is sometimes misinterpreted. When we say that a court of equity will never interfere by injunction to prevent the commission of a crime, we mean that it will not do so simply for the purpose of preventing a violation of a criminal law. But when the act complained of threatens an irreparable injury to the property of an individual a court of equity will interfere to prevent that injury, notwithstanding the act may also be a violation of a criminal law. In such case the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case. On this question counsel have cited cases in which courts of equity have been denied jurisdiction to enjoin the publication of a libel, and in those opinions are to be found the general statement of the proposition above mentioned. But the law of libel is peculiar, and those cases turn upon that peculiarity. The freedom of the press has been

so jealously guarded both in England and in this country that our law of libel is like no other law on the books. Our constitution provides that a man may, say, write, and publish 'whatever he will,' being answerable only for the 'abuse of liberty.' Libel is the only act injurious to the rights of another which a man cannot, under proper conditions, be restrained from committing; and that is so because the constitution says he shall be allowed to do it, and answer for it afterwards. Equity will not interfere when there is an adequate remedy at law. But what remedy does the law afford that would be adequate to the plaintiff's injury? How would their damages be estimated? How compensated? The defendants' learned counsel cites us to the criminal statute, but how will that remedy the plaintiff's injury? A criminal prosecution does not propose to remedy a private wrong. And, even if there was a statute giving a legal remedy to plaintiff, it would not oust the equity jurisdiction. The legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy. humiliating thought it would be if these defendants were really attempting to do what the amended petition charges, and what their demurrer confesses-that is, to destroy the business of these plaintiffs, and to force the eight or nine hundred men, women, boys, and girls who are earning their livings in plaintiff's employ to quit their work against their will-and yet there is no law in the land to protect them. The injunction in this case does not hinder the defendants doing anything that they claim they have a right to do. They are free men, and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quiting is wise or unwise, just or unjust, it is nobody's business but their own. And they have a right to use fair persuasion to induce others to join them in their quitting. But when fair persuasion is exhausted they have no right to resort to force or threats of violence. The law will protect their freedom and their rights, but it will not permit them to destroy its freedom and rights of others. The same law which guaranties the defendants in their right to quit the employment of the plaintiffs at their own will and pleasure also guaranties the other employees the right to remain at their will and pleasure. These defendants are their own masters, but they are not the masters of the other employees, and not only are they not the masters of the other employees, but they are not even their guardians. There is a maxim of our law to the effect that one may exercise his own right as he pleases, provided that he does not thereby prevent another exercising his right as he pleases. This maxim or rule of law comes nearer than any other rule in our law to the golden rule of Divine authority: 'That which you would have another do unto you,

do you even so unto them.' Whilst the strict enforcement of the golden rule is beyond the mandate of human tribunal, yet courts of equity, by injunction, do restrain men who are so disposed from so exercising their own rights as to destroy the rights of others. The demurrer to the amended petition is overruled."

The law applicable to the case is so clearly stated in this opinion of the learned judge that to add anything to it would be a work of supererogation. We adopt it as the opinion of this court, and affirm the judgment. All concur.

NOTE .- Though the principles governing the application of the writ of injunction to cases of this character are very clearly stated by the court in the principal case, no cases are cited on the subject. Cases of this character are of modern instance and develop-Within recent years they have become more frequent. The display of banners with devices as a mode of threats and intimidation to prevent persons from entering into or continuing in the employment of the person in front of whose premises the banners were displayed, has been enjoined by the Supreme Court of Massachusetts in a somewhat recent case as an unlawful act, injurious to business and property, and a nuisance against which a court of equity should grant relief. Sherry v. Perkins, 147 Mass. 212, 9 Amer. St. Rep. 689. So an injunction was allowed in Springfield Spinning Co. v. Riley, L. R. 6 Eq. 551, a case presenting facts similar to the case last cited. Injunction has been granted against a labor organization which had instituted a boycott against a newspaper, and which was attempting to drive away business from it by threatening its subscribers and advertisers with a boycott in case they continued their patronage. Casey v. Typographical Union, 45 Fed. Rep. 135. But in Rogers v. Evarts, 17 N. Y. Supp. 264, the Supreme Court of New York denied an injunction to restrain the publishers of a newspaper from advising and encouraging persons in the employ of others to violate their contracts of employment. It was held, also, that an injunction would not issue to restrain workmen from combining and persuading peaceably and without intimidation fellow-workmen to leave their employers for the purpose of compelling a raise of wages. Members of a union have been enjoined from intimidating workmen and thereby preventing them from continuing in the employ of the applicant for the injunction. Cœur d'Alene Consolidated Min. Co. v. Miners' Union, 51 Fed. Rep. 260. In Mogul Steamship Co. v. McGregor, 15 Q. B. Div. 476, it was sought to restrain certain persons from sending out circulars or documents to the effect that if the parties receiving them dealt with plaintiffs the defendants would cease to trade with them. An injunction was refused on the ground that the injury was not irreparable. In Johnston Harvester Co. v. Meinhardt, 9 Abb. N. Cas. (N. Y.) 893, it was held that an injunction should not be granted against a confederation of persons whose object was to entice away employees, where there was not sufficient evidence that violence, force or intimidation were intended against the employees. In New York, etc. R. Co. v. Wenger, 17 Weekly Law Bull. 806, an injunction was granted to restrain a trespass by discharged employees on strike. The Supreme Court of Pennsylvania held that an injunction will lie to restrain persons from attempting by force, menaces or threats to prevent workmen from working on such terms as they may agree on with any employer. Murdock v. Walker, 25 Atl. Rep. 492.

Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination pendente lite. Hagan v. Blindell (U. S. C. C. of App.), 56 Fed. Rep. 696, 6 C. C. A. 86. A trade union against whose members plaintiff discriminates in employing labor, will not be enjoined from sending circulars to plaintiff's customers to induce them to withdraw their custom from plaintiff as long as such discrimination continues, where defendants are not guilty of any violence or injury to property or intimidation. Sinsheimer v. United Garment Workers of America, 26 N. Y. S. 152, 5 Misc. Rep. 448; reversed in 28 N. Y. S. 321, 77 Hun, 215. Because the proprietor of a daily newspaper used plate matter in making up its forms, contrary to a resolution of the local typographical union, of which the employees were members, some of the employees left his employment, withdrew the union's indorsement of the paper and reported the matter to the trades' council, in which several trades' unions affiliated, the whole comprising a body of operatives in the county of a purchasing capacity of \$400,000 a week: Held, that the trades council would be restrained from issuing circulars calling on the members of the several unions and the public to cease buying and advertising in the paper. Barr v. Essex Trades Council (N. J. Ch.), 80 Atl. Rep. 881. An employer is not entitled to an injunction against striking employees for inducing others, by entreaty and persussion, to leave his employment, where no intimidation is used. Reynolds v. Everett (N. Y. App.), 89 N. E. Rep. 72, 144 N. Y. 189. Another late case of interest on the general subject of the legal rights of capital and labor is Longshore Printing & Pub. Co. v. Howell, 88 Pac. Rep. 547, 40 Cent. L. J. 245. points there decided, succinctly stated, are as follows: That a strike is not illegal per se; that where a trade's union seeks by fair means to compel an employer of its members to observe one of its lawful rules, it cannot be restrained therefrom upon the ground that its object in enforcing the rule is to create a monopoly of labor in that particular trade; that a statute which makes it a misdemeanor for one by force, threats or intimidation to prevent an employee from continuing or performing his work, does not make it unlawful for a trade's union, by resolution or order of its executive committee, to require its members, under pain of suspension or expulsion from the union, to quit a person's employ because of his violation of a lawful rule of the union; that a conspiracy to injure or destroy a person's business or property is wrongful per se, although not indictable under the statute; and that where persons conspire to injure or destroy another's business or property, and it clearly appears that the injury is threatened and imminent, and will be irreparable, injunction will lie to restrain the conspirators.

Within recent months judges of the federal courts have asserted the applicability of the writ of injunction to restrain railway employees from committing acts of violence or intimidation, and from enforcing rules and regulations of labor organizations which, if carried out, would result in irremediable injury to the railway corporations and to the public. Toledo, etc. R. Co. v. Penn. Co., 53 Amer. & Eng. R. Cas. 293, 24 Amer. & Eng. Encyclopedia of Law, 136, 54 Fed.

Rep. 780, 53 Amer. & Eng. R. Cas. 307; Arthur v. Oakes (C. C. A.), 63 Fed. Rep. 810. But such cases are grounded principally upon the injury to the pub-A late opinion by Judge Holmes, of the Massachusetts Supreme Court (Walker v. Cronin, 107 Mass. 555), on the subject of the right of strikers to exercise "persuasion, advice and social pressure," has created considerable comment, the position being taken by that eminent judge that the general rule applicable to injunction against combinations of strikers applies only to interference for pure mischief or for harm's sake. Interference for a good purpose, such as to compel a man to accept the strikers' schedule of wages, would be justifiable, in his opinion, though he admits that the weight of judicial opinion is the other way. See editorial reviews of this decision in 40 Cent. L. J. 507, 41 Cent. L. J. 337.

CORRESPONDENCE.

LIEN OF JUDGMENT APPEALED FROM AND DIS-MISSED.

To the Editor of the Central Law Journal:

In answer to O. M. B. in correspondence in Cent. L. J. of Vol. 41, p. 477, I will say that the cases of Robideau v. Ewing, et. al. 5 Bikt. 552, and State ex rel. Cory v. Brewer, et. al. 64 Ind. p. 182, the first of which is in point.

J. W. T.

A QUESTION OF EVIDENCE.

To the Editor of the Central Law Journal:

An Indiana court has just decided a question of evidence that may be of interest to the profession. In an action for personal injuries, the plaintiff, Mrs. A, testified that she, in walking along a certain street after dark, fell over an exposed and unguarded water pipe in the line of the sidewalk; that she was pregnant at the time and in consequence of her fail suffered a miscarriage. It was proved by her medical attendant that as a result of the accident, she sustained permanent injuries and that the operation of ovariotomy was necessary. The defendant, under the general denial which had been pleaded as an answer, introduced four witnesses who testified that, in different conversations, the plaintiff had stated to three of them, that some months after the accident and after she had her first miscarriage, that she had twice become pregnant and both times had produced an abortion upon herself. The fourth witness testified that the plaintiff had stated that she had hurt herself by lifting a heavy flower pot. The plaintiff went on the stand and denied that she had ever had any of these conversations. Her counsel then offered to prove by her and by her physician who was in constant attendance upon her, that she never had but the one miscarriage. They also offered to prove by her physician that he examined the plaintiff once or oftener every week from the time of her accident, until the time of the trial; that he had full opportunity to know whether she could have had a second or third miscarriage, and that he was positive that she had not had any such subsequent miscarriages. The offer was also made to prove by the plaintiff that she never, at any time, lifted a flower pot. The court rejected all of this testimony, upon the ground that while the plaintiff had the right to deny the conversations, she did not have the right to prove either by her own or independent testimony that the facts sought to be established by the admissions proved against her were

untrue. The plaintiff's position was, that she was not confined to a denial that she made the admission, but that since the admission was offered in order to prove that she herself had either caused or aggravated the injuries for which she sought damages, she had the right to controvert the facts, for the proof of which, the admissions against her were offered in evidence. The plaintiff, under the ruling of the court, had four witnesses against her to prove the fact that the admissions were made, but it was within her power to prove with absolute certainty, the falsity of the facts implied in the admissions, had she been permitted to do so. I have been unable to find any other court that has ever held this to be the law. Can you cite me to any authority which will uphold this ruling?

SUBSCRIBER.

EJECTMENT-DIVORCE-QUERY.

To the Editor of the Central Law Journal:

A and B are husband and wife and live in property purchased by A, the husband, after marriage. They separated A going to the State of Nebrasks, leaving his wife in possession of the property. A got a divorce from B in the State of Nebraska, service being had by publication and of which proceedings B knew nothing although A knew where B resided. A, after getting the divorce, came back to Missouri and institutes ejectment proceedings to eject B out of the property. A deserted B and she has maintained herself since the separation. Now has B any defense to the ejectment proceedings? Has she any rights or interest in the property in Missouri?

J. C. H.

MORTGAGE-NOTICE.

To the Editor of the Central Law Journal:

A the owner of real estate in fee simple executes a mortgage on the same to B; the amount being for \$1,500 which is duly recorded, etc. B pays A \$1,000 of the amount. Then A executes a mortgage on same property to C for \$500 which is duly recorded and the entire amount paid over by C to A. B some time after this who has actual as well as constructive notice of C's mortgage pays the balance of the \$1,500 to "A." Has B a first lien for \$1,500 or only for a \$1,000?

E. H. A.

JETSAM AND FLOTSAM.

DIVORCE IN SOUTH CAROLINA.

South Carolina may be weak in the matter of just treatment of the blacks, and tender towards white rascals who carry elections by fraud, but it is firm as a rock in defense of the sanctity of the marriage relation. From the earliest times public sentiment in that State has looked upon the idea of divorce with abhorrence, and except for the brief period of reconstruction rule the courts have never enjoyed any power to dissolve a marriage. The convention now sitting at Columbia has decided to maintain the ancient rigor unimpaired, adopting a clause for the new constitution which expressly provides that "no divorce shall be granted in South Carolina for any cause whatsoever;" while the sentiment was clearly expressed that the State will not recognize divorces granted in other States, except in so far as she is compelled by the constitution of the United States. Tillman was ready to let down the bars so far as to permit the granting of divorces under certain circumstances, and he also offered an amendment providing for the recognition of divorces granted in other States,

but this proposition was defeated by an almost two-to-one vote, and the boss of the State found that even his power was not great enough to overcome a sentiment that has generations of tradition behind it.— New York Nation.

LACHES AND ACQUIESCENCE.

Laches are often a defense, wholly independent of the statute of limitations, says the U. S. Supreme Court, in a late case, adopting the text of Pomeroy, Eq. Jur., Vol. 2, Sec. 817, as aptly expressed:

"Acquiescence in the wrongful conduct of another by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of quasi estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone. In order that this effect may be produced the acquiescence must be with knowledge of the wrongful acts themselves and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him, after he has been suffered to go unmolested, and his conduct apparently acquiesced in. It follows that what will amount to a sufficient acquiescence in any particular case, must largely depend upon its own special circumstances. The equitable remedy to which this quasi estoppel by acquiescence most frequently applies, is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with easements, from committing nuisances, from trespasses, or other like acts in derogation of the plaintiff's proprietary rights. This effect of delay is subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no strict legal right. Where an injunction is asked in support of a strict legal right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself. The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction and the like. Upon obtaining knowledge of the facts, he should commence the proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief."

The same principle also appears, as applied in Herr v. Payson, which was a case on constructive trust (Attorney & Client). The principle upon which this ground of defense rests has often been vindicated and applied by the courts in cases where relief would have been swiftly administered at an earlier stage of the controversy. However reluctant courts may feel to make the application in exceptional cases, the principle is too valuable ever to be cast aside.—National Corporation Reporter.

BOOKS RECEIVED.

American Railroad and Corporation Reports. Being a collection of the current decisions of the courts of last resort in the United States pertaining to

the law of railroads, private and municipal corporations, including the law of insurance, banking, carriers, telegraph and telephone companies, building and loan associations, etc., etc. Edited and annotated by John Lewis, author of "A Treatise on Eminent Domain in the United States." Volume XI. Chicago: E. B. Myers & Company, Law Publishers. 1896.

Commentaries on the Constitution of the United States,
Historical and Judicial, with observations upon
the ordinary provisions of State constitutions and
a comparison with the constitutions of other countries. By Roger Foster, of the New York Bar,
author of "A Treatise on Federal Practice,"
"Trial by Newspaper," etc., and lecturer on Federal Jurisprudence at the Law School of Yale
University. Volume I. Boston: The Boston
Book Company. 1895.

The American State Reports, containing the cases of general value and authority, subsequent to those contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several States. Selected, reported and annotated by A. C. Freeman and the associate editors of the "American Decisions." Volume XLV. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1895.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except these that are Published in Full or Commented upon in our Notes of Recont Decisions.

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1. ABSTRACTOR OF TITLE — Liability for Defects.—An abstractor, who furnishes an abstract to a landowner, to be used by him in borrowing money, to be secured by a mortgage on the land, is not liable for mistakes in the abstract to an assignee of the mortgage negotiated, though the assignee, in buying the mortgage, relied wholly on the abstract for the title to the land.—TALPEY V. WRIGHT, Ark., 32 S. W. Rep. 1072.

2. ADMINISTRATION — Action against Administrator— Heirs as Parties.—Heirs have no right to make themselves parties to an action on account against the administrator, though they allege collusion between plaintiff and the administrator.—BYRD v. BYRD, N. Car., 28 8. E. Rep. 824.

- 8. ADMIRALIT Maritime Liens State Statutes.— Liens given by State statutes for supplies furnished in the home port may be enforced in the federal courts, and are entitled to priority over a previously recorded mortgage; but they are subject to the conditions imposed by the State statute, and must be enforced within the statutory limit of time.—The H. N. EMILLE, U. S. D. C. (Minn.), 70 Fed. Rep. 511.
- 4. ADMINISTRATION Rights of Widow.—Where a widow leases a part of the mansion house she is entitled to the rents until assignment of her dower.—FLYNN V. O'MALLEY, N. J., 88 Atl. Rep. 402.
- 5. ADMIRALTY—Injuries to Seamen on Foreign Ships.

 —A United States court sitting in admiralty has full jurisdiction of a libel filed by a seaman, who is an American citizen, to recover damages for personal injuries caused by cruel treatment while engaged as a seaman on board a foreign vessel.—BOLDEN V. JENSEN, U. S. D. C. (Wash.), 70 Fed. Rep. 505.
- 6. ADVERSE POSSESSION Extent Ouster.—Where the grantee in a deed of vacant land, to which the grantor had no title, takes actual possession of a part of the land, claiming the whole of it, his possession is adverse as to the whole tract, and is not limited to the part of which he has actual possession.—STULL v. RICH PATCH IRON CO., Va., 28 S. E. Rep. 298.
- 7. ALTERATION OF NOTE—Effect of.—The alteration of a note by the payee, so as to make it bear interest from date instead of maturity, does not cancel the debt for which it was given, where the payee's purpose was to make the note conform to the intention of the parties when it was given, and he believed he had the right to so alter it.—OTTO v. HALFF, Tex., 32 S. W. Rep. 1052.
- 8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Marshaling of Assets.—The doctrine of marshaling assets applies where one of the creditors in a general deed of assignment for the whole amount of his debt has a prior security on a piece of property which is also conveyed by such deed.—Winston v. Biggs, N. C., 23 S. E. Rep. 316.
- 9. ASSIGNMENT FOR CREDITORS—Registration of Deed.
 —Under Acts 1893, ch. 458, requiring schedule of preferred debts to be filed within five days after "registration" of deed of assignment for creditors, time for filing schedule commences to run from date of filing deed for registration, irrespective of the actual registration.
 —GLANTON v. JACOBS, N. C., 23 S. E. Rep. 835.
- 10. ATTACHMENT—Plea in Abatement—Waiver.—In an action aided by attachment, a plea in abatement of the attachment is not waived by the subsequent filing of an answer to the merits of the action.—B. F. COOMBS & BRO. COMMISSION CO. V. BLOCK, Mo., 32 S. W. Rep. 1189.
- 11. ATTACHMENT—Tax Books in Sheriff's Hands.—Tax books in the hands of a sheriff for collection are not subject to attachment by a personal creditor of that officer, though the amounts to be collected are debts due the sheriff personally, he having previously settled his taxes with the proper authorities.—Davie v. Blackburn, N. Car., 23 S. E. Rep. 821.
- 12. ATTORNEY'S SERVICES—Liability of Trustee.—T was employed by the trustee of certain bondholders to render professional services as counsel, which were useful and beneficial to the trust estate. The trustee did not stipulate against a personal liability, nor did such trustee profess or undertake to create any lien on the trust estate for such services, and the trustee was not insolvent: Held, that T must look to the trustee for compensation for his services, and not to the beneficiaries of the trust estate.—TRUESDALE V. PHILADELPHIA TRUST, SAFE DEPOSIT & INSURANCE Co., Minn., 65 N. W. Rep. 133.
- 13. BANKS-Insolvency.—Where a mortgage is sent to a bank for collection, with direction to remit, the

- relation of creditor and debtor is not established between the sender and the bank, where the latter fails to remit, and therefore, on the insolvency of the bank, a trust will be imposed on its assets in favor of the the sender, as against general creditors of the bank.—WALLACE V. STONE, Mich., 65 N. W. Rep. 118.
- 14. Bastardy—Justices of the Peace.—Code, § 81, expressly confers upon justices of the peace jurisdiction to try bastardy cases commenced by the voluntary affidavit of the mother.—State v. Mize, N. Car., 28 S. E. Rep. 880.
- 15. BUILDING ASSOCIATIONS—Foreclosure.—A building association cannot, on a complaint against a member to recover the principal and interest due on his note, and to foreclose the mortgage securing it, recover an alleged assessment against his stock, though a mortgage provision that all indebtedness due in connection with the stock or loan shall be included in the judgment of foreclosure is alleged.—CUMMINGS V. CITIZENS' BUILDING, LOAN & SAVINGS AS.'N, Ind., 42 N. E. Rep. 213.
- 16. CHATTEL MORTGAGE Recording Priorities.—
 The title of a bona fide purchaser of personalty is superior to the ciaim of a person based on a prior agreement of the vendor giving him a lien thereon by deed of trust.—Braxton v. Bell, Va., 28 S. E. Rep. 289.
- 17. CONSTITUTIONAL LAW—Taxation.—Held that section 25, ch. 286, Laws 1889 and sections 34, 85, ch. 181, Laws 1891 are unconstitutional, for they exempt from taxation in this State a substantial portion of the personal property of building and loan associations doing business within and without this State, contrary to the provisions of section 3, art. 9, of the constitution.—STATE V. PIONEER SAVINGS & LOAN CO., Minn., 64 N. W. Rep. 188.
- 18. CONTRACTS—Parol Evidence. Defendants contracted with a railroad company to do the masonry work for a bridge, the contract providing that all materials should be subject to the approval of the engineer of the company. Defendants sublet the contract to plaintiff, the contract providing that the work should be done according to the specifications in the contract with the railroad company, and to the satisfaction of its engineer: Held, that plaintiff could not set up an antecedent verbal agreement between defendants, himself, and the engineer, as to the quality of stone to be used, as a standard to determine whether he had complied with his contract.—Jones v. RISLEY, Tex., 32 8. W. Rep. 1027.
- 19. CONTRACT—Sale.—A contract for the consignment of goods "f. o. b. Wallingford, Conn.," to a Chicago merchant, implies that the consignee shall pay the freight from Wallingford to Chicago.—KNAPP ELECTRICAL WORKS V. NEW YORK INSULATED WIRE CO., Ill., 42 N. E. Rep. 147.
- 20. CONTRACT OF SURETYSHIP—Consideration.—Equity will not relieve a principal or surety from liability on an instrument under seal, merely for want of consideration, when no consideration was contemplated by the parties.—MEEK v. FRANTZ, Penn., 33 Atl. Rep. 418.
- 21. CONTRACT TO EXTEND TIME OF PAYMENT.—Where, for a valuable consideration, a creditor has agreed with his debtor to postpone and extend the time for payment, so that the debt shall be payable from time to time, in installments, an action to recover the entire indebtedness cannot be maintained, notwithstanding the debtor has wholly failed to pay as the installments full due, until the amount of the last installment is due. Such an action would be prematurely brought as to installments not yet payable, according to the terms of the agreement for an extension.—NAPA VAL. WINE CO. V. DAUBNER, Minn., 64 N. W. Rep. 143.
- 22. CORPORATION Consolidation Railroad Companies.—An attempt at the organization of a consolidated railroad company of two other companies, one a domestic and the other a foreign corporation, in the absence of a statutory provision for such consolidation, does not create a corporation de facto, since corporations de facto can only exist where there is a law

under which they could be incorporated.—AMERICAN LOAN & TRUST CO. v. MINNESOTA & N. W. R. Co., Ill., 42 N. E. Rep. 153.

- 22. CORPORATION—Corporate Charter—Receivers.—A judgment of a State court forfeiting the charter of a corporation does not affect the rights of a receiver of such corporation, who was previously appointed by the federal court; and he may sell the corporate property, apply the proceeds to the payment of corporate debts, and distribute the surplus, if any, among the stockholders.—City Water Co. v. State, Tex., 32 S. W. Rep. 1083.
- 24. CORPORATIONS—Dissolution—Title of Receiver.—
 The legal effect of the appointment of a receiver of a
 corporation, in proceedings by the attorney general
 for its dissolution, under the statute of Wisconsin is to
 invest such receiver with full title to all the property
 and effects of the corporation, wherever they may be
 found, whether within or without the jurisdiction of
 the court appointing the receiver.—American Nat.
 Bane of Denver v. National Benefit & Casualty Co.,
 U. S. C. C. (Colo.), 70 Fed. Rep. 420.
- 23. CORPORATION—Foreign Corporations.—The single act of making a loan, and taking notes and mortgages to secure it, in Alabama, by a foreign corporation,—the mortgage being on land situated in said State,—is the doing of business, within the inhibition of Const. art. 14, § 4, which provides that "no foreign corporation shell do any business in this State without having at least one known place of business, and an authorized agent or agents therein."—STATE v. BRISTOL 64v. BANK, Ala., 18 South. Rep. 538.
- 28. CORPORATIONS—Insolvency Evidence.—Though the liabilities of a corporation greatly exceed its assets, it is not insolvent in the sense that its assets become a trust fund for pro rata distribution among its creditors, unless there is some positive act of insolvency, such as permanent cessation from business, the making of a general assignment, or the filing of a bill to administer its assets.—Tradesman Pub. Co. v. Keoxville Car-where Co., Tenn., 32 S. W. Rep. 1097.
- 77. CORPORATION—Service of Process.—A judgment by default against a corporation, founded on the service of process in another county than that in which the suit is instituted, on an officer of the corporation, is void where process was not served more than ten days before its return day, as required by Code 1887, \$227.—STAUNTON PERPETUAL BUILDING & LOAN CO. v. HADER, Va., 23 S. E. Rep. 285.
- 23. CORPORATIONS—Subscriptions—Contract.—A business corporation may subscribe money in consideration of securing the location of a post office near its place of business.—B. S. GREEN CO. V. BLODGETT, Ill., 42 N. E. Rep. 176.
- 29. COVENANT—Construction.—A covenant in a deed recited that the grantors "will warrant specially the land hereby conveyed; that they have the right to convey the said land to the said grantees; that the said grantees shall have quiet possession thereof, free from all incumbrances; that they shall execute such further assurances of said land as may be requisite; and that they have done no act to incumber the same:" Held, that the word "specially" governs all the succeeding covenants.—ALLEMONG V. GRAY'S ADM'R, Va., 23 S. E. Rep. 298.
- . 30. CRIMINAL EVIDENCE—Confessions.—The fact of a confession having been made under excitement, and while in a state of great nervousness, does not deprive it of the character of a voluntary statement. Nor is it deprived of that character solely for the reason that it was made to the jailor while he was in close confinement.—State v. Johes, La., 18 South. Rep. 515.
- \$1. CRIMINAL EVIDENCE—Homicide—Instructions.— Evidence of threats by deceased to commit suicide, quaecompanied by any attempt at the time to carry them into execution, are inadmissible unless dying declarations, or a part of the res gests.—STATE V. FITZ-GERALD, Mo., \$2 S. W. Rep. 1118.

- 32. ORIMINAL LAW—Abduction for Purposes of Concubinage.—Under Rev. Stat. 1889, § 3484, providing for the punishment of "any person who shall take away any female under the age of 18 from her father for the purposes of concubinage," defendant may be convicted though the female was previously unchaste.—STATE v. BOBBST, Mo., 32 S. W. Rep. 1149.
- 83. CRIMINAL LAW—Arson—Alibi.—In a criminal case, where the defense was an alibi, it was error to refuse to charge that the State must show the presence of defendant at the time and place of the alleged commission of the crime, and if the jury believe defendant's evidence sufficient to raise a reasonable doubt, or if the State's evidence is so defective as to raise a reasonable doubt, or if, taking the whole evidence on the question of alibi, there is a reasonable doubt of defendant's guilt, they should acquit.—STATE v. HARVEY, Mo., 32 S. W. Rep. 1111.
- 34. ORIMINAL LAW—Arson—Ownership of Bridge.—
 Though the bridge purchased by St. 1872, ch. 181, was
 laid out as a public highway, and the care thereof
 given to certain cities, a county, by reason of its payment of one half the cost and expenses for maintenance thereof, had such a special property therein as
 would support an allegation of ownership in an indictment for the burning thereof.—COMMONWEALTH V.
 FITZGERALD, Mass., 42 N. E. Rep. 119.
- 85. CRIMINAL LAW—Burglary.—St. Ky., § 1162, provides that if any person "break any dwelling-house or any part thereof, or any outhouse belonging to or used with any dwelling-house," etc., he shail be punished as prescribed therein: Held, that an indictment under such statute is not supported by evidence that defendant broke and entered a barn used for storing corn, wheat and tobacco, which was located 800 yards from the dwelling-house and in a different inclosure.—Whalen v. Commonwealth, Ky., 32 S. W. Rep. 1995.
- 86. CRIMINAL LAW—Carrying Weapons.—One charged with carrying a pistol at a political meeting in his own county, is not shown to be within the provision of the statute that the prohibition against carrying weapons shall not apply to "travelers," by evidence that three or four days before he borrowed a pistol to carry with him on a visit to his brother in an adjoining county, it not appearing that he was en route to or from his brother.—BROWNLEE V. STATE, Tex., 31 S. W. Rep. 1048.
- 87. CRIMINAL LAW Clubrooms Gaming House. Rooms used for gambling by a club and such other persons as the members invite is a common gaming house.—Commonwealth v. Blankinship, Mass., 42 N. E. Rep. 115.
- 88. CRIMINAL LAW-Diseased Meat.—An information under Rev. Stat. 1894, § 2164 (Rev. Stat. 1881, § 2070), making it a penal offense for anyone to have in his possession, with intent to sell, the meat of any diseased animal, which alleges that defendant unlawfully and knowingly had such meat in his possession, with intent to sell, sufficiently charges defendant with knowledge that the meat was diseased.—Brown v. State, Ind., 42 N. E. Rep. 244.
- 89. CRIMINAL LAW—Forgery—Indictment.—An indictment that defendant forged a check, and, with intent to defraud one C, offered him the check in payment for goods, does not charge two crimes, within Code Cr. Proc. §§ 278, 279, providing that an indictment must charge but one crime, except it may charge, in separate counts, the crime to have been committed in different ways.—PBOPLE V. ALTMAN, N. Y., 42 N. E. 180.
- 40. CRIMINAL LAW—Forgery—Indictment.—An indictment charged defendant with having in his possession, with intent to use it as a bill of sale to protect himself from a charge of theft, the following written instrument: "Sulphur Springs, July 8, 1895. This is to certify that I have sold and delivered one bay mare, sold by J C, sold to J F E. Witnesses: W O F, O W H: Held, that a motion to quash the indictment, on the ground that the instrument was on its face insuffine.

cient as a bill of sale, was properly denied.—ELKIMS V. STATE, Tex., 32 S. W. Rep. 1047.

- 41. CRIMINAL LAW—Misconduct of Jury.—In a capital case, when the jury separate, and some are out of sight and out of hearing of the remainder, unattended by an officer, a verdict of guilty will be set aside and new trial granted.—STATE'v. Moss, La., 18 South. Rep. 507.
- 42. CRIMINAL LAW—Persons Fleeing from Justice.—To constitute "fleeing from justice," within the meaning of Rev. Stat. § 1045, providing that the three years limitation, fixed by the previous sections, for a prosecution for a criminal offense, shall not apply to one so fleeing, an intent to avoid the justice of the United States is not necessary, an intent to avoid the justice of the State having criminal jurisdiction over the same territory and the same act being sufficient.—STEREFY. UNITED STATES, U. S. S. C., 16 S. C. Rep. 244.
- 43. CRIMINAL LAW—Receiving Stolen Property.—On a prosecution for receiving stolen property, instituted in the county where the theft was committed, it need not be proved that defendant received the property in such county.—BONNER V. STATE, Tex., 52 S. W. Rep. 1048.
- 44. DEATH BY WRONGFUL ACT—Intoxication of Decedent.—In an action for death by wrongful act, evidence of habitual drunkenness of decedent is admissible in mitigation of damages.—WRIGHT V. CITY OF CRAWFORDSVILLE, Ind., 42 N. E. Rep. 227.
- 45. DEED—Names—Identity of Grantee.—Where land was occupied jointly by both father and son, of the same name, the presumption that a patent for the land to a man of that name is intended for the father, may be rebutted by proof that neither the father nor his wife ever claimed any interest in the land, and that the son, for many years after their deaths, continued to treat the land as his, without objection on the part of his brothers and sisters.—Doty v. Doty, Iil., 42 N. E. Red. 174.
- 46. DEED OF MINERALS Construction.—A deed of "mineral ores" does not include granite.—ARMSTRONG V. LAKE CHAMPLAIN GRANITE CO., N. Y., 43 N. E. Rep. 186.
- 47. EASEMENT—Right to Carriage Way.—Where the commissioners in partition gave defendant a right of way in "a passage way six feet wide" over plaintiff's land, defendant had no right to use the same for a carriage way, in the absence of evidence that it had been used for that purpose before partition, or that after partition the parties had actually held it in that manner; and the driving of teams generally on the land did not prove a right to so use it, particularly as it was shown that there was another way from which teams could go upon defendant's land, and that teams were from five and one-half to seven feet in width.—Perry V. SNOW, Mass., 42 N. E. Rep. 117.
- 48. EASEMENT—Title by Prescription.—To show title to a roadway in another's hand by prescription, an allegation that it was used by plaintiffs for fifty years continuously, with the knowledge and acquiescence of the owner, is sufficient, without an averment that the use thereof was adverse.—MITCHELL v. BAIN, Ind., 42 N. E. Rep. 230.
- 49. EQUITY—Bills of Discovery.—The jurisdiction of courts with equity powers, to entertain bills of discovery, has been abrogated by our Civil Code of Procedure and the several statutes giving a party to an action the right to call his adversary as a witness, and compel the production of books and documents in his possession.—TURNBULL V. CRICK, Minn., 65 N. W. Rep. 185.
- 50. EQUITY—Fraud.—The N. Ins. Co. issued a policy of insurance to one L. L claimed a loss under such policy, and, the company objecting to the proofs of loss, procured an appraisement, under the terms of the policy, and a report by the appraisers finding a certain sum to be due. The company filed a bill in equity, alleging that the proofs of loss were fraudulent, that the appraisement was procured by fraud, and that L was about to apply for the sale of securities, deposited by the company with the State superintendent of insurance, in order to pay the award, and pro-

- cured an injunction restraining L from enforcing the award in any way until the further order of the court. L afterwards filed a cross bill alleging that she had been prevented by the injunction from suing the company within a period of limitation fixed by the policy, and praying for a decree against the company for the amount of her loss: Held, that the court had jurisdiction of the original bill, by reason of the absence of an adequate remedy at law against the fraud alleged to exist in the appraisement, the report of the appraisers, though not technically an award, presenting the essential qualities of an arbitration.—NORTH BRITISH & MERCANTILE INS. CO. V. LATHROP, U. S. C. C. of App., 70 Fed. Rep. 429.
- 51. EQUITY—Jurisdiction,—After a creditor bad assigned the debt due him, and the assignment had been accepted by the debtor, the creditor sued the debtor on the same claim and recovered judgment: Held, that the assignee could not enjoin the collection by the creditor of his judgment, his remedy at law being adequate, as the recovery of judgment by the creditor did not release the debtor from liability to the assignor.—PERRY V. THOMPSON, Ala., 18 South. Rep. 524
- 62. EVIDENCE Maps Presumption on Appeal.—Where, in an action against a town for possession of land claimed by defendant to have been dedicated for a street, defendant, after giving evidence to show the laying out, opening, acceptance, and use of the street, introduced a map of the town showing the street, it will be presumed, in the absence of anything showing its purpose, that it was introduced in explanation of the preceding evidence, for which purpose it is competent, and not for locating the land, that being specifically done by the complaint.—RIDDLE v. TOWN OF GERMANTOWN, N. Car., 28 S. E. Rep. 382.
- 58. EXECUTION SALE—Estoppel.—Where a defendant in execution, being present at a judicial sale of personal property levied upon as his own, bid off the same, and, upon refusing to comply with his bid, the property was again sold during the same day, the defendant being also present at the second sale, again bidding for the property, and making no objection to the sale until after it had been completed, he thereby waived his right to afterwards deny the validity of the sale, though it was not in all respects regular and lawful.—Mock v. Stuckey, Ga., 28 S. E. Rep. 307.
- 54. FIXTURES—What Constitutes Mortgage.—Chattels must, to constitute them fixtures, be actually annexed to the real estate, or something appurtenant thereto. They need not necessarily be attached to the building. That is one way of annexing them to the soil, but not the only way. To satisfy this test, it is not material whether the substructure is brick-or wood, or whether the machinery is annexed to the building, or rests upon a foundation securely laid for it in the soil, and to which it is fastened.—FEEDER v. VAN WINELE, N. J., 33 Atl. Rep. 399.
- 55. FRAUDULENT CONVEYANCES.—Where land is conveyed in consideration that the grantee support the grantor for life, a reconveyance by the grantee at the request of the grantor, the grantee having become indebted, a proper allowance being made for the support already furnished, is not fraudulent in law as to the grantee's creditors, though the land is then conveyed to the wife of the first grantee under a similar agreement.—R. P. Gustin Co. v. Arn, Mich., 65 N. W. Rep. 112.
- 56. FRAUDULENT CONVEYANCES—Bill of Sale—Change of Possession.—The burden of rebutting the presumption of a fraudulent intent, arising from the actual and continued possession by the vendor of property sold, rests upon the vendee, as against creditors, under Gen. St. 1894, § 4219; but this burden does not rest upon him to show affirmatively that the vendor was not implicated in orgulity of the fraud, because the fraudulent intent of the vendor cannot affect the rights of a bons fide purchaser for a valuable consideration, without notice. It is sufficient if the vendee is innocent of any fraud, and did not participate therein, and had no no-

tice of the fraudulent intent of the vendor.—LEQVE V. SMITH, Minn., 65 N. W. Rep. 121.

- 57. FRAUDULENT CONVEYANCES—Preference by Debtor —Under the law of Alabama, a debtor may prefer a creditor by a sale, made for a fair price and honestly executed to extinguish the debt, and containing no reservation of any interest or benefit in the vendor, even though the vendor be insolvent, to the knowledge of the vendee. Nor is the sale invalidated by a fraudulent intent on the vendor's part to defeat his other creditors, or by the fact that, as a result, the remaining creditors of the vendor cannot obtain payment of their debts.—Bamberger v. Schoolffeld, U. S. S. C., 16 S. C. Rep. 225.
- 58. FRAUDULENT CONVEYANCES Purchase of Land with Wife's Money.—Land was purchased with a wife's money, and a deed taken in the husband's name, without her knowledge or consent. The cash payment was made by her; and, though the husband alone signed notes and a mortgage for the balance of the price, the notes were paid by the wife with her own money. Before making such payment, she ascertained that the deed had been taken in his name, and frequently asked him to deed the land to her: Held that, as between the husband and wife, the slatter was the quitable owner.—PIERCE v. Hower, Ind., 42 N. E. Red. 238.
- 59. GIFT OF LAND—Enforcement.—Though a court of equity will compel the conveyance of the legal title of land claimed under parol gift, supported by consideration, by reason of which the donee has been induced to alter his condition and put valuable improvements on the land, where the donee claims the gift was on certain conditions, and the evidence as to the terms of the contract and as to the acts of part performance relied on is not satisfactory, and does not establish the elements of the donee's demand by a clear preponderance of proof, but leaves the whole controversy doubtful and obscure, conveyance of the title will not be decreed.—LIGHTNER V. LIGHTNER, Va., 28 S. E. Rep. 801.
- 60. Homestrad—Family.—A man who has living with him several persons, to whom he is not related, and who are not dependent on him, is not a householder having a family, within the homestead law.—Holnbeck v. Wilson, Ill., 42 N. E. Rep. 169.
- 61. HUSBAND AND WIFE—Estate by Entirety.—A deed by a husband alone, during coverture, of land in which he and his wife have an entirety estate, is void.—GRAY V. BAILEY, N. Car., 28 S. E. Rep. 318.
- 32. INSOLVENCY—Pledge.—Where a claim against an insolvent is collaterally secured, the amount on which the creditor is entitled to receive dividends is the amount actually due him when he files his claim.—LETY V. CHICAGO NAT. BANK, Ill., 42 N. E. Rep. 129.
- 63. INSURANCE—Delivery of Policy.—Where a life insurance policy is found in the possession of the beneficiary, the presumption is that it was duly delivered by the insurance company.—MASSACHUSETTS BEN. LUBE ASSN. V. SIELEY, Ill., 42 N. E. Rep. 187.
- 64. INSURANCE POLICY Additional Insurance, Where a policy of insurance stipulates that it shall become void by the taking of additional insurance without the consent of the insurer, such stipulation is not within the provisions of section 3643, Rev. St., for the reason that additional insurance does, as a matter of law, increase the risk, and if taken without the consent of the insurer, invalidates the policy.—Sun FIRE OFFICE OF LONDON V. CLARK, Ohio, 42 N. E. Rep. 248.
- 65. JUDGMENT Confession Foreign Executor. A warrant of attorney authorizing judgment to be confessed on a note "as of any term," does not authorize confession of judgment in vacation. WHITNEY v. GRAVES, 111., 42 N. E. Rep. 162.
- 66. JUDICIAL NOTICE—Intoxicating Liquors.—Where a statute gives an alphabetical list of counties, each name being followed by a list of places within a certain distance of which the sale of spirituous liquor is prohibited, the courts will take judicial notice that the names in alphabetical order are names of counties,

- though the word "county" nowhere appears.—STATE v. Snow, N. Car., 23 S. E. Rep. 322.
- 67. JUDICIAL SALE—When Set Aside.—A commissioner's sale of a debtor's residence, appraised at \$4,000, to the debtor's wife for \$2,700, will not be set aside because persons would not bid against her, knowing the family were distressed over the debtor's failure, and sympathized with them.—ALMS & DOEPKE CO. V. GATES, Ky., 32 S. W. Rep. 1088.
- 68. LANDLORD AND TENANT—Constructive Eviction.—Where a lease recites that the lessee has received the demised premises in good condition, and contains a covenant by him to repair, acts of the landlord amounting merely to neglect to repair do not constitute a constructive eviction.—BARRETT V. BODDIE, Ill., 42 N. E. Rep. 148.
- 69. LANDLORD AND TENANT—Renting on Shares.—A tenant who agrees to pay the rent by delivering to the landlord one-fourth of the crop raised, or its value, cannot refuse to account for a portion of the crop because, owing to its poorness, such portion could not be gathered without much trouble and unusual expense.—JOHNSON V. BRYANT, Ark., 32 S. W. Rep. 1061.
- 70. LIBEL Evidence. Probable cause to suspect does not excuse an imputation of crime, especially where the truth which would dispel the suspicion is easy of access.— LONG V. TRIBUNE PRINTING CO., Mich., 65 N. W. Rep. 108.
- 71. LIFE INSURANCE POLICY—Stipulation Against Suicide.—A life insurance company may lawfully stipulate against liability for the death of insured by his own hand, whether sane or insane.—MUTUAL RESERVE FUND LIFE ASSN. V. PAYNE, Tex., 32 S. W. Rep. 1063.
- 72. MANDAMUS—Payment of Disputed Claim.—Mandamus wil not lie to compel a town treasurer to pay claims not audited, as required by law.—FOSTER V. ANGELL, R. I., 33 Atl. Rep. 406.
- 78. Mandamus—Recanvass of Election Returns.—A petition for mandamus to compel supervisors to recanvass election returns and declare the relator elected sheriff, which alleges that the relator, according to the returns, was elected sheriff, and that the board incorrectly canvassed the returns of a certain precinct, without alleging whom the board declared elected, or that the error affected the relator's election, is fatally defective.—State v. Cobb, Ala., 18 South. Rep. 532.
- 74. MARRIED WOMAN'S CONTRACTS.—Under a statute which makes all the property of a married woman her separate property, and absolves the husband from liability for the contracts, requiring her to sue and be sued thereon alone, it will be presumed that she had capacity to make the contract on which she is sued; and a plea of coverture, therefore, without additional averments, is insufficient.—STRAUSS V. GLASS, Ala., 18 South. Rep. 526.
- 75. MASTER AND SERVANT—Liability for Servant's Tort.—Decedent, while calling to receive his baggage, was shot by the depot agent of a railway company on account of abusive language used by the decedent to the agent: Held, that a finding by the jury that the agent was acting in the line of his duty, so as to render the company liable for decedent's death, will not be disturbed.—DANIEL V. PETERSBURG R. CO., N. Car., 23 S. E. Rep. 827.
- 76. MASTER AND SERVANT—Negligence—Fellow-servants.—A "track foreman" in the employ of a railroad, who, by the rules of the company, is required to report to the supervisor and receive his instructions as to all his work, who can only suspend or discharge the men in his gang temporarily, and subject to the approval of the supervisor; who follows minute directions as to the use of the track in his work; and who works with the men forming the gang under his charge, is a fellow-servant of the members of such gang, who assume the risks of injury by his negligence.—DEAVERS V. SPENCER, U. S. C. C. of App., 70 Fed. Rep. 480.
- 77. MASTER AND SERVANT-Negligence-Vice-principal.—The fact that a rule leaves it to the judgment of a



freight conductor whether he shall take a train over the summit of a steep grade as it is made up, or whether he shall detach a part, or call for extra help, does not make him a vice-principal, for whose negligent performance of such duty a brakeman injured thereby can recover from the company.—WOODEN V. WESTERS NEW YORK & P. B. Co., N. Y., 42 N. E. Rep. 199.

- 78. MASTER AND SERVANT—Negligence of Fellow-servant.—One employed by a railroad company as foreman over a crew whose duty it is to repair bridges and trestles, and who, for such purpose, is supplied by the company with cars in which he boards the crew, the company moving the cars as required, is a fellow-servant of the engineer of a train which collides with one to which his cars are attached, and he cannot recover for personal injuries received.—St. Louis Southwestern Ry. Co. v. Henson, Ark., 32 S. W. Rep. 1079.
- 79. MASTER AND SERVANT—Obvious Risks.—Application of the rule that a master is not liable for an injury sustained by his servant in the course of his employment, when the danger is of such a character as to be as obvious to the servant as to the master.—SMITH V. TROMANHAUSER, Minn., 64 N. W. Rep. 144.
- 80. MASTER AND SERVANT—Physicians—Liability for Another Physician's Act.—M, a practicing physician, promised H to attend his wife at her confinement. Instead of doing so, however, he sent P, another physician, in his stead, who, by his unskillfulness, caused the death of the child. The shock from the child's death was such as to seriously affect the health of the mother, thereby depriving H of her society and services, and causing him to incur expenses to which he would not otherwise have been put: Held, that P, being engaged in a distinct and independent occupation of his own, was not the servant or agent of M in this matter, and that, therefore, M was not liable for his unskillful or negligent acts.—MYEES v. HOLBOEN, N. J., 33 Atl. Rep. 889.
- 81. MECHANIC'S LIEN-Limitations.—Under Rev. Stat. 1898, ch. 82, § 28, which declares that no creditor shall be allowed to enforce a lien against or to the prejudice of any other creditor or purchaser, unless a claim for a lien shall have been filed within four months after the last payment shall have become due and payable, one who buys after the claim for a lien is filed, and who has full notice of it, takes title free of the lien, if the claim is filed after said four months.—Von Tobel v. Ostrander, Ill., 42 N. E. Bep. 152.
- 82. MINING—Lease.—A contract reciting that the landowner assigns to the other party all minerals on the land for a term of years, "to farm," and that such other party shall have the right of way over the lands, on condition that he pay the landowner a percentage of the profits made from mining the minerals, is a mining lease which is forfeited by failure, on the part of the lessee, to mine the minerals within a reasonable time.—SHENANDOAH LAND & ANTHRACITE COAL CO. V. HISE, Va., 28 S. E. Rep. 803.
- 83. MINING CLAIMS-Location.-One N discovered a mineral bearing lode, and posted on the spot a notice claiming the right to locate 1,500 feet on the lode and 300 feet on each side thereof, naming it the "R J Lode," and also claiming the right to have twenty days in which to complete his boundary monuments. He afterwards went to the premises to mark the boundaries, but was prevented by sickness, but within twenty days he agreed with three other persons to give them half the claim if they would complete the location, which they did by setting up monuments at the corners and on the lines thereof, and posting a location notice, describing the same, in which the claim was called the "R J Gold, Silver and Nickel Quartz Mining Claim:" Held, that the location made by N's associates was a completion of the claim made by N, notwithstanding the addition of descriptive terms to the name of the claim in the notice posted by them.—DOE ▼. WATBRLOO MIN. Co., U. S. C. C. of App., 70 Fed. Rep. 455.
- 84. MORTGAGE Foreclosure Limitations.—A life tenant of an undivided interest in land conveyed it in

- fee, and to indemnify the grantee against failure of the remainder-men to confirm the conveyance on attaining majority, executed to him a mortgage on other land, to be void if the remainder-men, without further consideration, on attaining majority, "do or shall" execute to the mortgagee a deed of their interest, and if the mortgager "shall in the meantime, until the said" remainder men "shall have executed such conveyance aforesaid, and delivered the same," indemnify the mortgagee. The mortgager died after the remaindermen attained majority: Held, that the twenty-years limitations began to run against the mortgagee's right to foreclose from the date the youngest remainderman attained majority, and not twenty years after the death of the mortgagor.—SUBBERS v. HURLOCK, Md., 33 Atl. Rep. 409.
- 85. MORTGAGE OF PROVISIONS—Validity.—An insolvent's mortgage on crops to be grown the following year, also covering stock and provisions, which were to remain in the possession of the mortgager, is not void, though it was apparent from the mortgage, and the mortgagee and his assigns understood, that the mortgager would consume the stock and provisions before the mortgage was due, as such consumption, being necessary to the planting and harvesting of the crop, was of advantage to the mortgagee.—P.GH V. HARWELL, Ala., 18 South. Rep. 535.
- 86. MUNICIPAL BONDS—Validity.—Where a town, duly authorized, issued its negotiable bonds, free from all conditions, and delivers them as part payment for an interest in a light and power plant, the fact that the contract for such plant was ultra vires will not render the bonds void in the hands of a bona fide holder.—Town of CLIFTON FORGE V. BRUSH ELECTRIC CO., Va., 28 S. E. Rep. 288.
- 87. MUNICIPAL CORPORATIONS—Bonds.—Where a town is authorized to issue bonds, the proceeds to be used for a certain purpose, the bonds are enforceable in the hands of a purchaser from the person intrusted by the town with their sale, though the proceeds were used for an unauthorized purpose and the purchaser was aware of such intended use.—Town of Clipton Force v. Alleghany Bank, Va., 28 S. E. Rep. 284.
- 88. MUNICIPAL CORPORATIONS—Injury by Vacating Streets.—A town vacated that portion of a street covered by a railroad crossing in consideration of the railroad company constructing a viaduct over its tracks parallel to and adjoining the street. Plaintiff owned land fronting on the street on the opposite side from the viaduct, and cornering on the vacated portion of the street: Held, that since access to her land in one direction was cut off by vacating the street, and in another by constructing the viaduct, she had a right of action against the town.—CITY OF CHICAGO V. BURCEY, Ill., 42 N. E. Rep. 178.
- 89. MUNICIPAL CORPORATIONS—Paving Ordinances—Repeal.—The rule, where there are two acts on the same subject, to give effect to both if possible, but if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first, does not apply to successive city ordinances appropriating money for paving different streets, in case the aggregate sum appropriated exceeds the sum available for such purposes.—SMYRK V. SHARP, Md., 83 Atl. Rep. 411.
- 90. MUNICIPAL CORFORATIONS—Power to Tax.—Const., art. 9, § 8, providing that the corporate authorities of cities may be invested with power to assess and collect taxes, requires a legislative enactment to make it effectual, and as there is now no act authorizing cities to assess taxes, the assessor of the city of Charleston has no right to make any other assessment than that made for State and county taxes.—STATE v. KELLY, S. Car., 28 S. E. Rep. 281.
- 91. MUNICIPAL CONTRACTS—Validity.—St. § 2768 (Laws 1998, ch. 244, § 6), relating to cities of the first class, declaring that members of the city council shall be 25 years old, shall be housekeepers or landowners, shall

hold no other civil office, and shall not be interested in any contract with the city, or in the employ of any one holding a contract with the city, is not a mere declaration of the eligibility of members, but prevents the city contracting with a corporation in whose employ is a member of the council.—NUNEMACHER v. CITY OF LOUISVILLE, Ky., 82 S. W. Rep. 1091.

92. NEGLIGENCE—Contributory Negligence.—One who takes a lighted candle to discover the location of a gas leak is not guilty of contributory negligence as a matter of law.—SCHMEER v. GASLIGHT CO. OF STRACUSE, N. Y., 42 N. E. Rep. 202.

98. NEGLIGENCE—Evidence—Injury—Damages.—In an action for injuries to a horse and buggy by a collision, the testimony of the owner respecting the value of the property before and after the accident may be admitted, though witness does not deal in horses and buggles.—SHEAV. HUDSON, Mass., 42 N. E. Rep. 114.

94. NEGOTIABLE INSTRUMENT—Bills and Notes.—By the general commercial law, parties who place their names on the back of a promissory note, before its delivery, for the purpose of giving credit to the maker, are joint makers of the note, and will be so treated in the federal courts, though the note is made in a State whose courts hold such parties to be indorsers.—Phipps v. Harding, U. S. C. C. of App., 70 Fed. Rep. 482.

95. NEGOTIABLE INSTRUMENTS—Indorsement.—An indorsement on a warrant as follows: "H J H, Agt. H and A"—is an indorsement by H and A, in the absence of any showing that their names were written by H J H.—HUNTY. LISTEMBERGER, Ind., 42 N. E. Rep. 240.

%. NEGOTIABLE INSTRUMENTS — Indorsement—Guaranty.—One who signs his name on the back of a note payable to the maker's order and by him indorsed in blank, and does so for the purpose of aiding the maker in negotiating the note, is liable as indorser, not as guarantor.—CHICAGO TRUST & SAVINGS BANK V. NORD-GREE, Ill., 42 N. E. Rep. 148.

97. NEGOTIABLE INSTRUMENT—Promissory Note—Indorser.—Where a person not connected with the original consideration of a note indorses it after a prior indorsement by the payee, and below his signature, the law conclusively presumes it to have been done in aid of the negotiation of the note, and the party thereby becomes a second indorser; and it is not competent to vary the legal effect of that indorsement by parol evidence, as between the second indorser and a subsequent holder of the note, whether the latter is an in-mocent purchaser or not.—BOWLER v. BRAUN, Minn., & N. W. Rep. 124.

98. Parthership — Payment of Individual Debts.—Money paid by one partner to his individual creditor in satisfaction of a just debt, and received by the creditor without knowledge or notice that it is partnership money, may be retained by such creditor against the claims of the partnership or the other partners, although it was in fact money derived from the sale of partnership property; aliter as to partnership property transferred in payment of an individual debt.—Babcock v. Standish, N. J., 83 Atl. Rep. 385.

99. POWER OF ATTORNEY.—An attorney of record has power to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution, defense, or management of the action, and which affect only the remedy, and not the right; and this includes the power to waive objections to evidence, and enter into stipulations for the admission of facts on the trial.—Garrett v. Hamshue, Ohio, 42 N. E. Rep. 256.

180. POWER OF ATTORNEY — Limitations.—Under a power of attorney to convey lands in a certain grant, no other land belonging to the principal can be conveyed, and the burden of proof is on one claiming thereunder to show, by other evidence than his muniments of title, that the land conveyed was on said grant.—Blume v. Rice, Tex., 32 S. W. Rep. 1056.

MI. RAILEOAD COMPANY—Injury—Contributory Neg-

a car cannot hold the company liable on the ground that the car was not provided with grab irons and hand holds on the end of the car isufficient to prevent his fail, if there were steps, for the use of brakemen, so constructed as to answer the purpose of grab irons or hand holds as well as of steps, and such cars were in common use and were sufficient if used with ordinary care.—DOONER V. DELAWARE & H. CANAL CO., Penn., 33 Atl. Rep. 415.

102. RAILBOAD COMPANIES-Lease of Right of Way. The plaintiffs conveyed to the defendant by deed a right of way along the street in front of their lots. The deed contained the agreement "that, in case the second party shall sell the above mentioned right of way to any other company, the party of the first part shall be entitled to receive one-half of the purchase money." The defendant leased to another company its entire railway property, including this right of way, reserving rent payable quarterly, for the term of 999 years: Held, construing the agreement with reference to the allegations of the answer as to the inducement and consideration for the execution of the deed, and the terms and conditions of the lease, that the latter was not a sale of the right of way, within the meaning of the contract.—MORRISON V. ST. PAUL & N. P. RY. CO., Minn., 64 N. W. Rep. 141.

103. RAILROAD COMPANY—Negligence—Sounding Bell on Street Car.—It is negligence for one operating a street car to continue sounding its bell after he sees, or by the exercise of ordinary care could see, that horses attached to a wagon in front of it were being frightened and rendered unmanageable.—CITIZENS' RY. CO. V. HAIR, Tex., 32 S. W. Rep. 1050.

104. BAILROAD COMPANIES—Right of Way—Abandonment.—The erection and operation of a public elevator and warehouse upon land acquired by a railway company, by condemnation, for public purposes, either by itself or its lessee, are neither a misuser nor an abandonment of its easement in the land occupied by such structure, and the owner in fee cannot maintain ejectment for the land so occupied.—GURNEY V. MINNEAPOLIS UNION ELEVATOR CO., Minn., 64 N. W. Rep. 136.

105. RAILROAD MORTGAGE FORECLOSURE—Bondholders as Parties.—In a suit by a trust company which is trustee under several necessarily conflicting mortgages upon the railroad and its various branches, such trustee is not in a position to fairly represent both sides of the resulting controversies; and the court will therefore permit representatives of the bondholders under the different mortgages to be made parties, to the end that each set of bondholders may be represented by some one whose single object is to secure all to which they are entitled, unhampered by any obligation to opposing parties.—Farmbers' Loan & Trust Co. v. Northern Pac. R. Co., U. S. C. C. (N. Y.), 70 Fed. Rep. 423.

106. REAL ESTATE AGENT—Commission—Statute of Frauds.—A real estate broker is not entitled to commission where the sale to his customer is not consummated, and the executory contract of sale is not binding, under the statute of frauds.—WILSON v. MASON, Ill., 42 N. E. Rep. 184.

107. REAL ESTATE BROKERS—Commission.—One who is acting as agent of both parties in effecting a sale is not entitled to compensation from the vendor in the absence of any showing that the vendor knew and consented to the double agency.—Young v. Trainor, Ill., 42 N. E. Rep. 139.

108. RECEIVERS—Appointment.—A receiver may be appointed, not only after final decree in the action, but even after an appeal has been perfected, though such relief was not demanded in the original bill.—CHICAGO & S. E. RY. CO. V. ST. CLAIR, Ind., 42 N. E. 225.

109. REHEARING — Suspension of Judgment. — After the Supreme Court has denied a writ of prohibition to restrain the circuit judge from enforcing a judgment in a contested election case pending an appeal from said judgment, neither an intention to file nor the actual

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filing of a motion for a rehearing will suspend the force of the judgment of the Supreme Court, in the absence of an order specially providing therefore.—IN RECRAIG, Mo., 52 S. W. Rep. 1121.

110. REMOVAL OF CAUSES—Citizenship.—A member of an Indian tribe residing within the limits of the United States, who has not been naturalized, is not a citizen of the United States, nor of the State of his residence, nor is he a citizen or subject of a foreign State, within the meaning of the constitution or the statutes conferring jurisdiction on the federal courts; and such unnaturalized Indian cannot remove into a federal court a civil suit, brought against him in a State court, unless it appears upon the face of the complaint or declaration that a federal question is necessarily involved.—Paul v. Chilsoquib, U. S. C. C. (Ind.), 70 Fed. Rep. 401.

111. REMOVAL OF CAUSES—Time of Remeval.—A trial in the State court upon demurrer, plea or other defense, precludes a subsequent removal, even if such trial was had before the date on which defendant was required by the State law and practice to file his defense.—FIDELITY TRUST & SAFETY VAULT CO. v. NEWFORT NEWS & M. V. CO., U. S. C. O. (Ky.), 70 Fed. Rep. 403.

112. SALE—Construction of Contract.—Where an executory contract of sale is evidence by two contemporaneous writings, one signed by each of the parties—that by the seller declaring the "terms of sale cash," and that by the purchaser reciting, "I shall pay bills daily"—the two should be construed together to mean that bills are to be presented and payment made each day for the goods delivered during that day.—ANGLO-AMERICAN PROVISION CO. v. PRENTISS, Ill., 42 N. E. Rep. 157.

113. SALE—Option to Return Goods.—Where, in a contract for the sale of merchandise, the purchaser reserves the right to return to the seller within a given time, at a stated price, such of the articles sold as bore a particular and definite description, it was essential to the exercise of the option of return thus reserved, either that within the time limited the specific chattels be actually tendered or returned; and if tendered by letter it was essential that such letter should be sufficiently definite in its terms to accurately describe the particular chattels sought to be returned, otherwise the tender by letter would not impose a duty upon the seller to accept, after the time limited, the goods then actually tendered.—Langston v. Bitting, Ga., 23 S. E. Rep. 308.

114. SUBROGATION — Lien on Land — Limitations.— Where a husband pays a mortgage on his wife's land, given to secure his sole bond for unpaid purchase money, and is entitled to be subrogated to the rights of the mortgagee, the fact that the husband can sue the wife only in equity does not constitute a sufficient reason for refusing to apply to such cause of action the statute of limitations.—BENNETT V. FINNEGAN, N. J., 33 Atl. Rep. 401.

115. Taxation—Situs—Securities and Bonds.—While it is true that the actual situs of personal property which has a visible existence, and not the domicile of the owner, will in many cases determine the State in which same is taxable, and the same is true of public securities and circulating notes which have acquired the character of property in the place where they are found, yet that rule only applies to such securities and bonds as are operated in market, and have thus acquired a domicile or situs there.—STATE V. BOARD OF ASSESSOBS, La., 18 South. Rep. 519.

116. Tax DEED—Time of Issuing.—Code, § 596, provides that the time within which an act is to be done shall be computed by excluding the first day and including he last. Laws 1891, ch. 326, § 66, directs the sheriff at any time, "within one year after the expiration of one year from the date of sale of any real estate for taxes," to execute and deliver to the purchaser a deed: Held, that where a sale for taxes was on May 3, 1892, a deed of the land executed and delivered on May 3, 1893, be-

ing within the year, was yold.—BURGESS v. BURGESS N. Car., 23 S. E. Rep. 336.

117. Tax Sale.—For the purposes of ascertaining the ownership of land in order to charge it with taxes, the officer may resort to the duly-certified copy of en tries made on the books of any register of a United States land office on file in the county, and a judgment for taxes against one who appears from a copy of such entries to be the true owner, and a sale thereunder is sufficient to carry the title to the purchaser.—NOLANY. TAYLOR, MO., 32 S. W. Rep. 1144.

118. TELEGRAPH COMPANY—Delay in Delivering Telegram.—Where no written notice was given defendant of plaintiff's claim for delay in delivery within 60 days after the telegram was sent, and plaintiff's evidence shows a contract with defendant that no action for damages by defendant's negligence could be maintained "where the claim is not presented in writing within 60 days after the message is filed with the company for transmission," plaintiff cannot recover.—LEWIS V. WESTERN UNION TEL. Co., N. Car., 23 S. E. Rep. 319.

119. TRUST — Election — Contest—Evidence.—Where ballots in an envelope scaled with the village scal are put by the village clerk in an unlocked desk, containing also the village scal, and situated in a room exposed to the public, and the envelope is partly torn by some unknown person while it remained in such desk, the ballots are not better evidence of the result of the election than the return of the judges.—Beall v. Albert, Ill., 42 N. E. Rep. 166.

120. TRUST — Mortgage — Resulting Trust.—Where a mortgage is assigned without consideration, and with the understanding that the beneficial interest is to remain in the assignor, a trust vests in favor of the assignor which, on his death, passes to his estate.—KICE v. RICE, Mich., 65 N. W. Rep. 108.

121. TRUST—Resulting Trust.—A man bought land, paid part of the price with his own money, and gave his notes for the balance. Before he bought he had orally agreed with his wife that she was to have an interest in the land and was to pay part of the deferred payment, which she afterwards did: Held, that she did not have a resulting trust, since her money did not enter into the original purchase.—Jacksonville Nat. Bank v. Beesley, Ill., 42 N. E. Rep. 164.

122. TRUST—Resulting Trust.—To establish a parol trust in land in favor of a person whose money is alleged to have gone into the purchase and improvement of the land, the evidence must show the existence of the facts constituting the trust at the time of the transmission of the legal title.—NATIONAL BANK OF GREENSBORO v. GILMER, N. Car., 23 S. E. Rep. 333.

123. VENDOR AND VENDEE — Sale of Land—Bond for Deed.—Where a bond for a deed recites that the vendee has executed to the vendor certain notes, and, through inadvertence, the notes were not executed, the vendee is liable in equity as if they had been executed.—BLOCK v. SMITH, Ark., 32 S. W. Rep. 1070.

124. WILL—Charitable Use—Cy-pres.—A will devised the income of a trust fund to support a school in a particular district of a town, in addition to the land and school house thereon, which the testator had already given the district. Testator had devised property to two other districts of the town, and the residue of his estate to a charity. The heirs recovered the lot and school house on breach of the deed of gift: Held that, on abolishment of the school district by law, the in come, under the doctrine of cy-pres, should be devoted to supporting a school maintained in the same territory, though it accommodated children from other territory.—Attorney General v. Briggs, Mass., 42 N. E. Rep. 118.

125. WILLS — Revocation — Presumption.—Where a will has which has been left with an attorney for safe-keeping is taken from him by the testator, and never seen again, the presumption is that it was destroyed by the testator, or under his direction.—BOYLE V. BOYLE, Ill., 42 N. E. Rep. 140.

Central Law Journal.

ST. LOUIS, MO., JANUARY 31, 1896.

The New York Law Journal of recent date contains an interesting discussion of the recent English decision in Skeete v. Silberberg, 2 Q. B. Div. 11, L. T. Rep. 491, wherein is considered the question of marriage as a valuable consideration. The action of the court is expressly founded on the earlier case of Shadwell v. Shadwell, in the Court of Common Pleas (9 C. B. N. S. 159). In the latter case it appeared that an uncle wrote to his nephew "I am glad to hear of your intended marriage with Ellen Nicholl; and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas, etc., etc." The nephew thereafter married the lady named and the uncle made several annual payments of the above named amount. After the uncle's death, on proof that the nephew's yearly income had never reached 600 guineas, it was held that the nephew might recover from the uncle's arrears of payments under the terms of the above letter, falling due during the uncle's life. Erle, C. J., with whom concurred Keating, J., held that the uncle's promise was a valid and enforcible contract. the consideration being both loss sustained by the plaintiff and benefit derived from the plaintiff to the uncle at the latter's request.

As the New York Law Journal says, the reasoning of the majority of the court in that case is somewhat far-fetched. "The detriment to the plaintiff suggested is that he might have made a material change in his position, and incurred embarrassing liabilities upon the faith of his uncle's promise. But, granting this, the only thing in the nature of consideration expressed in the uncle's letter was the entering into a marriage to which plaintiff was already obligated. The uncle did not promise that if the nephew, after marriage, would live in a certain style, the former would pay £150 per year."

The ground of benefit to the uncle assigned

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appears to be the very unsubstantial one of the natural interest of near relatives in each other's career and welfare. The logic of the dissenting opinion of Byles, J., seems unanswerable. He said, in part: "The reason why the doing what a man is already bound to do is no consideration, is, not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed make an attempt to meet the difficulty by alleging in the replication to the fourth plea that he married relying on the testator's promise; but he shrinks from alleging that, though he had promised to marry before the testator's promise to him, nevertheless he would have broken his engagement. and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty, who yet is prepared to do his duty without these encouragements. At the utmost the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation."

In Skeete v. Silberberg, the plaintiff being already under engagement to marry her present husband, the defendant agreed to pay her an annuity provided the marriage took place within three months. It was held that, on her complying with the terms of the offer, an enforcible contract existed. Commenting upon this decision the *Harvard Law Review* remarks:

"Although already bound by her engagement to perform a portion of the defendant's proviso, the plaintiff was under no obligation to marry before a reasonable time had elapsed, so that a marriage within three months leaves no difficulty regarding a detriment to the plaintiff in this case. Whether that detriment was suffered at the request of the defendant, whether compliance with his proviso is the thing in exchange for which his promise was given, or merely a condition to his gift, is the real point at issue. The truth should be gathered from all the circumstan-

ces, benefit to the promisor being well nigh determinative. The English court, however, passes lightly over such debatable ground, merely recognizing as stronger than this the case of Shadwell v. Shadwell."

NOTES OF RECENT DECISIONS.

GARNISHMENT-SITUS OF DEBT - FOREIGN CORPORATION .- In Reimer v. Seatco Manuf. Co., 70 Fed. Rep. 573, decided by the United States Court of Appeals for the Sixth Circuit, it appeared that R, a citizen of Illinois, commenced suit against the S Co., a Washington corporation, in a court of the State of Michigan, by process of garnishment issued against the M Co., an Illinois corporation, which had an office and did business in Michigan, and was indebted to the S Co., the debt being payable in the State of Washington. It was held that though, under the statutes of Michigan, a foreign corporation doing business in the State subjected itself to service of process by garnishment, the Michigan courts could not acquire jurisdiction in rem to pronounce judgment in favor of a non-resident against a foreign corporation, by garnishment of a debt due to the defendant from another foreign corporation, and not payable within the State. The court cites and discusses Southern Pac. Co. v. Denton, 146 U. S. 202; Douglas v. Insurance Co., 138 N. Y. 209; Insurance Co. v. French, 18 How. 404; Railroad Co. v. Dooley, 78 Ala. 524; Railroad Co. v. Maltby, 34 Kan. 125; Wright v. Railroad Co., 19 Neb. 175, 27 N. W. Rep. 90; Railway Co. v. Sharritt, 43 Kan. 375, 23 Pac. Rep. 430; Keating v. Refrigerator Co., 32 Mo. App. 293; Fielder v. Jessup, 24 Mo. App. 91; Green v. Bank, 25 Conn. 452; Lawrence v. Smith, 45 N. H. 533; Nye v. Liscombe, 21 Pick. 263; Pierce v. Railway Co., 36 Wis. 283; Renier v. Hurlbut, 81 Wis. 24, 50 N. W. Rep. 783; Everett v. Walker (Colo. App.), 36 Pac. Rep. 617; Baylies v. Houghton, 15 Vt. 626; Tingley v. Bateman, 10 Mass. 343; Sawyer v. Thompson, 4 Fost. (N. H.) 510; Lovejoy v. Albee, 33 Me. 414. The court also showed that the Michigan cases (Newland v. Reilly, 85 Mich. 151; Cofroda v. Gartner, 79 Mich. 332; Drake v. Railroad Co., 69 Mich. 168), were not in fact opposed to the doctrine invoked by the court, as was claimed by appellant.

Homestead—Conveyance in FRAUD OF CREDITORS-ESTOPPEL.-Those interested in the subject will find, in the case of Kennedy v. First Nat. Bank, 18 South. Rep. 396, an exhaustive review of the precedents on the subject of the effect of setting aside a fraudulent conveyance of homestead. In that case the court, on a rehearing, held, reversing the lower court, that where a conveyance of property, including a homestead, is set aside as in fraud of creditors, the debtor may, as against the creditors, maintain the claim of homestead exemption; and that where suit is brought against a grantor and grantee to set aside a conveyance as in fraud of creditors, the grantor need not make claim of homestead till after the decision setting the conveyance aside. Coleman, J., dissented from the view of the court in a long well written opinion.

LIABILITY OF MEDICAL PRACTITIONER FOR DECEIT.—It appeared, in Hedin v. Minneapolis Med. & Surg. Inst., 64 N. W. Rep. 158, before the Supreme Court of Minnesota, that there was sufficient evidence from which the jury found that plaintiff had sustained a fracture at the base of the skull, and that his injuries were incurable; that, after examination, one of the individual defendants, who was the president and physician and surgeon in charge of the defendant corporation, represented that the plaintiff could and would be restored to health by treatment; and that such representation was made for the purpose of inducing plaintiff to pay over the sum of \$500 to such physician, or to the institute, or both. The general rule undoubtedly is that "deception, in order to be actionable, must relate to existing or past facts;" that "representations made as to facts to transpire in the future are mere promises or an opinion, and will not of themselves support an action of There are, however, exceptions to such rule, and the Supreme Court of Minnesota brings the present case within them, and holds that an action for deceit will lie. The following is from the opinion:

To sustain such an action, it must be shown that a false representation of a material fact has been made, in ignorance relied upon, and that damage has ensued. The representation must be fraudulently made, an intention to deceive being a necessary element or ingre-

dient. But positive proof that a party knew his representation to be untrue is not essential. The intention may be proved by showing that, having no knowledge of the truth or falsity of his statements, he did not believe them to be true, or by showing that, having no knowledge of their truth or falsity, yet he represented them to be true of his own knowledge. When the knowingly false assertion is as to the belief of a party. or is as to his knowledge of the fact he assumes to announce, intent to deceive is the inevitable inference. If this defendant Lawrence made statements and representations to plaintiff that his injuries were curable, and that with treatment he could become a well and sound man, having no knowledge of the truth or falsity of his statements, and not believing them to be true, or if he made such statements, having no knowledge of their truth or faisity, yet representing that they were true, the intent to deceive is as well established as if positive knowledge of their untruthfulness had been proven. Generally speaking, the representations must be as to a material fact, susceptible of knowledge; and, if they appear to be mere matters of opinion or conjecture, they are not actionable. There are many cases, however, in which even a false assertion of an opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus, the liability may arise where one has, or assumes to have, knowledge upon a subject of which the other is ignorant, and knowingly makes false statements on which the other relies. Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating to the truth. And for a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie. Gordon v. Butler, 105 U. 8. 553; Robbins v. Barton, 50 Kan. 120, 31 Pac. Rep. 686; Eaton v. Winnie, 20 Mich. 156; Hicks v. Stevens, 121 Ill. 186, 11 N. E. Rep. 241; Cooley, Torts, 483. Take the facts in the case at bar. The plaintiff an illiterate man, badly injured in an accident, and physically a wreck, consulted with the physician and surgeon in charge of a medical and surgical institute or hospital as to his condition and the probability of a recovery. After an examination by the surgeons he was positively assured, if he told the truth as to what was said (and the jury found that he did), that he could be cured, and by treatment at that institute could and would be made sound and well. Considering the circumstances and the relations of the parties, there was something more in defendant's statements than the mere expression of his opinion upon a matter of conjecture and uncertainty. It amounted to a representation that plaintiff's physical condition was such se to insure a complete recovery. The doctor, especially trained in the art of healing, having superior learning and knowledge, assured plaintiff that he could be restored to health. That the plaintiff believed him is easily imagined; for a much stronger and more learned man would have readily believed the same thing. The doctor, with his skill and ability, should be able to approximate to the truth when giving his opinion as to what can be done with injuries of one year's standing, and he should always be able to speak with certainty before he undertakes to assert positively that a cure can be effected. If he cannot speak with certainty, let him express a doubt. If he speaks without any knowledge of the truth or falsity of a statement that he can cure, and does not believe the statement true, or if he has no knowledge of the train or falsity of such a statement, but represents it as true of his own knowledge, it is to be inferred that he intended to deceive. The deception being designed in either case, and injury having followed from reliance upon the statements, an action for deceit will lie.

NEGLIGENCE-DRUGGIST-SALE OF WRONG DRUG.-In Howes v. Rose, 42 N. E. Rep. 303, it is held by the Supreme Court of Indiana that where a wholesale druggist delivers to a retail druggist a package of tartaric acid, labeled "Rochelle Salts" and the retail druggist breaks the package and sells a part of the contents as Rochelle salts, the latter will be liable for injury resulting to the vendee from taking the drug, and that in action against druggist for injury from taking a drug which he has by mistake delivered in lieu of one called for by a purchaser, actual negligence of defendant independent of the prima facie negligence of defendant shown by the fact of delivery of a wrong drug must be shown. The court says:

In view of the dire consequences that may result from the least inattention or want of care or skill, druggists, apothecaries, and all persons engaged in manufacturing, compounding, or vending drugs and medicines should not only be required to be skillful, but should also be exceedingly cautious and prudent. All persons who deal with deadly poisons, noxious and dangerous substances, are held to a strict ac-countability. The highest degree of care known to practical men must be used to prevent injury from the use of drugs and ipoisons. It is for these reasons that a druggist is held to a special degree of responsibility. The care required must be commensurate with the danger involved. The skill employed must correspond with that superior knowledge of the business which the law requires. Walton v. Booth, 34 La. Ann. 913; Cooley, Torts, pp. 75, 76; Thomas v. Winchester, 6 N. Y. 397. It is also an established rule that a vendor of provisions for domestic use is bound to know that they are sound and wholesome, at his peril. Van Bracklin v. Fonda, 12 Johns. 468. The vendor, by implication, undertakes that they are sound and wholesome. 2 Bl. Comm. 165. Ordinarily, a slight inspection or examination of articles of food will determine their soundness. The appellee's complaint does not proceed upon the theory of the breach of an implied warranty, but it is founded upon a tort, that of negligence. If the cause of action had been put upon the same ground as the sale of food, a different question might have been presented.

The appellants insist ithat they are protected from liability by the label of the reputable wholesale dealers. If the drug sold had been received and labeled in an unbroken package, and had by them been sold to the appellee in an unbroken package, there would be much force in this contention. But here the package was broken. The contents were handled and put into a jar, and were again dealt out in a small quantity to the appellee. The appellants and their agents had opportunities of seeing, knowing, and determining the character of the drug. It is further insisted that the liability, if any, is against the wholesale dealers, or those who had improperly labeled the drug.

Thomas v. Winchester, supra. It is, perhaps, true that an action would lie against the persons who made the first mistake, but it does not follow from this that the appellants are excused. If they were guilty of negligence in making the sale, they must respond. The appellants further contend that the verdict fails to find the facts from which the legal inference of negligence can be drawn-that, for aught that appears, the injury was the result of inevitable accident, for which nobody is legally responsible. The case of Brown v. Marshall, 47 Mich. 576, 11 N. W. Rep. 392, is relied upon in support of this contention. . In that case an instruction given by the trial court stated it to be the duty of druggists to know the properties of the medicines which they sell, and to employ such persons as are capable of discriminating and dealing out according to prescription, and if the defendant's clerk sold and delivered to the plaintiff a poison, instead of a harmless drug, the defendant would be liable for the injury resulting. It was held that this instruction correctly stated the druggist's duty, but that it was erroneous as applied to the facts, because it ignored the element of negligence. It was further stated, in the opinion in that case, that there is no liability in such cases, irrespective of the questions of negligence and intentional wrong. In that case the druggist's clerk sold sulphate of zinc for Epsom salts. The court, by Cooley, J., said: "That such an error might occur without fault on the part of the druggist or his cierks is readily supposable. He may have bought his drugs from a reputable dealer, in whose warehouse they may have been tampered with, for the purposes of mischief. It is easy to suggest accidents after they came into his own possession, or wrongs by others of which he would be ignorant, and against which a high degree of care would not give perfect protection. But how the misfortune occurs is unimportant, if, under all the circumstances, the fact of occurrence is attributable to him as a legal fault. . . . But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability, when a mistake has occurred." The case of Fleet v. Hollenkemp, 18 B. Mon. 219, bears little similarity to the case at bar. The druggist there sold the drugs ordered, but owing to his carelessness in preparing them, they became poisoned. The same rule would apply under such circumstances as applies in the case of impure or poisoned food or provisions. In the verdict before us there is no finding of any fact or facts showing that the appellants were guilty of negligence, unless the mere sale of the wrong drug establishes a prima facie case—a proposition which the authorities do not seem to support. Appellants might have taken every precaution required of them by the law, for anything that is found by the jury. The facts constituting the negligence must be established before the plaintiff can have judgment on the special verdict. This was not done in this case. Judgment reversed.

THE LAW OF THE CASE.

The law of the case is a term made use of to express the rule that whatever an appellate court has decided concerning a question of law arising in a case on appeal, is a final de-

termination thereof, and like any other final judgment estops the parties in all subsequent proceedings in the case from questioning its correctness.1 "A previous ruling of the appellate court upon a point distinctly made, may be only authority in other cases, to be followed and affirmed, to be modified or overruled, according to its intrinsic merits; but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves."2 "When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case, upon the same state of facts, is higher authority than the rule of stare decisis; it is generally regarded as res judicata, so far as the particular action is concerned." Should the same question arise in a subsequent action between the same parties, or those claiming under them, the decision first rendered is equally binding upon both court and parties.4 It does not matter how erroneous the decision may have been. Right or wrong⁵ it must be

¹ Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. Rep. 876; Sibbald v. U. S., 12 Pet. 488; Roberts v. Cooper, 20 How. (U. S.) 467, 481; Corning v. Troy Iron Co., 15 Id. 451, 466; West v. Douglas, 145 Iil. 164; Stacey v. Vermont R. R. Co., 32 Vt. 552; Halleran v. Meisel (Va.), 21 S. E. Rep. 658; Mt. Sterling Nat. Bank v. Snyder (Ky.), 30 S. W. Rep. 613; Wilson v. Bates (Colo.), 40 Pac. Rep. 351; Garretson v. Mer. & Bank. Ins. Co. (Ia.), 60 N. W. Rep. 540; Herman Est. and Res Ad., Secs. 115, 116, 117; Elliott's App. Proced., Sec. 578; Barney v. Winona, etc. R. Co., 117 U. S. 228, 22 Cent. L. J. 495, and note, p. 497; Note by W. W. Thornton, 25 Cent. L. J. 297; Wells, Res AdJ., Sec. 618; Chand Res Jud., Secs. 296, 297.

² Phelan v. San Francisco, 20 Cal. 39; Leese v. Clark, Id. 387, 417.

³ Lee v. Stahl, 18 Colo. 174.

4 Dodge v. Gaylord, 53 Ind. 365.

5 It is believed that Missouri and Texas are the only exceptions to this rule. In those jurisdictions a former decision in the case will not be reviewed "unless some general principle of law has been manifestly decided incorrectly the first time, or injustice to the rights of the parties would be done by adhering to the first opinion." Chambers' Adm'r v. Smith, Adm'r, 80 Mo. 158; or in "exceptional cases" (Frankland v. Cassaday, 62 Tex. 418), when the first decision is "very clearly erroneous" (Bomar v. Parker, 68 Id. 435), and no injustice or hardship will result from changing it. Boone v. Shackelford, 66 Mo. 495. In Alabama the matter is regulated by statute which provides that the court shall decide what it deems to be right without regard to a former ruling. Nat'l Com. Bank v. Mo-Donnell, 92 Ala. 387; Stoudenmire v. DeBardelaben. 85 Id. 85. An erroneous ruling is not even controlling upon the trial court. Moulton v. Reid, 54 Id. 320.



followed in all future proceedings in the case, either in the trial court or upon a second appeal.6 This is so even where the former decision is admitted to have been "in abrogation of one of the plainest principles of law."7 The rule applies also to the question of juris-"The first point decided by any court, although it may not be in terms, is that the court has jurisdiction, otherwise it would not proceed to determine the rights of the parties," and having been so determined, neither the jurisdiction of the appellate court nor of the trial court can be subsequently questioned in that case, although in fact the courts did not have jurisdiction.8 In truth, the principle only applies in its full force to cases where, in the opinion of the judges hearing the second appeal, the first decision was wrong,9 for if right the matter would be decided in the same way again without reference to its having become the "law of the case."

The rule is based principally upon two reasons: 1. That there must be an end to litigation. 2. The courts having no appellate jurisdiction over their own decisions, and there being no power anywhere to review them, they become final judgments, and the questions decided by them res adjudicata. 10 "The rule is founded upon the absolute and obvious necessity for the termination of controversies, as well as upon the finality of the decisions of the appellate court. "The want of power in this court to review its judgments or decrees has been so frequently determined by it, that it is not now an open question." Where the decision is placed

⁶ Lawrence v. Ballou, 37 Cal. 521; Dodge v. Gaylord, 53 Ind. 365; Clark v. Hershey, 52 Ark. 473; Baxter v. Brooks, 29 Id. 173; Sample v. Anderson, 9 Ill. 546.

upon several different grounds, the law is conclusively settled as to both.¹⁸ point necessarily involved in the decision, although not particularly noticed, is as much res adjudicata as if expressly decided.14 A decision by the Supreme Court, construing a deed or determining the effect of a written instrument, becomes the law of the case.15 But where, upon an appeal, the validity of a deed is attacked upon but one ground, and its validity is sustained, this does not prevent its being subsequently attacked upon other grounds.16 Where a case is reversed upon the ground that the evidence is insufficient to support a finding, this becomes the law of the case so long as the evidence remains the same.17 But when the ruling relates to a matter of fact, the principle can be invoked only when the fact appears again to the appellate court under the same circumstances in respect to which it was originally considered.18

In some jurisdictions it is held that a decision of the appellate court is decisive, not only of the points that were actually made and decided on the appeal, but also of all. questions that might have been made, and that would have affected the result.19 Where the point is one necessarily involved in the decision, this would probably be the rule everywhere, and it would also apply, under the principle of estoppel by judgment, where the court of appeals has affirmed the judgment. or has directed what judgment shall be entered; but where the case is reversed for a new trial, because of certain errors, it is believed the decision would not generally be held conclusive as to matters not noticed or

⁷ Dewey v. Gray, 2 Cal. 377. Where the doctrine of the first decision has been overruled by later cases, it still remains the law of the case in which it was made. Pheaix Ins. Co. v. Pickel, 3 Ind. App. 332; Thomson v. Albert, 15 Md. 268. Wells, Res Adjudicata, Sec. 633. Contra: Hamilton v. Marks, 63 Mo. 167.

Clary v. Hoagland, 6 Cal. 685; Semple v. Anderson, 9 Ili. 546; Washington Bridge Co. v. Stewart, 3 How. (U. S.) 413; Skillern's Adm'r v. May's Adm'r, 6 Cranch, 267.

Wixson v. Devine, 80 Cal. 385.

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²² Shuart v. Palmer, 80 Va. 625.

^{*** (}Washington Bridge Co. v. Stewart, 3 How. (U. S.)

**** Sibbald v. U. S., 12 Pet. 488.

¹³ Bates v. Taylor, 87 Tenn. 319; Cameron v. Kenfield, 57 Cal. 553.

Li Eversdon v. Mayhew, 85 Cal. 7; Reclamation Dist.
 v. Goldman, 65 Id. 635; Carr v. Quigley, 16 Pac. Rep.
 9; Forgerson v. Smith, 104 Ind. 246; Klauber v. San Diego Street Car Co., 34 Pac. Rep. 516.

¹⁵ More v. Calkins, 95 Cal. 435; Sharpstein v. Friedlander, 63 Id. 78; Leese v. Clark, 20 Id. 418.

¹⁶ Anderson v. Hancock, 64 Cal. 455.

 ¹⁷ King v. LaGrange, 61 Cal. 221; Lassing v. Paige,
 56 Id. 139; Brusie v. Gates, 96 Id. 265; Plymouth Co.
 Bank v. Gilman, 3 S. D. 170; Leeser v. Boekhoff, 38
 Mo. App. 445.

¹⁸ McLeran v. Benton, 73 Cal. 329; Dodge v. Gaylord, 53 Ind. 365; Mattingly v. Pennie, 39 Pac. Rep. 200; Nieto v. Carpenter, 21 Cal. 455.

¹⁹ Findlay v. Triggs, 83 Va. 539; Campbell v. Campbell, 22 Gratt. 649; Effinger v. Kenney, 79 *Id.* 551; Dilworth v. Curtis, 139 Ill. 508; Ogden v. Larrabee, 70 *Id.* 513.

decided.20 But the decision of a point which arose in the case and was decided is within the rule, although it was not necessary to the disposition of the appeal.21 So the decision of a point which will arise upon a new trial is not obiter.22 The rule applies only to the decisions of courts of last resort; therefore if, upon the trial of the case, the nisi prius court makes an erroneous ruling, it is not binding upon the court if the question again arises.23 A decision by a divided court is equally as controlling as one in which all the judges agree.24 Where, upon an appeal, by inadvertence, the court decides two principles of law in such opposition to each other as to be incapable of harmonious construction, neither becomes the law of the case.25 Upon the second appeal the record and briefs in the first case may be looked into for the purpose of ascertaining the points then before the court, so as to see whether the questions now raised were then decided.26

But it is not everything that was said by an appellate court in passing upon a case that becomes a conclusive adjudication. "We have recently, in Sharon v. Sharon, 79 Cal. 633, had occasion to consider this doctrine of the law of the case, which means, as we understand it, that the court, having erroneously decided some matter of law, will always stand by the error in that case, though it will not allow it to be a precedent in another, and we there decided that the doctrine had nothing to commend it to the favor of the court, and that its application would not be extended beyond the cases in which it had been held to

apply. It has never, that we are aware, been held to apply to expressions in an opinion that are merely obiter." This is undoubtedly a true statement of the doctrine, and although the rule may be necessary upon the ground that there must be an end to litigation, yet as the true end of litigation ought to be justice, which the tendency of this rule is often to prevent, it should be held to a strict construction. In this view, the rule adopted by the courts of Missouri and Texas, that they will not follow a former clearly erroneous ruling when it can be changed without injustice or hardship,28 comes much nearer being abstract justice. It follows that courts which hold the general rule should, and do, scan former erroneous decisions very closely to ascertain whether the point then discussed was squarely before the court, and constitutes the same question presented on the second appeal.

The law of the case does not become settled by the mere opinion of the judges unnecessarily expressed, but only by a decision of the point when the ground, or at least one of the grounds, of the judgment.29 "The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision."30 An appellate court can only pass upon questions of law raised and decided in the lower court. Its remarks upon anything else are not conclusive.³¹ It is only upon questions in issue upon the first appeal that a former adjudication is conclusive.*2 Where the plaintiff had obtained judgment, but a new trial was granted the defendant by the trial court on the ground that the verdict was not sustained by the evidence, which order was affirmed, upon appeal, for the reason that the granting a new trial upon that

21 Gwin v. Hamilton, 75 Cal. 265.

²⁴ Washington Bridge Co. v. Stewart, 3 How. (U. S.) 424; Emeric v. Alvarado, 90 Cal. 444.

25 Gage v. Downey, 94 Cal. 241.

28 Supra, note 5.

²⁰ Davis v. Krug, 95 Ind. 1; Union School Tp. v. First Nat. Bank, 102 *Id.* 464; Anderson v. Hancock, 64 Cal. 455; McLeran v. Benton, 73 Cal. 329.

Table Mountain Co. v. Stranahan, 21 Cal. 548. This, of course only refers to points properly before the court, for "the court cannot give any opinion upon points not properly before it. · · · The proper function of a court, in a writ of error, is to pass its judgment upon the points excepted to in the opinion of the court below; and not to decide the law of the case, in anticipation of its trial in the court below." Bradstreet v. Potter, 16 Pet. 317.

²³ Lawrence v. Ballou, 37 Cal. 518. It has, however, been held to apply to the decision of an intermediate appellate court, where no appeal was taken from the decision there. Lockland v. Smith, 75 Mo. 307.

²⁶ Eversdon v. Mayhew, 85 Cal. 7; McKinley v. Tuttle, 42 *Id.* 571; Plymouth Co. Bank v. Gilman, 3 S. D. 170, 52 N. W. Rep. 869.

²⁷ Wixson v. Devine, 80 Cal. 385. To the same effect, Klauber v. San Diego Street Car Co., 98 Cal. 105; Mattingly v. Pennie, 39 Pac. Rep. 200.

²⁹ State v. McGlynn, 20 Cal. 233; Powelson v. Lockwood, 82 Cal. 613; Wixson v. Devine, 80 Id. 385; Mulford v. Estudillo, 32 Id. 131; Clark v. Hershey, 52 Ark. 473.

Field, J., in Barney v. Winona, etc. R. R. Co., 117
 U. S. 228, 22 Cent. L. J. 495, and note, p. 497.

³¹ United States v. Bank of U. S., 5 How. (U. S.) 382; Wadsworth v. Warren, 12 Wall. 307.

³² Hughes v. Detroit, etc. R. R. Co., 78 Mich. 399; Lathrop v. Knapp, 37 Wis. 305; Gwin v. Waggoner, 116 Mo. 143; Clark v. Hershey, 52 Ark. 473.

ground rested in the sound discretion of the court, which had not been abused in that case, this is not an adjudication that the evidence is insufficient to support a second judgment in the plaintiff's favor.33 think it can be safely said, without going outside any of the cases, that in order that a decision may operate as an estoppel on a subsequent appeal of the same case, the question must have been fairly presented to the court as necessary to a decision in the case, and directly considered and decided."84 Dictum does not become the law of the case.85 Upon this point, and as illustrating the closeness with which a court will view the question, the case of Wixson v. Devine, 36 already quoted, is instructive. There the plaintiff had obtained a decree enjoining the defendants from interfering with a certain dam, or in any manner preventing him from diverting twentyfive inches of the water of a stream, "after said water shall have reached plaintiff's In a second action between the same parties for another interference with the dam and water right, the defendants were permitted to prove a prior appropriation of all the water of the stream below the dam. Upon appeal this was held error; the court saying that the first decree precluded the defendants from setting up a right to the twenty-five inches of water at the dam, or at any point above. Upon the new trial the defendants offered to prove a prior appropriation above the dam, and that this right had not been litigated in the first action. This offer was rejected upon the ground that the decision on the first appeal had adjudicated the matter. Upon a second appeal the court held, speaking through Beatty, C. J., that the point before the court on the first appeal was whether evidence of defendants' appropriation below the dam was properly admitted; that having decided that in the negative, on the ground of the conclusiveness of the first decree, that ended the matter, and there was no call to determine whether the decree was also conclusive of defendants' rights above the dam;

28 Moore v. Murdock, 26 Cal. 514.

that consequently that part of the decision was clearly *obiter*, and being erroneous, it was not followed.⁸⁷

The decision of the court as to a question of fact does not become the law of the case.88 "Facts are stated, in the opinion of the court, solely that the course of reasoning adopted by the court, and the principles enunciated, may be the better understood. The court does not assume to find the facts in a case, for it has no authority to do so, except in case where an ultimate fact results, as a conclusion of law, from the proof of certain prior facts. If this court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the court below, and cannot prejudice the parties, where a new trial is had. It is upon questions of law that the decision of the court becomes the law of the case, and not upon questions of fact."29 The Supreme Court has no power to find the facts of a case. That is the province of a trial court or a jury. 40 Even where the evidence remains the same, if it is conflicting, so that different judges might come to different conclusions as to what it proves, it is the province of the trial. court to find the facts, and the conclusions of the supreme court as to what the facts were does not become the law of the case.41 Where the facts are changed upon the second trial, the law, as established on the first appeal, is no longer the law of the case. 42 Nor

37 See, as following the same line, Luco v. DeToro, 34 Pac. Rep. 516; Johnson v. Bailey, 17 Colo. 59; Mattingly v. Pennie, 39 Pac. Rep. 200.

stingly v. Pennie, 39 Pac. Rep. 200.

Mattingly v. Pennie, 39 Pac. Rep. 200; Mitchell v. Davis, 23 Cal. 383. But in the Supreme Court it is a question of law whether the evidence is sufficient to support a verdict or other decision of fact, so where that court has held the evidence insufficient, and upon the retrial it is substantially the same, the rule of the law of the case requires that such evidence should also be held insufficient upon the retrial. Lassing v. Paige, 56 Cal. 142; Hayne, New Trial and Appeal, Sec. 291.

39 Sneed v. Osborne, 25 Cal. 619.

40 Hayne, New Trial and App., Sec. 296; Bagley v. Eaton, 10 Cal. 149; Kimball v. Semple, 25 Id. 455; Dyer v. Brogan, 57 Id. 234. Contra: In re Meeker's Estate, 45 Mo. App. 193; Tuttle v. Garrett, 74 Ill. 444.

41 Mahan v. Wood, 79 Cal. 258.
42 Dodge v. Gaylord, 53 Ind. 389; Johnson v. Bailey, 17 Colo. 59; Klauber v. San Diego, etc., 98 Cal. 105; Mattingly v. Pennie, 39 Pac. Rep. 200; Burton v. Perry, 146 Ill. 71; Lane v. Starkey, 20 Neb. 586; Herman, Est. and Res Jud.. Sec. 115. But the change must be material, and not such as to leave the case without substantial difference. Wells, Res Adj., Sec. 614; Stacey v. R. R., 32 Vt. 552; Estate of Cook, 83 Cal. 415.

³⁴ Gwin v. Waggoner, 116 Mo. 143.

²⁵ Barney v. Winona, etc. R. Co., 117 U. S. 228; Wixson v. Devine, 80 Cal. 385; Klauber v. San Diego Street Car Co., 98 *Id.* 105; Clark v. Hershey, 52 Ark. 473. As to what is *obiter*, see Carroll v. Carroll, 16 How. 287.

^{≈ 80} Cal. 385.

does the rule prevent the parties from proving facts that were not before the court on the first appeal, nor from introducing new testimony. Where the statute permits two appeals, one from the judgment and one from an order refusing a new trial, a decision upon the former does not become the law of the case, so that an erroneous ruling then made must be followed on the second appeal.

R. R. BIGELOW,

Chief Justice Supreme Court of Nevada. Carson City, Nev.

- 43 West v. Douglas, 145 Ill. 164; Ryan v. Tomlinson, 39 Cal. 639.
 - 44 Sharon v. Sharon, 79 Cal. 683.

CONTRACTS — ILLEGAL CONSIDERATION — RIGHT OF ACTION.

STORZ V. FINKELSTEIN.

Supreme Court of Nebraska, December 7, 1895.

- 1. No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law.
- 2. Plaintiff sued the defendant for the purchase price of beer, to which the defendant, by way of counterclaim, pleaded payment for a license to sell beer, which, as defendant alleged, plaintiff had agreed to furnish, to enable defendant to make such sales. By reply, plaintiff alleged a custom, in accordance with which a retail traffic in beer had been carried on by defendant, under and by virtue of a license held by the plaintiff, which traffic, in legal effect, was a violation of the statute of Nebraska regulating traffic in liquors: Held that, for the purchase price of beer sold under these circumstances, plaintiff was not entitled to a recovery against the defendant.

RYAN C.: This action was brought by the plaintiffs in error, a partnership firm, engaged in the manufacture of beer, to recover of defendant the sum of \$707.06, the price of certain beer alleged to have been furnished by plaintiffs to defendant in the month of June, 1889. By way of counterclaim the defendant alleged that the beer was furnished him by plaintiffs under a written agreement, which required that the plaintiffs should furnish the license necessary under the laws of Nebraska, that plaintiffs had neglected to provide this license, and that, in consequence of such neglect, the defendant had been required to pay the sum of \$1,000 for such license. By reply, the plaintiffs averred that, if the defendant had taken out a license, it was to enable him to sell vinous and spirituous liquors, and not to enable him to perform his contract with the plaintiffs. There was, also, in the reply this language: "The plaintiffs further allege that there is, and has been since long before September 1, 1888 (the date of a written contract between plaintiffs and defendant), a usage and custom existing and pre-

vailing among brewing companies generally, and particularly in the State of Nebraska, and in the City of Omaha, for each of said brewing companies to operate, in connection with its brewery, a bottling department for the purpose of bottling beer of its own manufacture exclusively; that, under said usage and custom, said bottling department had been conducted under the liquor license issued to the brewery, and through an agent who receives beer from the brewery, at a fixed price, and who operates the bottling department as a part of and in the interest of the said brewery; that the contract referred to in the defendant's answer was entered into by the plaintiffs and the said defendant with knowledge of and with reference to said usage and custom; and that said usage and custom thereby became and is a part of said contract." Upon the trial defendant admitted that he owed plaintiffs the amount claimed, and a verdict was accordingly returned. Thereupon defendant moved for a dismissal of the plaintiffs' action, and for a judgment for costs, for the reason that "the pleadings, upon their face, show that the sales for which plaintiffs sought to recover were made in pursuance of an unlawful contract between the plaintiffs and the defendant, and for the further reason that the contract under which the sales were made contemplated the resale of said beer by the defendant, with the intent and for the purpose, on the part of the said plaintiffs, of enabling the defendant to resell contrary to law." This motion was sustained, and judgment was accordingly rendered against the plaintiffs for costs.

From the fact that the plaintiffs brought suit for the price of the beer agreed upon between themselves and the defendant, it is clear that the defendant was not a mere agent for the sale of the plaintiffs' beer. The petition was framed upon the theory that plaintiffs had sold the defendant the beer for which suit was brought, though the use of the word "sale" or any equivalent term was avoided. It is equally clear that, as a retail vendor of liquor, the defendant was, by section 25, ch. 50, Comp. St., required to pay a license of \$1,000; his place of business being, as it was, in the City of Omaha. By the reply there was alleged a custom, with reference to which the parties litigant had contracted, whereby the obligation to pay the required license was avoided, which arrangement was clearly in violation of the statute above referred to. The plaintiffs, however, insist that, since the defendant had admitted that he had obtained the beer from plaintiffs, and was owing that amount, judgment should have been accordingly rendered. This admission did not amount to a confession of judgment, neither did the verdict thereon returned, restricted, as the jury was, by the instruction of the court that the counterclaim was not by them to be considered. The question whether or not a recovery should be had by one of the two parties to a contract for the violation of a statute still remained open for determination by the court upon the



pleadings. Whether or not this question was correctly decided by the court is the only one with which we are concerned. The plaintiffs have cited only one adjudged case which is directly in point, and, as the principle upon which that case proceeds must be far-reaching in its effects, the extent of its recognition, as well as its soundness, will now be considered at some length.

The case referred to is Manchester & L. R. Co. v. Concord R. Co. (N. H.), 20 Atl. Rep. 383, in which there is quoted, with approval, the following language, found in 2 Mor. Priv. Corp. § 721: "If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement, who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief, irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case. * * * These doctrines have been repeatedly applied in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and, although the contracts are held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received." A review of the authorities cited in support of these propositions does not tend to establish the doctrine announced. It was held, in White v. Bank, 22 Pick. 181, that a suit could be maintained upon an entry in a deposit book made by the defendant's cashier, by which, in effect, the bank became bound to pay at a future time the amount of plaintiff's deposit, because the statute of Massachusetts prohibited banks from assuming such liability. In the opinion we find the following language: "The second objection, and that on which the defendant's counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that, where money has been paid by one of two parties to the other, on an illegal contract, both being participes criminis, no action can be maintained to recover it back. The rule of law is laid down by Lord Kenyon in Howson v. Hancock, 8 Term R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely malum prohibitum the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule, as stated by Comyns, in his treatise on Contracts, will reconcile most of the cases which are apparently conflicting: 'When money has been paid upon an illegal contract, it is a general rule that, if the contract be executed, and both parties are in pari delicto, neither of them can recover from the other money so paid; but if the contract continnes executory, and the party paying the money be desirous of rescinding it, he may do so, and

recover back his deposit by action of indebitatus assumpsit for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover.' 2 Com. Cont. 109." The inhibition of the statute was with reference to the incurring by the bank of an indebtedness payable at a future day certain. The entry in the deposit book was as follows: "Dr. Franklin Bank in account with B. F. White, Cr. 1837, Feb. 10th, to cash deposited, \$2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier." This entry was held to be within the inhibition of the statute. The party forbidden was the one which violated the provisions of the statute. The depositor was by no means in pari delicto. Therefore, he was held entitled to recover the amount of his deposit. This distinction in principle was recognized in Bank v. Codd, 18 N. Y. 240, and the liability of the defendant was accordingly adjudged to exist.

The action in Dill v. Inhabitants of Wareham, 7 Metc. (Mass.) 438, was to recover back the sum of \$500, paid by the plaintiff to the town of Wareham for the privilege of taking oysters within the limits. The power of the town to grant the privilege was denied by the statute, and, upon the refusal of the town to allow the privilege paid for, the suit was brought as indicated. Chief Justice Shaw, in delivering the opinion of the court, said: "In regard to the sum of \$500, as it appears that it was received by the treasurer, and went to the use of the town, and was so received in advance, upon a consideration which has failed, it must be regarded as money had and received by the town to plaintiff's use, and, therefore, the action for that sum will lie." In Episcopal Charitable Soc. v. Episcopal Church in Dedham, 1 Pick. 372, a note had been given by the rector and wardens of the church, upon request of the church society, which money had been not only borrowed for, but had been used by, the church society, and it was held that such society was bound to pay the amount so borrowed, even though there existed no direct legal authority in the rector and wardens to bind the church. As will be seen by the title of this case, it was an action by the lender of the money to recover the amount loaned. Hence, the principle laid down by Mr. Morawetz, even if abstractly correct, was not applicable, as it might have been if the rector and wardens, after having paid the note, had sued the church society to recover the amount so paid. The syllabus in Whitney v. Peay, 24 Ark. 22, begins with the

statement: "The State issued bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof." But this proposition cuts no special figure in the case; for, these bonds having been pledged as security for a loan, the sole questions determined were as to the rights and liabilities of the original pledgee and his assignee of the pledge, and of assignee of such assignee, among themselves, as to the respective loans on the property pledged. The court held that the bonds must be returned to the original pledgor upon payment of the amount to secure which, originally, such pledge was made, notwithstanding the fact that, by subsequent pledges of the bonds, a loan of a larger sum had been effected. The recovery of indement in Loan Co. v. Towner, 13 Conn. 249, was for an amount loaned in Pennsylvania. It was held, in this case, that the laws of Pennsylvania should govern, and that, as the charter of plaintiff had provided that "nothing therein contained should be construed to authorize the company to discount notes," the loan of money upon which the interest was reserved in advance constituted a discount, and that, therefore, no recovery could be had upon the note. The right of the loan company to recover judgment upon another theory, which was recognized by the Supreme Court of Errors of Connecticut, is thus fairly stated in one paragraph of the syllabus: "Where a corporation, having power to sue and be sued, and to loan money under certain restrictions, made a loan, and afterwards took a note as security, in contravention of the provisions of its charter, it was held, in a suit on such note with the money counts, that, although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered on the money counts." This principle was the only one involved in Vanatta v. Bank, 9 Ohio St. 27. In Foulke v. Railroad Co., 51 Cal. 365, the opinion was very brief, and was correctly summarized in this language of the syllabus: "The provision in the act concerning railroad corporations, that 'no contract shall be binding on the company unless made in writing, refers only to contracts wholly executory; but the action against the corporation on such verbal executory contract must be brought upon an implied promise, and the recovery must be limited to the value of the benefit received by the corporation."

The lease of a certain part of a line of railroad was not authorized by the stockholders of the company by which said line was owned, as required by statute, and said lease was, therefore, held void. Inasmuch as the transaction was not tainted with any immorality, a recovery of just compensation for the use of the road was allowed without reference to the unauthorized lease. Farmers' Loan & Trust Co. v. St. Joseph & D. C. R. Co., 1 McCrary, 247, 2 Fed. Rep. 117. In Madison Ave. Baptist Church v. Baptist Church in Oliver St., 73 N. Y. 82, there had been an attempted union of the two church societies, under

an agreement that one should be merged in the other, which should be bound for and pay the debts of both. This was ultra vires, but, while the arrangement existed, and was supposed by all parties to be binding, debts were paid by the church supposed to be the sole survivor for the church supposed to have been merged in it. The court of appeals held that, for money so paid, the church whose debt had been thus paid was liable. In Tracy v. Talmage, 14 N. Y. 162, it was held that, although the vendor was a party to the illegal contract, he was not in pari delicto, within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other, and that, where parties to a contract or transaction, not malum in se, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party. In Express Co. v. Lucas, 36 Ind. 361, it was held that an agent who had received money for which the company was liable could not, as a defense to an action of the company, his principal, set up that his said principal had failed to file in the proper recorder's office a statement of the capital employed in its business, as required by statute.

From this review of the principal authorities cited to sustain the rules quoted from 2 Mor. Priv. Corp. § 721, it is shown to be extremely probable that no court, except such, perhaps, as may have been misled by his statements, has ever enforced the aforesaid principle, laid down by Mr. Morawetz, "that, if an agreement is legally void and unenforceable, by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party must account to the latter for what has been so received." Equally without judicial sanction is his next proposition, that, "under these circumstances, the courts will grant relief, irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case.' The correct rule was quoted from the language of Lord Mansfield, in Holman v. Johnson, 1 Cowp. 343, by Eyre, C. J., in Lightfoot v. Tenant, 1 Bos. & P. 551. This language is as follows: "The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff-by accident, if I may so say. The principle of public policy is this, 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If. from the plaintiff's own stating or otherwise, the cause of action appears to arise 'ex turpi causa,' or the transgression of a positive law of this country. there the court says he has no right to be assisted." After this introduction Lord Mansfield stated the question to be "whether the plaintiff's

demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country." These clearly stated principles were recognized and enforced in Spurgeon v. McElwain, 6 Ohio, 442; Banchor v. Mansel, 47 Me. 58; Hubbell v. Flint, 13 Gray, 277; Hull v. Ruggles, 56 N. Y. 424; Skiff v. Johnson, 57 N. H. 475; Aiken v. Blaisdell, 41 Vt. 655; Foster v. Thurston, 11 Cush. 322; Hooker v. De Palos, 28 Ohio St. 251; Ruckman v. Bryan, 3 Denio, 340; McKinnell v. Robinson, 3 Mees. & W. 434; Mosher v. Griffin, 51 Ill. 184; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. Rep. 525. In Wilde v. Wilde, 37 Neb. 891, 56 N. W. Rep. 724, an action for divorce, the rule was applied that the courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. The following language is quoted from Luce v. Foster, 42 Neb. 818, 60 N. W. Rep. 1027: "When any portion of the consideration is illegal, the promise cannot be enforced, unless there are several promises, and that which relates to the bad consideration can be distinguished and separated from the others. In other cases the promise is unenforceable. All the text writers so state the rule. See, for instance, Whart. Cont. 339; Anson Cont. 191; Pol. Cont. 338. The rule is so well settled that a reference to adjudications is unnecessary."

The first paragraph of the syllabus of Gould v. Kendall, 15 Neb. 549, 19 N. W. Rep. 483, is as follows: "No court of law or equity will lend its assistance in any way towards carrying out an illegal contract. Therefore, such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it." In the body of the opinion of the case last cited there is an analysis of the case of Brooks v. Martin, 2 Wall. 70, which, by the Supreme Court of New Hampshire, in Manchester & L. R. Co. v. Concord R. Co., supra, was cited as a leading case in support of the erroneous doctrine stated in section 721, Mor. Priv. Corp. By this analysis it was clearly shown by Judge Cobb that, in the case of Brooks v. Martin, a recovery was sanctioned, chiefly because, between the parties litigant, there had existed a partnership, and the property of the partnership had been the product of the money furnished by the party who had brought the suit. The discussion of this proposition may be fittingly closed by quoting from the above mentioned opinion, delivered by Judge Cobb, his quotation from the language of Chief Justice Marshall, in Armstrong v. Toler, 11 Wheat. 268, as follows: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or probibited by law." No argument is necessary to illustrate the applicability of the rule just quoted to the facts of this case. The judgment of the district court is affirmed.

NOTE.—The law imposes certain limitations upon the freedom of contract by forbidding and refusing to enforce certain kinds of contracts. The contracts which the law thus discourages and forbids are of three kinds, viz: 1st. Contracts made in breach of a statute. 2d. Contracts made in breach of some rule of the common law. 3d. Contracts contrary to public policy. Lawson on Contracts, § 278. Where an act is expressly prohibited by statute, a contract to perform or in furtherance of the prohibited act is illegal and unenforceable. Mitchell v. Smith, 1 Binn. 110; Seidenbender v. Charles, 4 Serg. & R. 151; Bank v. Owens, 2 Pet. 527; Johnson v. Cooper, 2 Yerg. 524; Linn v. Bank, 2 Ill. 87; Persons v. Jones, 12 Ga. 371; Adams v. Hackett, 27 N. H. 289; Woodworth v. Bennett, 43 N. Y. 273; Buxton v. Hamblin, 32 Me. 448; Capehart v. Rankin, 3 W. Va. 571; Jones v. Blocklidge, 9 Kan. 562; Foley v. Speir, 100 N. Y. 552. And the same rule obtains where the contract is in violation of a statute, although not thereon expressly declared to be void. Fowler v. Scully, 72 Pa. St. 456, 18 Am. Rep. 699. Where a contract made in violation of a statute is void, the subsequent repeal of the statute does not make it valid. Woods v. Armstrong, 54 Ala. 150; Banchor v. Mansel, 47 Me. 58. In dealing with illegal transactions or contracts the main motive that actuates a court is a desire to discourage them. Lord Thurlow was of opinion that the most efficient means of attaining this object was to place the parties to these contracts in statu quo, and thus by unraveling all that had been done, at the instance of either party, to remove all hope of gain from their minds. Neville v. Wilkinson, 1 Bro. Ch. 544. But it is very doubtful whether the knowledge by a party to a fraud, that if his confederate break faith with him he may have recourse to the law, and by it be replaced in his original position, would have a very deterrent influence. The more common sense view has been adopted that these parties should have no standing in court; that the sole reliance of the one must be the confidence reposed that the other shall fulfill his part of the corrupt agreement. In consonance with this, cases of this description are generally decided by an application of the maxim, in pari delicto potior est canditio defendentis. Therefore, as the principal case clearly shows, if a fraudulent or illegal contract is executory a court will refuse to enforce it; if executed it will refuse to divest the rights that have accrued thereby, whether the illegality proceeds from a disregard of a rule of public policy, or of the common law, or an infraction of the requirements of a statute; whether in fact the illegal act be malum in se or merely malum prohibitum. Therefore money paid (Newstead v. Hall, 58 Ill. 172), or goods delivered (Myers v. Neimrath, 101 Mass. 366), or land conveyed (St. Louis, etc. R. R. Co. v. Mathers, 71 Ill. 592) under an illegal contract cannot be recovered back. The principal case so clearly states the principles governing this class of cases, and so exhaustively cites the leading and older cases, that it seems here to append here only the very late cases on the subject.

Recent Cases on the Subject.—In an action for money had and received on certain city warrants, it appeared that defendant was city treasurer, and was charged with the duty of serving certain notices; that no provision for compensation has been made, though the city council had been accustomed to allow the bills for such expenses; that defendant employed plaintiff's intestate to serve the notices at a fixed salary,



and with an agreement that defendant should receive whatever money the council allowed for the services: that the council did allow bills as presented as though for money due intestate; and that orders payable to intestate were, with his consent, indorsed and appropriated by defendant: Held, that even if the agreement was illegal, plaintiff could not recover, since it was fully executed. Leveroos v. Heis (Minn.), 58 N. W. Rep. 1155. A party to a contract, void as against public policy and unenforceable while executory, cannot recover sums of money stipulated to be paid him, even though he performs his promises. Oliver v. Gilmore, U. S. C. C. of App., 52 Fed. Rep. 562. Rebates allowed by a firm, under an illegal agreement, cannot be recovered back, though the agreement and rebates were known at the time to only one member of the firm, if he had authority to act for the firm in making a settlement with the other party to the agreement. McEwen v. Shannon, 25 Atl. Rep. 661, 64 Vt. 583. A creamery firm bought some butter from plaintiff, and in settling for that, and for the drawback of three cents per pound due plaintiff under the secret agreement for cream manufactured into butter during the first year of the agreement, a due bill was given plaintiff for the balance found due: Held, in an action against the creamery firm, that plaintiff was entitled to recover the amount of his due bill, such recovery leaving the parties to the secret agreement where they placed themselves. McEwen v. Shannon, 25 Atl. Rep. 661, 64 Vt. 583. A creditor of one who had sold all his property, and fled from the country, agreed with complainant that if he would procure the affidavits and testimony of the debtor, and of two other witnesses, showing that no consideration was paid for said property, and that the purchaser knew of the debtor's insolvency, he would give complainant a share of whatever he recovered upon a creditor's bill filed by him against the debtor and said purchaser. Held that, the contract being illegal, the creditor, although he has recovered a large sum of money by help of it, will not be compelled by the courts to account therefor to complainant. Goodrich v. Tenney (Ill. Sup.), 33 N. E. Rep. 44, 44 Ill. App. 381. Courts will not enforce an illegal contract for division of railroad earnings at the suit of one party thereto claiming to have performed its part thereof. Brooks v. Martin, 2 Wall. 70, distinguished. Central Trust Co. v. Railroad Co., 23 Fed. Rep. 306, disapproved. Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co. (U. S. C. C. of App.), 61 Fed. Rep. 993. The fact that the statute prohibits a warehouseman from shipping grain for which a receipt has been given by him, without the written assent of the holder (Hill's Code, Secs. 4201-4207), does not prevent a recovery by the warehouseman in assumpsit for wheat shipped without a receipt, on the ground that he is in "pari delicto," where the evidence shows that plaintiff supposed defendant had the receipts, and would turn them over on demand; as, to prevent a recovery in such case, there must be a manifest intent on the part the bailee to dispose of the wheat to the injury of the bailors. Miller v. Hirschberg (Oreg.), 37 Pac. Rep. 85. Where the officers, directors and shareholders of a railroad company designedly enter into an illegal and void lease of their railroad to another company, the court will not relieve them therefrom, they being in pari delicto. Olcott v. International & G. N. R. Co. (Tex. Civ. App.), 28 S. W. Rep. 728. Where the president of a savings bank induces the bank to loan money, and take as security a mortgage on land, in order that a mortgage belonging to him may be paid, the mortgagor cannot, in defense to an action by the bank to foreclose, claim that its mortgage is invalid, under Civ. Code, Sec. 578, prohibiting any officer of a savings corporation from directly or indirectly borrowing its funds. Savings Bank of San Diego County v. Burns (Cal.), 38 Pac. Rep. 102, 104 Cal. 473. A principal cannot recover money received by its alleged agent from the sale of lottery tickets delivered to the latter by the former under an agreement that he shall account for the proceeds. Mexican International Banking Co. v. Lichtenstein (Utah), 37 Pac. Rep. 574.

CORRESPONDENCE.

SUGGESTED EVIDENCE.

To the Editor of the Central Law Journal:

The developments from psychological study have brought forward some interesting phenomena. One of the most important is the subject of this article. It is not necessary to discuss the scientific features, vel non, of hypnotism, nor, indeed, to grant the fact or non-existence of that state. Certain it is that investigations at home and abroad have opened up a wide field for thoughtfulness upon the proved phenomena and well nigh established conditions. Such investigators as Liebault, Bernheim, Charcot, Binet and Fere, and others, of France; Moll. Kraft-Ebig, Bentivegrin, Lilienthal and Forel, of Germany, and many in our own country, under various theories and designations of the condition, have brought into one common search-ground the therapeutic and legal aspects, such as never before known. The effects of "imagination" upon the physical organism have long been recognized, though hitherto unexplained. The same effects upon the psychical are beginning to be observed and sought after. In the normal organism imagination may develop disturbances without apparent physical cause. This is true in both physical and psychical. We may think of nauseau until we vomit; we may fancy a fact until we believe it. The line of demarkation becomes less discernible as we study the laws of body and of soul.

The susceptibility of the human mind to the influences of its environment; the impressions it unconsciously receives and acts upon; its prejudices; its innate perceptions; its automatic initiatives; its belief in demonstrated errors; its many inexplicable features are recognized by the thoughtful ones the world over. All of this is known and taken into account by the physician when he examines and prescribes for his patient; by the lawyer when he ascertains and arranges and elicits his proof, and should be by the minister when he promulgates his dogma. Juries are instructed that in weighing the testimony of the witnesses before them they may take into account the appearance of the witness, his manner of testifying upon the stand, his motives, his interest, his means of knowing the facts about which he testifies, and those thousand and one matters which lead to the belief in, or discredit of, his testimony. Yet, though comprised within these tests, mention is never made of that prominent feature of all minds, its susceptibility to suggestion, from within itself, from ex-

Proof, and as absolute as it is possible to obtain, with added and superadded confirmation, is the end sought in all investigations. With concrete matter the subject offers fewer complexities, but where facts are to be established from the testimony of human minds, the difficulties, though apparently seduced to

the truth or falsity of the witness, are much more serious. Every lawyer knows, at sometime in his professional experience, of cases where witnesses, worthy of credit and of unimpeachable veracity, have testified "falsely" to material matters, though they were honest in their own beliefs. Two reputable and equally reliable parties assert exactly the opposite, each with absolute belief in the truth of his statements. Each one is known to be incapable of falsehood, yet both cannot be correct. In the absence of conscious falsehood in the witness, whence an explanation?

To illustrate: Sometime since the writer was called upon, in his professional capacity, to advise upon a trivial assault case. The assailant was a proud, reputable, honorable gentleman, of quick temper and hot blood. The circumstances, in his judgment, required vindication. He insisted upon trial, as the unfortunate affair had occurred upon the public thoroughfare. In the privacy of the office he confessed himself to be the aggressor. Two reputable gentlemen, one a professional man of high standing, the other a prosperous merchant, passed by at the time of the occurrence. They testified that the assailant had been the assailed. The defendant was not permitted to go upon the stand. Cross-examination could not shake the testimony of the witnesses. Afterward, in conversation with these witnesses in presence of the defendant, and after they had heard his account, and they were convinced of their error, they stated that their first impressions had been as he stated to them. Upon talking together immediately after the affray, and seeking a reason for such conduct in one whom they knew to be so far above such behavior, they suggested to themselves that he must have been first attacked, and this satisfactory suggestion led them to believe it and they so testified.

The wish is often truly the father to the thought. M. Liegeois, professor of law at Nancy, tells of many curious incidents noted by himself. Similar ones are also noted by Bernheim, Bentivegni, Lilienthal, Forel, Max Dessoir and many other psychologists who have studied these peculiarities. The concensus of opinion seems to be that with or without apparent hypnotic phenomena some people can be made to believe that they have witnessed certain scenes or acts which have not existed. The Tisza-Eslar affair is a good illustration. Observation has proved, too, that it is not children alone who give false testimony in good faith. Matured and serious adults who appreciate the sanctity of an oath and desire to tell the truth, have honestly testified to a falsehood. The experiments made by Liegeois, Bernheim and Liebault are of peculiar interest and well worth study. They have each made persons of good intelligence believe that they have witnessed thefts, murders and facts which never existed, by simple suggestion without any indication of the hypnotic state.

Would it not, be well for abreast-of-the-times lawyers and judges to investigate this interesting and important subject?

C. C. B.

BOOKS RECEIVED.

The Principles of Equity and Equity Pleading. By Elias Merwin, late of the Boston Bar, and Professor in the Law School of Boston University. Edited by H. C. Merwin. Boston and New York: Houghton-Mifflin & Company. The Riverside Press Company. 1895.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCIDENT INSURANCE — Conditions.—In an action on an accident policy, evidence that insured, who was free from disease so far as his family or physician could discover, directly before the fall which caused his death, was seen to stagger, does not conclusively prove that the fall was caused by "fits or vertigo," so as to avoid the policy, under a condition avoiding the same in such event; physicians testifying that insured's conduct might have been due to other causes.—MEYER V. FIDELITY & CASUALTY CO. OF NEW YORK, Iowa, 65 N. W. Rep. 329.

2. ACTION ON CONTRACT—Evidence.—In an action on a contract containing a condition precedent to plaintiff's right of recovery, where plaintiff fails to allege performance of such condition, and defendant fails to take advantage of the defect by demurrer or motion in arrest, plaintiff need not prove the performance of such condition to entitle him to recover.—CLARK V. Ross, Iowa, 65 N. W. Rep. 340.

8. ADMINISTRATION—Sale of Land.—Where an administratrix has her intestate's land sold to pay debts, causes it to be bid in by a third party for her benefit, and afterwards had it transferred to another person, who has notice of the transactions, the latter's title may be set aside at the suit of the heirs.—O'CONNOR V. MAHONEY, Ill., 42 N. E. Rep. 378.

4. ADMINISTRATORS — Final Discharge.—Where the final report of an administratrix is approved, and the administratrix discharged, the court cannot reappoint such administratrix for the purpose of allowing her to sue on an uncollected claim due the estate; such claim having, on approval of the final report, vested in the heirs, leaving no assets upon which to order further administratiou.—JORDAN v. HUNNELL, Iowa, 65 N. W. Red. 302.

5. ADVERSE POSSESSION.—That a person planted tobacco on different portions of land for more than the statutory period, the land not being inclosed except for the period it was cultivated, does not show adverse possession.—HAMILTON v. ICARD, N. Car., 23 S. E. Rep. 354.

6. ADVERSE POSSESSION — Limitation of Actions.—
Under the Ohio statute which provides that "an action for the recovery of the title or possession of real property can only be brought within twenty one years after the cause of action accrues" (Smith & B. Rev. St. § 4977), and the construction placed thereon by the Supreme Court of the State, an open, notorious, exclusive, and adverse possession of land for 21 years, with or without color of title, whether continuous in the first possessor, or tolled in persons claiming under him, and whether with or without knowledge of the existence of another title, confers upon the original possessor, or those claiming under him, an indefeasible title in fee.—ELDER v. MCCLASKEY, U. S. C. C. of App., 70 Fed. Rep. 529.

- 7, ALTERATION OF NOTE Redelivery to Payee.—Where a note was delivered by the payee to the maker to purchase stock, and the maker transferred it, in payment for stock, to one of two owners thereof, who altered the note by reducing the rate of interest and afterwards transferred it to the other owner, who re-delivered it to the payee upon an agreement to rescind the purchase of stock, the payee cannot recover on the note, as against the parties not consenting to the alteration.—KEENE v. WEEKS, R. I., 38 Atl. Rep. 446.
- 8. APPEAL—Claims against Decedents.—A proceeding in the county court for allowance of a claim against the estate of a decedent is not a suit or proceeding at law or in chancery, within the purview of Act June 6, 1887, providing for appeals from county to appellate courts in all suits or proceedings at law or in chancery.—GRIER V. CABLE, III., 42 N. E. Rep. 395.
- 9. APPEAL—Parties.—An appeal, taken during vacation of court, which does not join as coappellants all the joint judgment defendants, will be dismissed.—DENKE-WALTER V. LOEPER, Ind., 42 N. E. Rep. 858.
- 10. APPEALABLE ORDERS—Receivers.—An order authorizing a receiver to issue receiver's certificates, which shall be a first lien on the property in the hands of the court, and to expend the proceeds in the maintenance of the railroad, is appealable.—STATE v. PORT ROYAL & A. RY. CO., S. Car., 23 S. E. Rep. 380.
- 11. APPLICATION OF PAYMENT.—Where a bank holding secured and unsecured notes, after the destruction by fire of the maker's stock, garnished the insurance companies, and afterwards accepted a proposition of the maker to dismiss the garnishment proceedings, release part of the insurance, and take an assignment of the balance, it has no right to apply the amount assigned on the unsecured debt, it being sufficiently protected as to the secured notes, where the maker, before the assignment was realized upon, directed application of the proceeds to the secured debt.—ROSENBAUM V. MERIDIAN NAT. BANK, Miss., 18 South. Rep. 549.
- 12. Assignment for Benefit of Creditors.—A creditor may maintain an action upon the original claim against an assignor who has made an assignment for the benefit of creditors, which is still open, and recover a personal judgment against him for the amount due, notwithstanding such creditor has presented a claim against the estate which has been disallowed by the assignee, and from which said ruling of the assignee an appeal is pending in the district court.—SHULLS-BURG BANK V. EASTERN KANSAS BANKING CO., Kan., 42 Pac. Rep. 835.
- 13. ASSUMPSIT Money Received.—Where a lumber dealer purchased goods from his debtor, to be credited on the debt, and the debtor ordered the goods to be shipped by another, who, supposing the order was from the dealer, shipped the goods to him, and the dealer received them thinking they were from the debtor, and sold them in the course of his business, the dealer is liable to the shipper in an action for money had and received for his use, for the price for which they were sold, though such dealer had not collected such price.—BURTON LUMBER CO. v. WILDER, Ala., 18 South. Rep. 552.
- 14. ASSUMPSIT—Set-off.—In assumpsit for advances on logging contracts, defendant cannot set off items [for cutting, hauling, and skidding a quantity of logs, amounting to a certain sum, where liens and attachments are flied against such logs for an amount exceeding defendant's charges. BACKUS V. MORRILL, Mich., 65 N. W. Rep. 273.
- 15. ATTACHMENT—Action for Wrongful Attachment.—Code, § 2961, relating to actions on attachment bonds, provides that the plaintiff therein may recover reasonable attorney's fees if the attachment was wrongfully sued out, and there was no reasonable cause to believe the ground upon which the same was issued to be true: Held, that said fees cannot be recovered unless both of such conditions are shown to exist, and there-

- fore, where the ground of attachment was that defendant was a non-resident, and he was in fact a non-resident, he cannot recover such fees, though the attachment was served by fraudulently inducing him to come into the State.—DICKINSON V. ATHEY, Iowa, 65 N. W. Rep. 326.
- 16. Banks and Banking Collections.—Where the owner of a note places it in a bank for collection, without any understanding or instructions other than, without any understanding or instructions other than, without any understanding or instructions other than paper," and the said bank voluntarily selects a person to present said note at the place named therein, and demand and receive payment thereon, and said person so selected does collect the amount due upon said note, held, that the person so selected is the agent of the bank selecting him; that the said bank must be considered as having collected said note; and that said bank is liable to said owner for the amount so collected. —FIRST NAT. BANK OF GIRARD v. CRAIG, Kan., 42 Pac. Rep. 830.
- 17. Carriers—Injury to Freight—Connecting Lines.—Goods received by a railroad company from a connecting line, to be transported over its own road, are, in the absence of a statement to the contrary in its receipt for the goods, presumed to have been received as in good order, within the meaning of section 2084 of the Code.—Georgia Railroad & Banking Co. v. Forrester, Ga., 23 S. E. Rep. 416.
- 18. CARRIERS Passenger Omission of Agent to Stamp Ticket .- Plaintiff purchased from the defendant railway company a round-trip ticket from P to S and return, one of the conditions of which, printed on its face, was that the return coupon would not be honored for passage unless the passenger was identifled by the agent at 8, before returning, and the coupon signed by him, and witnessed and stamped by such agent. Plaintiff when about to return from S, presented his ticket to the agent there, signed it for the purpose of identification, and handed it to the agent, at the same time asking for a sleeping car ticket. The agent took the ticket to the rear of his office, and, returning with it, handed it to plaintiff, folded up with the sleeping-car ticket. Plaintiff put the ticket, so folded, in his pocket, and did not discover until he was on the train on the way to P, that the agent had omitted to stamp the ticket, for which cause plaintiff was ejected from the train by the conductor upon his refusal to pay fare: Held, that the plaintiff, having done all that he was required to do, and being justified by the circumstances in believing that the agent had duly stamped the ticket, was a legal passenger upon the train, and the railway company was liable in damages for his expulsion .- NORTHERN PAC. R. CO. V. PAUSON, U. S. C. C. of App., 70 Fed. Rep. 585.
- 19. Carriers of Goods—Defective Refrigerator Car. —Where a railroad company undertakes to carry hams in a refrigerator car, and they are damaged in transit by reason of a defect in the car, the company is not relieved of responsibility therefor by the fact that it had the car inspected by the packer from whom the hams were bought.—CHICAGO & A. R. CO. V. DAVIS, Ill., 42 N. E. Rep. 882.
- 20. CHATTEL MORTGAGES Foreclosure.—Where the mortgager was present, and acquiesced in a chattel mortgage foreclosure, at which the mortgagee bid in the property, an attaching creditor, who had not levied on the particular property sold, cannot collaterally attack the sale, though it was not conducted in strict conformity to law.—Brown v. Mynard, Mich., 65 N. W. Rep. 293.
- 21. CHATTEL MORTGAGE Preferring Creditor.—A debtor, although in embarrassed condition, and even in failing circumstances, may prefer one of his creditors, to the exclusion of other creditors, if he acts in good faith in such preference, and such preference may be made by way of chattel mortgage on so much of his property as is necessary to secure the payment of the debt.—HADLEX V. ADSIT, Kan., 42 Pac. Rep. 386.

- 22. CHATTEL MORTGAGES—Senior and Junior Mortgages.—The holder of a junior mortgage on personal property, who, with knowledge of the existence of a senior mortgage thereon, receives the mortgaged property from the mortgagor and with his consent appropriates it, in whole or in part, to the satisfaction of the junior mortgage, and then places it beyond the reach of an execution issued upon the foreclosure of the senior mortgage, is liable to the plaintiff in that execution for the value of the property thus received and disposed of—not, of course, exceeding the amount due upon such execution. This is true although the junior mortgagee did the acts mentioned solely for the the purpose of collecting his own debt.—Harris v. Grant, Ga., 23 S. E. Rep. 390.
- 23. CHATTEL MORTGAGES Validity Possession by Mortgagor.—The validity of chattel mortgage on a stock of imerchandise is not impaired by a contemporaneous verbal agreement that the mortgagor may remain in possession of the goods, sell the same in the usual course of trade, and apply the proceeds to the mortgage debt.—HEILBRONNER v. LLOYD, Mont., 42 Pac. Rep. 853.
- 24. CONTRACT Account Stated—Counterclaim.—An employer who, after performance of services by an employee under contract, agrees to pay the employee, in "full discharge of the contract and in full settlement thereof," a certain sum for his services, cannot maintain an action against the employee for damages caused by his negligent performance of the service, in the absence of a showing that the settlement was fraudulently procured.—GRISWOLD v. PIERATT, Cal., 42 Pac. Rep. 920.
- 25. CONTRACT—Execution—Mutuality.—Where a contract, drawn as if to be executed by two parties, is signed by only one of them, but is accepted and acted on by the other, it is as binding as if signed by both parties.—VOGEL v. PEKOG, Ill., 42 N. E. Rep. 386.
- 26. CONTRACT—Omissions by Fraud—Parol Evidence.—Plaintiff and defendant having contracted in writing to exchange certain realty for personalty, plaintiff cannot show by parol that defendant represented the land to be worth much more than it really was, and that such representation was omitted from the contract by fraud, in an action on an implied promise to pay the difference in value.—Warnes v. Brubaker, Mich., 65 N. W. Rep. 276.
- 27. CONTRACT OF INDEMNITY Extent of Liability—Public-Pub
- 28. CONTRACT TO MAKE A WILL.—A complaint against the estate of one deceased, alleging that decedent's husband declared that he would make provision in his will for labor performed by claimant, but that said husband did not make such provision, and that decedent, who inherited all her husband's estate, in consideration that claimant would not bring any suit against the estate of her husband, promised that she would provide for the payment of said labor by her will, but that she did not make such provision, states a good cause of action.—PURVIANCE v. PURVIANCE, Ind., 42 N. E. Rep. 364.
- 29. CORPORATIONS Estoppel.—A stockholder who has paid for his stock is not personally liable to the creditors of the corporation because it carried on business before its capital stock had been subscribed for, where he had no notice that such stock had not been subscribed for, or of any intent to carry on an illegal corporation. AMERICAN MIRROR & GLASS-BEVELING OO. V. BULKLEY, Mich., 65 N. W. Rep. 291.
- 30. CORPORATIONS—Management.—A court will not interfere in the internal policy and management of a

- corporation, unless it is manifest that it is about to exceed its corporate powers, and do an act in fraud of the rights of stockholders.—LOWE V. PIONEER THRESHING CO., U. S. C. C. (Minn.), 70 Fed. Rep. 646.
- 81. COUNTIES—Boundaries.—Pol. Code, § 3969, providing that the survey of the boundary lines between counties may be "made by the surveyor general," on application of the hoard of supervisors of any county affected thereby, does not require that the survey should be made personally by the surveyor general or his deputy. His approval of a survey by a surveyor appointed by him is sufficient.—BIGE v. TRINITY COUNTY, Cal., 42 Pac. Rep. 809.
- 32. CRIMINAL EVIDENCE Burglary. On trial for breaking into a store in the night, with intent to commit larceny, the indictment also containing a count for larceny, bottles of peppermint, brought from the store at the time of the trial, were admissible to identify similar bottles found in defendant's house after the burglary.—PEOPLE V. VAN DAM, Mich., 65 N. W. Rep. 277.
- 33. CRIMINAL EVIDENCE—Receiving Stolen Goods.—On a trial for receiving stolen goods, evidence of previous transactions between defendant and the thief, in reference to other stolen property, is admissible to show knowledge that the goods were stolen.—STATE V. FRUERHAKEN, IOWA, 65 N. W. Rep. 299.
- 34. CRIMINAL LAW—Disorderly House—Construction of Statutes.—3 How. Ann. St. § 1997a, declares that all keepers of bawdyhouses, or houses for the resort of prostitutes, shall be deemed disorderly persons. Section 9286, provides that every person who shall keep a house of ill fame, resorted to for the purposes of prostitution, shall be punished: Held, that a person cannot be punished for the same transgression; under both statutes.—PEOPLE v. COX, Mich., 65 N. W. Rep. 283.
- 35. CRIMINAL LAW-Evidence—Confession.—A person accused of crime was promised by the State's attorney that, if he would make a written statement of the facts, it should not be used against him. He did so, and the State's lattorney, not being satisfied with the statement, then asked him to come to the latter's office, and make an oral statement, which the accused did, believing that it would not be used against him: Held, that such oral statement, being induced by promises, could not be proved against him.—ROBINSON v. PEOPLE, Ill., 42 N. E. Rep. 376.
- 36. CRIMINAL LAW-Insolvent Banks—Receiving Deposits.—On trial of an indictment of a banker for receiving money when insolvent, where defendant, to show want of connection with the transaction, testified that, on the morning of the day the deposit was made, he left the town where his bank was located, and went to W, after promising to telephone his son, left in charge of the bank, if things did not look favorable, not to receive deposits, and that he sent that message, the court was not required to confine the cross examination to what defendant did at W.—STATE V. EIFERT, IOWA, 65 N. W. Rep. 809.
- 87. CRIMINAL LAW Witnesses Impeachment.— Where, on trial of four persons for an affray, three of them have testified, and the fourth, who was their antagonist, is called in his own behalf, his codefendants have the same right to impeach him as though he were a State's witness.—STATE v. GOFF, N. Car., 23 S. E. Red. 355.
- 88. CRIMINAL LAW Witness Investigation before Grand Jury.—Where a witness before a grand jury refuses to testify, it is proper for the court, before whom the witness is brought, after deciaring that the witness had the right to refuse to testify on the ground that his testimony mighs tend to incriminate him, to direct the witness to return for further examination before the grand jury, as the law exonerates him from answering self-incriminating questions only.—STATE V. LEWIS, IOWA, 55 N. W. Rep. 295.
- 39. CRIMINAL PRACTICE—Conspiracy.—In an indictment under Rev. St. § 5440, for conspiring to defraud

the United States, it is sufficient to charge an unlawful combination and agreement as actually made, and in addition to describe any act by one of the parties as an act relied on to show the agreement in operation, without showing how such act would tend to effect the object, or that the object was actually feffected.— UNITED STATES V. BENSON, U. S. C. C. of App., 70 Fed. Rep. 591.

- 40. CRIMINAL PRACTICE—Larceny.—An indictment for stealing the property of "John F. Hinckley" may be sustained by proof that it belonged to "J. F. Hinckley."—LITTLE V. PROPLE, Ill., 42 N. E. Rep. 389.
- 41. DEATH BY WRONGFUL ACT—Negligence of Fellowservant.—A "chain gang boss" is not a fellow-servant of a "chain gang prisoner," and the employer of the "boss" is responsible for wrongful or negligent acts on the part of the latter, by which a prisoner is deprived of his life.—Boswell v. Barnhart, Ga., 28 S. E. Rep. 414.
- 42. DEED-Forcible Detainer-Evidence.—In a summary proceeding to recover possession of land, a deed purporting to convey the premises in question to plaintiff, is admissible to show plaintiff's right of possession.—GALE v. ECKHART, Mich., 65 N. W. Rep. 274.
- 43. DEED-Married Woman-Surety for Son's Debt.—
 If a married woman conveys land to her son for the purpose of enabling him to piedge it to a third person as security for a debt due, or to become due, to that person by the son, and this is a mere colorable transaction, growing out of a scheme suggested by the creditor in order to make her, in fact, a surety for the son's debt, although she did not become nominally bound therefor, the transaction was, as to her, contrary to law and void. If, on the other hand, there was no element of suretyship in the transaction, and the mother deliberately conveyed the land to the son, simply to enable him to secure thereby his own debt, she was bound by her deed.—NATIONAL BANK OF ATHENS V. CABLTON, Ga., 23 S. E. Rep. 388.
- 44. DIVORCE—Support of Children.—Under How. Ann St. § 6245, providing that where a divorce is granted to a wife the court may decree to her such part of the husband's estate as is reasonable for the support of children committed to her care, the court cannot direct that an amount awarded for the support of a child be paid to the guardian of the child instead of to the wife.—Swiner v. Swiner, Mich., 65 N. W. Rep. 287.
- 45. DEED TO RELIGIOUS SOCIETY—Charitable Use.—A conveyance of land to the rector, churchwardens and vestrymen of an unincorporated religious society, to be used for church purposes, is valid as a conveyance in trust for a charitable use.—ALDEN v. RECTOR OF ST. PETER'S PARISH, Ill., 42 N. E. Rep. 392.
- 46. EJECTMENT-Condemnation Proceedings—Collateral Attack.—In an action of ejectment, where it is shown that, subsequent to the commencement of the action, the defendant had begun proceedings for condemnation of the premises in dispute, and that in those proceedings an order had been made authorizing him to retain possession thereof during the pendency of the proceedings, which were still pending, such order is a defense to the action.—BYRNES v. DOUGLASS, Nev., 42 Pac. Rep. 798.
- 47. EMINENT DOMAIN—Jury Trial.—The legislature has power to give the State a right to jury trial in proceedings to condemn land for State purposes.—Condemnation of Certain Land for New State House, R. I., 33 Atl. Rep. 448.
- 48. ESTOPPEL Fraudulent Conveyances.—One who purchases land, knowing that another claims title thereto under a mortgage procured by false representations, cannot attack such mortgage on the ground of such representations.—Pass v. LYNCH, N. Car., 28 S. E. Rep. 357.
- 49. ESTOPPEL—Representations.—W, after obtaining an attachment against his debtor's property, bought from him his stock of goods, the price to be credited

- on the debt. H afterwards represented to M, another creditor, that he took the goods under the attachment. M induced the debtor to assign to him the part of the stock exempt: Held, in an action against W by M for the conversion of the exempt stock, that H was not estopped to claim the stock under the sale, where, before bringing the suit, M was notified that W claimed under such sale, and the representations in no way affected M's conduct.—MEISEL v. WELLES, Mich., 65 N. W. Rep. 289.
- 50. EVIDENCE—Books of Account.—Books of account are not admissible in evidence where the party offering them falls to show that the charges were made in the ordinary course of business, nor that the books show a continuous course of dealing with persons generally, or several items of charge at different times against the other party, and none of the charges are verified to the effect that they are just and true, and no reason is given for the failure to make such verification. Code, § 3658.—ARNEY V. MEYER, IOWA, 65 N. W. Rep. 337.
- 51. EXECUTION SALE—Eviction of Purchaser.—Proceedings instituted by a judgment creditor, in which the judgment, execution and sale thereunder are declared void, and the judgment creditor awarded a decree for the full amount of his claim, are equivalent to an eviction of the purchaser at the execution sale, within Code Civ. Proc. § 347, providing that, if the purchaser of real property sold on execution be evicted therefrom in consequence of irregularities in the proceedings, he may recover from the judgment creditor the price paid.—ELLING v. HARRINGTON, Mont., 42 Pac. Rep. 851.
- 52. FEDERAL COURTS—Diverse Citizenship—Failure to Defend.—Where a federal court once acquires jurisdiction by reason of the diverse citizenship of the parties to an actual controversy, such jurisdiction is not arrested by the fact that, after the action is begun by service of process, defendant does not continue to resist complainant's demands.—Park v. New York, L. E. & W. R. CO. (U. S. C. C.), N. Y., 70 Fed. Rep. 641.
- 53. FEDERAL COURTS Imputed Negligence. The question whether or not the negligence of a parent should be imputed to a child of tender years is one of general law, upon which a federal court will be guided by its own views of that law, and is not bound by the decisions of State courts.—BERRY V. LAKE KRIE & W. B. Co., U. S. C. C. (Ind.), 70 Fed. Rep. 679.
- 54. FIXTURES.—Machinery, such as planers, molders, beiting, shafting and the like, placed in and affached to a mill in order to carry out the obvious purpose for which it was erected, or to permanently increase its value for use as a manufacturing establishment, and not intended to be moved about from place to place, but to be permanently used with the building, becomes a part of the realty, although such machinery may be removable without injury either to itself or the building.—CUNNINGHAM v. CURETON, Ga., 23 S. E. Rep. 420.
- 55. FRAUDULENT CONVEYANCES—Action to Set Aside.
 —In an action by a creditor to set aside a deed as fraudulent, declarations by the grantor, after the delivery of the deed, as to his fraudulent intent in making it, are not admissible against the grantee where it is not shown that the grantee had notice of such intent.—NEUFFER V. MOEHN, IOWA, 65 N. W. Rep. 334.
- 56. FRAUDULENT CONVEYANCE Title Taken in Stranger.—Where the purchaser of a tract of land who is in debt has the grantor, when paid the consideration, execute a deed of general warranty to a third person, and the purchaser has the deed so made to hinder and delay his creditors, the deed is binding between the parties, and said real estate is subject to the lien of a judgment rendered prior to the execution of such a conveyance against a person to whom such conveyance is made: Held, further, that such lien is superior to that of a mortgage executed at the same time as the deed, where the mortgagee had knowledge of the fraudulent purpose of the purchaser in having the land so conveyed.—Hawley v. Smelding, Kan., 42 Pac. Rep. 841.

- 57. Garnishment Liability of Insurance Agent.—Where an insurance company, in consideration of a surrender by defendant of his policy, agreed to send to its agent, for defendant, a cashier's check for a certain sum, payable to defendant's order, the insurance agent became agent for defendant, so that the mailing of the check to him was a delivery to defendant, and the amount thereof could not be reached by a subsequent garnishment against the company. Campbell V. Hanney, R. I., 33 Atl. Rep. 444.
- 53. HIGHWATS—Dedication.—A conveyance of lots as bounding on a street, laid out over the grantor's land on a public or private plat but not opened is, as against the city seeking to take the land occupied by the street for street purposes without compensation, a dedication of only so much of the land occupied by the street, in either direction, as will enable the grantee and his successors to reach some other opened or unopened public way.—MAYOR, ETC., OF BALTIMORE v. FRICK, Md., 33 Atl. Rep. 435.
- 59. Highway—Obstruction.—Where the line of a highway is altered with the consent of the owner of the land taken for the change, and the public use the road as altered for 26 years, and it is included in the road district of a town, and is in charge of the town overseers, and the citizens are assessed for its maintenance, the land taken for the change becomes a public highway, though the boundaries of the road thereon have not been ascertained by the highway commissioners, or the exterior lines of the road marked out.—Wakeman v. Wilbur, N. Y., 42 N. E. Rep. 841.
- 60. Homestead—Married Woman—Abandonment.—A woman who married and went to live with her husband on a farm leased by him, leaving the greater part of her furniture stored in her homestead, and with the intention of returning after the expiration of the lease, did not abandon her homestead so as to subject the same to execution sale.—REESEMAN V. DAVENPORT, Iowa, &S.N. W. Rep. 301.
- 61. INSURANCE—Conditions—Vacant and Unoccupied.

 —A dwelling house in which insured lived at the time the policy thereon was issued, on the removal of his family therefrom to a house near by, becomes "vacant and unoccupied," within the meaning of such words in the policy, avoiding it in such event, though the house is still slept in occasionally by the employees of insured, and visited by his wife daily, for the purpose of getting therefrom provisions stored therein.—AGRICULTURAL INS. CO. OF WATERTOWN, N. Y., V. HAMILTON, Md., 33 Atl. Rep. 429.
- 63. I TERPLEADER—Necessary Allegations.—A bill of interpleader must show that two or more persons have preferred claims against complainant for the same thing; that complainant has no beneficial interest in the thing claimed, and that he cannot determine, without hazard to himself, to which of the several claimants the thing belongs. A bill of interpleader will not lie as to those defendants whose claim is for uniquidated damages sounding in tort, the interest of their codetendants being in the fund itself.—NORTH PAC. LUMBER CO. V. LANG, Oreg., 42 Pac. Rep. 789.
- 63. INTOXICATING LIQUORS Sale by Druggist. A druggist, in good faith, selling tincture of ginger as a medicine, cannot be convicted of selling intoxicating liquors because the buyer diluted the drug with water and drank it as an intoxicant.—Bertrand v. State, Miss., 18 South. Rep. 545.
- 64. JUDGMENT—Liability of Heir—Debts of Testator.—In Kansas a personal judgment cannot be obtained against an heir for the liability of his testator, except in accordance with the provisions of paragraph 2938 of the General Statutes of 1889.—HAMBLIN V. ROHRBAUGH, Kan., 42 Pac. Rep. 834.
- 65. JUDGMENT—Lien.—Where a motion to set aside a detault judgment is made on the day after its rendition, the same day it was enrolled, which is continued until next term, at which the judgment is modified, the judgment does not become a fixed one until after the motion is decided, and enrollable so as to become a

- lien on defendant's land; and therefore other judgments rendered and enrolled pending the motion are superior liens.—CRANE V. RICHARDSON, Miss., 18 South. Rep. 542.
- 66. JUDGMENT Usury as a Defense. Where, as against one claiming title to land under a deceased person, the right of a judgment creditor of the estate of the latter to subject the land to the satisfaction of the judgment depends upon the validity of a deed made by the deceased for the purpose of securing the debt upon which such judgment is founded, it is the right of the person so claiming under the deceased to attack the deed in question as being void for usury.—RYAN V. AMERICAN FREEHOLD LAND MORTGAGE CO., Ga., 23 S. E. Rep. 411.
- 67. JUDICIAL SALES—Notice—Rights of Purchaser.—The failure of the trustee to advertise the sale as required by the decree, coupled with the fact that the land was sold for much less than its real value, authorizes the court to set aside the sale, as against the purchaser.—CONROY V. CARROLL, Md., 33 Atl. Rep. 423.
 68. LANDLORD AND TENANT—Lease—Covenants.—The
- os. Landlord and Texant—Lease—Covenants.—The covenant of a lessor to "keep" the outside of the building in good repair requires him to put it in good repair where, at the execution of the lease, it was out of repair.—MILLER V. MCCARDELL, R. I., 83 Atl. Rep. 445
- 69. LANDLORD AND TENANT-Lease-Forfeiture-Nonpayment of Taxes.-Where a lease for the life of the lessee recites that the consideration thereof is a deed by the lessee of her interest in the premises, except a life estate therein under the lease, and it is provided in the printed part of the lease that the lessee shall keep the premises in repair, and that, on a breach by the lessee "of any of the covenants herein contained," she will surrender possession, and following is a written clause, providing that, "as a further consideration, R (lessee) hereby agrees to pay all taxes which may be assessed against said premises before they become delinguent." which is followed by a separate written clause, providing that the lessee shall make the repairs, and that "a failure so to do shall work a forfeiture of this lease," the lessor cannot declare a forfeiture for non payment of taxes.—HEIPLE v. REED, Iowa, 65 N. W. Rep. 831.
- 70. LANDLORD AND TENANT—Lease—Vacation of Premises.—A monthly lease, with rent payable on the first secular day of each month, provided that the lessor should furnish proper and sufficient heat for the demised premises, but he falled to do so, at times, from December to February 6th, when, by reason of such failure, the premises became untenantable, and the lessee vacated them: Held, that he was not liable for rent of the premises after he vacated them.—Bass v. ROLLINS, Minn., 65 N. W. Rep. 348.
- 71. LANDLORD AND TENANT—Rent—Destruction of Building.—Under Code, § 2498, providing that a tenant shall not be bound to pay rent for buildings after their destruction by fire without negligence on his part, the lessee of a plantation is entitled to have the rent apportioned on the destruction of the ginhouse.—TAYLOR V. HART, Miss., 18 South. Rep. 547.
- 72. LIBEL—Faise Reports of Business Standing.—The circulation of faise and unfounded communications concerning the business standing of another, from which, as a natural result, the latter suffers a special damage, gives a right of action for damages actually sustained, even though such communications may have been innocently and negligently, but not maliciously, made.—Bradstreet Co. v. Oswald, Ga., 28 S. E. Rep. 423.
- 73. LICENSE—Parol License Revocation.—A landowner orally granted B a license to construct a reservoir and lay pipes on his land to convey water from a certain spring, in consideration that B would give him the right to use such water in case of fire, and would so construct the reservoir as to enable him to take water therefrom in case of fire. There was no agreement as to the time they should be maintained. B

afterwards expended \$1,500 in improvements, which were used by him and such landowner: Held, that the landowner, or his grantees with actual notice, could revoke such license only on condition that the licensed should be permitted to remove his improvements, if it could be accomplished without material loss, or, if not, that the licensor should make just compensation therefor.—FLICK V. BELL, Cal., 42 Pac. Rep. 813.

- 74. LIFE INSURANCE—Beneficiaries—"Legal Heirs."—Where one designates his "legal heirs" as beneficiaries in a life policy, an irrevocable interest in the policy vests in those then living, and, on their birth, those subsequently born, who would on insured's death be his heirs.—Yore v. Booth, Cal., 42 Pac. Rep. 808.
- 75. LIMITATION OF ACTIONS Personal Injuries to Wife—Joint Action.—The fact that a wife who has sustained personal injuries during the disability of coverture elects to sue upon her cause of action before the disability is removed, and to that end necessarily joins her husband as nominal plaintiff, does not operate as a waiver of the exception in her favor, contained in the statute of limitations; and she may bring such suit any time during coverture, even though the husband's separate cause of action would be barred.—Fink v. Campbell, U. S. C. C. of App., 70 Fed. Rep.
- 76. Malicious Prosecution.—The plaintiff's declaration disclosing that, if he had any legal cause of complaint whatever against the defendant, it was for a malicious prosecution, and there being no allegation that the alleged malicious prosecution was ended before the plaintiff's suit was brought, a demurrer to the declaration was properly sustained.—McDaniel v. Nelms, Ga., 23 S. E. Rep. 407.
- 77. MANDAMUS TO COUNTY AUDITOR.—Mandamus will not lie against the auditor of a county to compel him to issue a warrant on a county treasurer for the charges and expenses incurred and paid by another county for a case therein tried on a change of venue from such auditor's county, but the claim must be presented to the county commissioners.—STATE V. JAMISON, Ind., 42 N. E. Rep. 350.
- 78. MASTERAND SERVANT—Conspiracy against Fellow-workman.—A combination among defendants to quit work unless plaintiff was discharged, by reason whereof he was thrown out of employment, or an agreement not to work with plaintiff, pursuant to which defendants quit work upon their employer's refusing to discharge plaintiff, by reason whereof the business was suspended, and plaintiff thrown out of work, is not actionable, in the absence of malice, intimidation, or violence, or evidence that defendants were bound to continue work, or that the employer was obliged to retain plaintiff in his service.—CLEMITT v. WATSON, Ind., 42 N. E. Rep. 367.
- 79. MASTER AND SERVANT—Negligence.—In an action by a workman on a bridge for injuries caused by defects in a plank track constructed on the bridge as the work progressed, on which to move timber, where the court cannot presume from the facts alleged that plaintiff participated in the construction of the track, or that he was a fellow-employee of those who did construct it, or even that he was an employee at the time it was constructed, the fellow-servant rule cannot be invoked to show the insufficiency of the petition.—BEDFORD BELT RY. Co. v. BROWN, Ind., 42 N. E. Rep. 359.
- 80. MECHANIC'S LIEN-Findings.—Plaintiffs, in their complaint in an action to foreclose a mechanic's lien, having alleged that they furnished material, under agreement with the contractor, and that there was a sum due from the owner to the contractor, cannot recover against the owner under a finding that the owner had paid out more than the contract price.—Gibson v. Wheeler, Cal., 42 Pac. Rep. 810.
- 81. MUNICIPA. BONDS-Elections.—One, who, before buying bonds issued under a vote of the qualified voters of a town, examines the election proceedings,

- and finds that a majority of the registered voters voted in favor of the issue, need not inquire whether the voters were legally registered where the registrar certified that each voter was so registered, and the returns of the canvass by the registrar and judges of election were approved by the county commissioners, though the result of the election was not formally declared by such commissioners as required by Laws 1887, ch. 87.—CLAYBROOK V. COMMISSIONERS OF ROCKINGHAM CO., N. Car., 23 S. E. Rep. 360.
- 82. MUNICIPAL CORPORATION Defective Sidewalk—Evidence.—In an action against a city for injuries from a defective sidewalk, where a witness for plaintiff testified, over defendant's objection, as to repairs after the accident, and other witnesses, including one of defendant's, testified without objection as to such repairs, defendant was not prejudiced by the allowance of the questions.—HUNT v. CITY OF DUBUQUE, Iowa, 65 N. W. Rep. 319.
- 83. MUNICIPAL CORPORATION—Defective Street Crossings.—Though one use a street crossing knowing that a plank is out of it, and having another convenient route, he is not guilty of contributory negligence if he believes, and as a reasonably prudent man has a right to believe, that he will pass in safety by the exercise of ordinary care, and uses such care.—NICHOLS V. INCORPORATED TOWN OF LAURENS, IOWA, 65 N. W. Rep. 836.
- 84. MUNICIPAL CORPORATIONS Sidewalk Improvements.—An ordinance compelling the owner of a vacant 20-acre lot to construct 1,256 feet of cement sidewalk along an unimproved street in place of a substantial plank sidewalk in good repair and constructed less than six months before, in obedience to a prior ordinance, is void, as being unreasonable, unjust and oppressive.—HAWES v. CITY OF CHICAGO, Ill., 42 N. E. Rep. 373.
- 85. MUNICIPAL IMPROVEMENTS Change of Grade—Damages.—The measure of damages to abutting property caused by raising the grade of a street is the difference between the market value of the property before and after the improvement; and, upon the trial of an action for the recovery of such damages, it is competent to give in evidence the necessity of filling in the lot, and raising the buildings thereon, with the probable cost of such work, not as furnishing a reason for the allowance of such cost as an independent item of special damage, but as a circumstance throwing light upon the general question of the diminution of the market value.—CITY COUNCIL OF AUGUSTA V. SCHRAMECK, Ga., 23 S. E. Rep. 400.
- 86. MUTUAL BENEFIT INSURANCE—Waiver of Conditions.—Where a member of a mutual benefit association is delinquent in paying his assessment 17 times out of 20, and the association always receives his money when tendered after the proper time, continues to levy assessments on him until his death, and does not strike his name off the roll of membership till after his death, the association waives the right to declare his membership forfeited for delinquency.—RAILWAY PASSENGER & FREIG IT CONDUCTORS' MUTUAL AID & BENEFIT ASS'N V. TUCKER, Ill., 42 N. E. Rep. 398.
- 87. NEGLIGENCE—Contributory Negligence—Gas Explosion.—The act of taking a lighted lamp into a cellar known by the person entering to be filled with escaped gas is not, as a matter of law, such contributory negligence as will preclude recovery for injuries from an explosion occurring over 10 minutes later.—Consolidated Gas Co. of Baltimore City v. Crocker, Md., 53 Atl. Rep. 423.
- 88. NEGOTIABLE INSTRUMENT—Accommodation Paper—Burden Jof Proof.—The K Co., which had obtained from the C Bank discounts of sundry notes of its own and of individuals given to it, with the bank's knowledge, for its accommodation, deposited with the bank sundry securities, as collateral to its indebtedness, and instructed the bank that such securities were pledged to secure the payment of loans made to the K Co. or

the various persons who had made the notes, and of any deficit on the present or future indebtedness: Held, that the burden was upon the bank to show that a note made by one of such persons to the order of the bank, and discounted after the deposit of the collateral, was made for the accommodation of the K Oo.; and that, upon the evidence in the case, the bank had failed to show such fact.—CLAY CITY NAT. BANK V. HALSEY, U. S. C. C. of App., 70 Fed. Rep. 567.

89. NEGOTIABLE INSTRUMENT - Action on Note .-Whether one who in good faith, and for value purchased before its maturity a negotiable promissory note exe cuted by a corporation chartered by a superior court, and having, under the charter, authority to execute such notes, is or is not bound to take notice of the general powers of the corporation, with a view to ascertaining whether or not, in purchasing the property for which the note was given, it acted ultra vires, yet, where the corporation retained the property for which the note was given, it could not set up the defense of ultra rires, even to an action upon the note by the original payee, and much less could it set up this defense to an action thereon brought by a person who had purchased the note as above stated.—Towars Excalsion & Ginning Co. v. Inman, Ga., 28 S. E. Rep. 418.

99. NEGOTIABLE INSTRUMENT — Action on Note—Defenses.—In an action on a note, where the defenses were that it was procured by fraud, and had been fraudulently altered after delivery by the insertion of a clause providing ifor interest, it was error to charge that defendant was not entitled to a verdict, though both defenses were proved, if plaintiff was an innocent holder, since, in the absence of evidence of negligence on the part of defendant, or authority from him to insert the interest clause, such alteration, if made without his knowledge, and after delivery, would defeat a recovery by an innocent holder.—DERR v. Keough, Iowa, 65 N. W. Rep. 339.

91. NEGOTIABLE INSTRUMENT—Note—Consideration.—
If a third party, without any consideration personal to himself, gives his promissory note to a creditor as collateral to the mere naked debt of another, without any circumstance of advantage to the debtor, or disadvantage to the creditor, the note is without consideration.—Turle v. Sargert, Minn., 65 N. W. Rep. 849.

92. NEGOTIABLE INSTRUMENT—Notice of Protest.—Under the law of this State, where a promissory note is made payable at a chartered bank, not only indorsers for value, but all other persons whose indorsements are essential to the due transmission of title, as distinguished from mere sureties by indorsement, are entitled to notice of non-payment and of protest; and the fact that the notary who protested such a paper sent by post to the last indorser notices of its non-payment and protest addressed to each of the prior indorsers, is not, of itself, sufficient to bind a prior indorser who did not receive notice, although his residence was unknown to the notary, it not appearing that it was unknown to the indorsers succeeding him in the order of indorsement, or that notice was actually mailed to him.—ALDINE MFG. CO. v. WARNEE, Ga., 23 S. E. Rep. 405.

33. NUISANCE.—A shed used for coal and wood removed by a lot owner to the portion of his lot adjoining a tenement building of his adjoining lot owner, though placed there maliciously, cannot be considered a nuisance.—KUZNIAK V. KOZMINSKI, Mich., 65 N. W. Red. 275.

94. NUISANCE — Abatement. — Injunction. — Where a rendering establishment located within a city, while operated so as to give the least possible offense, so contaminates the atmosphere as to affect the comfort and health of the occupants of houses in its vicinity, and there is nothing in the character of the business which requires that it shall be carried on in its present location, the owners and occupants of the houses may enjoin its further maintenance, under Code, § 3831, providing that whatever is injurious to health or offensive to the senses is a nuisance which may be enjoined by

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any person injured thereby, though the general public is affected in the same manner as the occupants.—MILLHISER V. WILLARD, IOWA, 65 N. W. Rep. 325.

95. Partition—Parol Partition—Estoppel.—In Ohio, a parol partition of land, consummated by possession and acquiescence under it for any less period than that which creates the bar by the statute of limitations, does not vest the legal title in severalty to the allotted shares; but such partition, acquiesced in for any considerable length of time, will estop any perfon joining in it, and accepting exclusive possession under it, from asserting title or right to possession, in violation of its terms; and if such a partition is made by the husband of a married woman, and consented to by her, and is fairly and equally made with respect to her rights, it is a good defense against her and her heirs in an action by them to recover her undivided interest in the shares allotted to her cotenants.—ALLEN v. SEAWELL, U. S. C. C. of App., 70 Fed. Rep. 561.

96. PARTMERSHIP—Dower in Partnership Realty.—The widow of a deceased member of an insolvent firm is not entitled to dower in the partnership realty, nor to have said realty taken into consideration in estimating her dower.—SPARGER V. MOORE, N. Car., 23 S. E. Rep. 359.

97. PRINCIPAL AND SURBITY—Waiver of Rights.—Where a contract to excavate a cellar provided that the owner should, out of the contract price, weekly pay the workmen having a time check signed by the contractor, and the contractor's surety, on being informed that the contract price was exhausted, consented to a further payment of the workmen by the owner, he is liable for the amount so paid, though that portion of the agreement as to signing the time checks by the contractor was not observed.—Hamilton v. Woodworth, Mont., 42 Pac. Rep. 849.

98. PROCESS—Service of—Acceptance of Service.—An indorsement on a summons, that defendant "hereby accepts service," and will allow plaintif "to proceed with the case the same as though service had been made as commanded in said summons," is sufficient to give the court jurisdiction, though defendant was without the jurisdiction when he made such indorsement.—ALLURED V. VOLLER, Mich., 65 N. W. Rep. 285.

99. RAILROAD COMPANIES—Foreign Competing Lines—Public Policy.—A foreign railroad corporation, on the ground of public policy, cannot acquire the stock, and thereby the management, of a domestic competing line.—STATE V. PORT ROYAL & A. Ry. Co., S. Car., 23 S. E. Red., 383.

100. RAILROAD COMPANIES — Trespassing Stock — Rights of Owners.—Where the stock of plaintiff below are trespassing in the inclosure of another, and go from there onto the right of way of the railway company, and are killed or injured, the plaintiff is entitled to no greater rights than the landowner would have.— ROUSE V. OSBORNE, Kan., 42 Pac. Rep. 843.

101. RAILROAD FORECLOSURE-Decree.-In railroad foreclosure proceedings a decree of foreclosure and sale was entered, with a reference to a master to ascertain and report the amount of the mortgage indebtedness, the proper allowances to be made to the receiver as compensation and for expenses, the amount of receiver's certificates outstanding, and the proper allowances to the trustee and its solicitors. On the coming in of the master's report a decree was entered confirming the same, though no sale had yet been made: Held, that the latter decree, taken in connection with and aided by the former one, terminated the litigation on the merits and fixed the respective rights of the parties, and that it was, consequently, a final decree which could not be modified or altered after the close of the term.-Petersburg Sav. & Ins. Co. v. Dellatorre, U. S. C. C. of App., 70 Fed. Rep. 643.

102. REAL ESTATE AGENTS—Commissions.—A contract by defendant to pay plaintiff a specified commission after six months from the delivery to defendant of a deed for a one-half interest in a ranch owned by a third person is indivisible, and plaintiff cannot, upon



defendant's purchase of a one-third interest in such ranch, recover a proportionate commission.—WITTE v. TAYLOR, Cal., 42 Pac. Rep. 807.

103. RECEIVERS.—A collateral attack on the partition suit cannot be made in a motion to set aside an order for the sale of the land by the receiver.—FANEUIL HALL NAT. BANK V. BUSSING, N. Y., 42 N. E. Rep. 345.

104. REMOVAL OF CAUSES—Federal Question.—A cause not depending upon the citizenship of the parties, nor otherwise specially provided for by congress, cannot be removed from a State to a federal court, as a case arising under the constitution, laws and treaties of the United States, unless the facts making it removable appear from plaintiff's statement of his claim.—STATE v. POET ROYAL & A. RY. CU., S. Car., 23 S. E. Rep. 363.

105. REMOVAL OF CAUSES—Time of Application.—Under the practice in Virginia, a summous against a defendant is made returnable at a rule day of the court following its issue. Upon that day, if the defendant fail to appear and plead, an order is entered that judgment go against him, unless he appear and plead at the next rule day; and at such next rule day the defendant may plead to the merits, but any dilatory plea must be filed on the rule day to which the summons is returnable: Held, that a petition and bond for removal of a cause to a federal court, filed on the second rule day, at which a plea to the merits is due, is filed in time.—Mahoney v. New South Building & Loan Ass'n U. S. C. C. (Va.), 70 Fed. Rep. 518.

106. RES JUDICATA—Enjoining Enforcement of Judgment.—A judgment regularly rendered, even by default, is binding upon parties and privies; and that the cause of action was the —liture to pay a promissory note founded upon a gaming consideration is no such exception to the general rule as will authorize a court of equity, after judgment, to interfere by injunction with its enforcement.—Owens v. Van Winkle Gin & Machinery Co., Ga., 28 S. E. Rep. 416.

107. SALE—Breach of Warranty.—A written contract provided that the vendor should place in the vendee's basement a heating apparatus, in consideration of a specified sum, a part to be paid when the job was completed, and the balance the following spring, "provided said apparatus works in accordance with guaranty," which declared that the furnace would heat rooms to a temperature of 70 degrees Fahrenheit "in the coldest winter weather:" Held, in an action by the vendor to recover the deferred payments, that the burden was on the vendee to allege and prove breach of warranty.—HOFFMANV. INDEPENDENT SCHOOL DIST. OF HAMPTON, IOWA, 65 N. W. Rep. 322.

108. SALE—Warranty of Chattels.—When a chattel is sold with a warranty of quality, accompanied by an agreement that if it proves to be inferior in quality it may be returned to the seller, or exchanged for another article, the buyer, upon breach of the warranty, is not restricted to such special remedy, but may waive it and sue for the breach of warranty.—EYERS V. HADDEM, U. S. C. C. (Wis.), 70 Fed Rep. 848.

109. SET-OFF-Fraud in Sale of Land.—In Alabama, under the Codes of 1852 and 1886, a defendant sued upon a note given for the purchase money of land has a right to set off any damages suffered through the fraud or deceit of the plaintiff, and arising out of the transaction of sale.—HOWISON V. ALABAMA COAL & IRON CO., U. S. C. C. of App., 70 Fed. Rep. 683.

110. TAXATION—Personal Property of Corporations.—Since a business corporation whose capital is in shares is taxable for such personalty only as is referred to in Pub. St. ch. 42, § 11, an assessment which, after specifying taxable articles of personalty, adds, "and other personal property," is void; it being impossible to know that it does not include property improperly assessed.—Rumford Chemical Works v. RAY, R. I., 33 Atl. Rep. 443.

111. TRADE-MARKS — Misrepresentation. — One C B, father of complainant, in 1837 began the business of manufacturing and selling boots and shoes of high

grade, upon all of which he placed his name "C B," as a trade mark. In 1860 he took complainant into partnership under the firm name "CB & Son," which was thereafter affixed to the boots and shoes as the trademark. In 1874 C B sold his interest in the firm to complainant and his two brothers, whose interests were bought in 1875 and 1877 by complainant, who thereafter continued the business alone; the name "CB & Son" being continuously used from 1960 as the name of the firm, and as the trade-mark on the boots and shoes, which had become known by that name and had acquired a reputation for their quality: Held, that complainant was not guilty of any misrepresentation, in so continuing the use of the name without indicating the changes in the actual manufacturers of the boots and shoes, such as to her the right in equity to restrain infringements of the trade-mark .- FEDER V. BENKERT. U. S. C. C. of App., 70 Fed. Rep. 613.

112. TRESPASS—Cutting Timber.—The grantee of a deed of standing timber is not the "owner of the land," within Code, § 8296, providing that any person who, without the consent of the owner of the land, willfully and knowingly cuts trees thereon must pay to the owner certain sums.—CLIFTON IRON CO. V. CURRY, Ala., 18 South. Rep. 554.

113. TRESPASS ON REAL PROPERTY.—A complaint alleged that defendant wrongfully permitted his cattle to enter on land rented by plaintiff, and destroyed the corn cultivated by plaintiff and growing thereon: Held, that the action was for trespass on real property, and not for trespass to personal property, even if such corn was personal property.—KEATON V. SNIDER, Ind., 42 N. E. Rep. 372.

114. TRIAL—Cross-examination.—In the cross examination of a witness, the party must confine the examination to facts and circumstances connected with the matters stated in his direct examination; and a witness cannot be cross-examined on collateral or irrelevant matters for the purpose of afterwards disproving his statements by other evidence to discredit his testimony.—Butler v. Cooper, Kan., 42 Pac. Rep. 889.

115. VENDOR AND VENDEE—Delivery of Void Deed.—Delivering to the vendee's attorney a deed which is void for want of a grantee does not, in the absence of its acceptance by the vendee, constitute compliance with a contract of sale, even though such void deed is never returned.—MILLER v. CROUSE, Ill., 42 N. E. Rep. 377.

116. VENDOR AND VENDEE—Forfeiture.—A vendor in a contract which makes time of its essence, who has accepted delayed payments, cannot forfeit the contract, for want of prompt payment according to its terms, without first giving the vendee a definite and specific notice of his intention.—MONSON v. BRAGDON, Ill., 42 N. E. Rep. 383.

117. WATERS—Riparian Owners.—The owners of land adjoining the meander line of a navigable lake, as established by government surveyors, are riparian owners, and entitled to all land lying between such line and the high-water line of the lake, though most of such land is high, and not subject to overflow.—SCHLOSSER V. CROOKSHABK, IOWA, 65 N. W. Rep. 344.

118. WATERS — Riparian Owners — Right to Divert Stream.—If a riparian proprietor, by placing a dam across a stream running through his land, obstruct the same, so that instead of running on, as theretofore, to the iriparian proprietor below, the water accumulates in an artificial lake or pond, and by means of percolation and evaporation is diminished in quantity to such an extent as to deprive the lower proprietor of the reasonable quantity of water to which he is entitled, and which he would otherwise receive, such obstruction of the stream operates as a diversion of the water, and for damages thus occasioned the lower proprietor is entitled to recover. If the diversion be complete, he is entitled to full damages; if partial the damages should be apportioned.—WHITE v. EAST LAKE LAND CO., Ga., 23 S. E. Rep. 398.

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A late legislature of Kansas passed an act in relation to the redemption of property after sale under foreclosure. (Chap. 109 Sess. Laws, 1893.) In substance, it provides that a mortgagor shall have eighteen months after sale under foreclosure to redeem; "that a receiver can only be appointed in case of waste; that the income during the period for redemption, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of the legal title." The Supreme Court of Kansas, in Watkins v. Glenn, 41 Cent. L. J. 68, held that the act, in so far as it assumed to operate retroactively, and apply to mortgage contracts existing at and before its passage, was repugnant to section 10, of article 1 of the federal constitution, providing that no State shall pass any law impairing the obligation of contracts. This decision was rendered in April, 1895, the opinion written by Chief Justice Horton being clear and convincing. The court has lately been called upon to consider the same question, and in the recent case of Beverly v. Barnitz, 42 Pac. Rep. 725, the court reverses its former decision and holds the statute both retroactive and constitutional. This is said to be due to a change in the personnel of the court, though as to that we know nothing. We do not think, however, that the court has done itself any credit by its change of view on the subject. The opinions of the court are quite lengthy; the argument in favor of the constitutionality of the statute being that a redemption law passed after a mortgage has been made affects the remedy only and does not touch the substantial rights of the parties. On the other hand, Chief Justice Horton, in his opinion in the Watkins case, cites a long list of decisions of the United States Supreme Court, the substance of which is expressed by Mr. Justice Field in Louisiana v. New Orleans, 102 U.S. 203, as follows: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Vol. 42-No. 6.

Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, qui cito dat bis dat-he who gives quickly gives twice—has its counterpart in a maxim equally sound, qui serius solvit minus solvit he who pays too late pays less. An authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition." To the same effect is Siebert v. Lewis, 122 U.S. 284, and many other cases which are cited approvingly in the Watkins case. In view of these decisions, the conclusion is almost irresistible that the Supreme Court of Kansas in its latest announcement on this subject has been controlled more by considerations of expediency than law.

It would not occur to the student of law that a decision of court is needed to uphold the proposition that one who seduces an unmarried woman is not liable in damages to her affianced husband. But the unfortunate plaintiff in Case v. Smith, 65 N. W. Rep. 278, recently decided by the Supreme Court of Michigan, who brought a suit of that description, evidently felt that there was some doubt of the question. The court, affirming the decision of the trial court, very properly held that a civil action for the alleged seduction of the woman could only be brought by the woman herself, or by her father, guardian, or some relative. A betrothed person has no right of action for the seduction or the alienation of the affections of his affianced. Cooley, Torts, p. 236. In Swanson v. Griffin, 8 South. Rep. (Miss.) 511, cited by appellant, defendant had seduced plaintiff's unmarried daughter, and she had given birth to a child. In Brannum v. O'Connor, 77 Iowa, 632, 42 N. W. Rep. 504, also cited by appellant, plaintiff had married defendant's foster daughter, and afterwards learned that she was pregnant, at the time of the marriage, by her foster father. Defendant agreed to continue to live with the woman and maintain the child. The court held that under the code the pregnancy of the woman at the time of her marriage was a cause for divorce, and that plaintiff was under no obligation to live

with the woman or maintain the child. In Loomis v. Cline, 4 Barb. 453, the maker of the note had assaulted plaintiff's daughter with attempt to commit a rape. The court held that, from his paternal relation alone, plaintiff had no authority to commence an action for his daughter; that he could not release or compromise such claim, and so, if she had a right of action, it remained unaffected by that agreement, and that the note was without consideration, citing Fonda v. Van Horne, 15 Wend. 631; Hunter v. Westbrook, 2 Carr. & P. 576; Macph. Inf. 228, 352.

NOTES OF RECENT DECISIONS.

GIFT CAUSA MORTIS-SUFFICIENCY OF EVI-DENCE.—In Leyson v. Davis, 42 Pac. Rep. 775, decided by the Supreme Court of Montana, it appeared that the owner of a majority of the stock of a national bank, 70 years old and in feeble health, on the eve of departure on a journey for his health, handed the certificates of stock to his nephew, saying: "I always intended that for you. Now take it. * * * I don't know whether I will ever come back or not. There may be an accident on the railroad. If I don't come back, or anything happens, I want you to have it. I am an old man, and there is no telling. don't think I can get over this disease. * * * I am too old. I can't expect it."—and the nephew took the certificates, and kept them till after the donor's death. It was held that there was a valid gift causa mortis, though the by-laws of the bank and the United States statutes provide that stock shall be transferable only on the books of the bank, and the donor did not die till after his return from the journey, where his death was due to the illness of which he complained, and he had often expressed his intention of giving "the bank" to the donee, and stated that he did not intend that "the bank" should go into his estate, and the certificates had no form of assignment indorsed on them.

Nuisance—Pollution of Stream.—Injunction to a bill by a riparian proprietor to restrain defendant from polluting, by discoloration, the stream, it is no defense or equitable excuse that the discoloration is the

natural and necessary result of mining operations prosecuted in the ordinary way, says the New Jersey Court of Chancery in Beach v. Sterling Iron and Zinc Co., 33 Atl. Rep. 286, repudiating the doctrine finally adopted in Pennsylvania in the case of Coal Co. v. Sanderson, 113 Pa. St. 126. Nor can the defendant set up that other independent causes are already operating to pollute. The maintenance of a nuisance to real estate, they contend, amounts to a taking of property, and cannot be legalized by the legislature for private purposes, even upon terms of making compensation. Hence, where the right of the complainant is clear and the facts undisputed, a court of equity is bound to give preventive relief. To refuse it is to allow the defendant to take complainant's property upon terms of paying such compensation, from time to time, as a jury may **a**88e88.

NEGOTIABLE INSTRUMENT-BANKS-Knowl-EDGE OF CASHIER-WHEN IMPUTED TO BANK. -One of the points decided by the Supreme Court of Utah in First Nat. Bank v. Foote, 42 Pac. Rep. 205, is that a bank that takes for value a note signed by its cashier and others is not chargeable with knowledge of an agreement between the cashier and his comakers that the note was not to be delivered until it was signed by the president of the bank. The general rule is well established that a principal is bound by the representations of his agent, made in the transaction of the principal's business, within the real or apparent scope of his authority, and that the knowledge of the agent concerning the business which he is transacting for his principal is to be imputed to his principal. There are, however, exceptions to the general rule no less well established. No person can act as an agent in regard to a contract in which he has any interest, or in which he is a party on the opposite side to his principal. 2 Daniel, Neg. Inst. § 1611; Story, Ag. § 210; Claffin v. Bank, 25 N. Y. 293; Voltz v. Blackmar, 64 N. Y. 440; West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557. court distinguished the case of Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, which announces the doctrine that an agent's knowledge of his own fraud is to be imputed to the principal in a transaction

where the agent alone represents the principal. "This is a distinction" says the Utah court, "which seems to us less substantial than technical, and we cannot give it our assent. The rule of law which imputes the knowledge of an agent to his principal, according to most of the authorities, is based upon the presumption that the agent will communicate to his principal whatever he knows concerning the business he is transacting, and the exceptions to the rule upon the contrary presumption, that the agent will not communicate to his principal his knowledge of his own independent frauds, committed in the course of transacting the principal's business, and that he will not communicate to his principal his knowledge in a transaction where he is interested upon the opposite side. In a case where the presumption arises that an agent will not communicate his knowledge to his principal, or to another acting for the principal, it would seem to be unreasonable to hold the principal responsible for the knowledge of the agent solely because the agent in the particular transaction appeared himself for the principal. The presumption would naturally be, in such a case, that he would fail to act upon such knowledge as the principal would act, just as he would fail to impart his knowledge in a case where another appeared for the principal."

Contract—Sale—Damages—Failure of Principal to Perform Contract by Broker.
—In Haas v. Ruston, 42 N. E. Rep. 298, the Supreme Court of Indiana holds that a broker employed to negotiate the sale of flour at a certain price, who, without express authority, makes a contract for the sale thereof at such price in his own name, cannot, on his principal's refusal to deliver at the price named, recover from the principal damages paid by him to the purchaser for his failure to perform the contract of sale, nor is he entitled to commissions on the price of the flour contracted for. The court said in part:

The main and controlling question in this controversy is: Can a broker make a contract in his own name, without the knowledge and consent of his principal, that will bind both his principal and the other contracting party? A broker is a peculiar kind of an agent, and brokerage is a peculiar kind of agency. It is the business of a broker to negotiate contracts between others in matters of trade and commerce. He would deals with the contracting parties, and not with the things which may be the subject of the contract. He has neither interest in nor possession of the prop-

erty which it is his business to buy or sell for others, and ordinarily he has no implied power to buy or sell in his own name. It is in these respects that a broker differs from a factor and from an ordinary agent. The office and duty of a broker is stated in Domat's Civil Law (part 1, bk. 1, tit. 17, art. 1), as follows: "1204. The Office of a Broker. The engagement of a broker is like to that of a proxy, a factor, or other agent; but with this difference: that the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus his engagement is two-fold, and consists in being faithful to all the parties in the execution of what every one of them entrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally." In Story on Agency, the office of broker is thus defined: "Sec. 28. Secondly, Brokers. The true definition of a broker seems to be that he is an agent, employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation, commonly called 'brokerage.' Or. to use the brief but expressive language of an eminent judge, 'A broker is one who makes a bargain for another and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name. but in the names of those who employ him. Where he is employed to buy or sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name. He is strictly, therefore, a middle man, or intermediate negotiator between the parties." Again, in section 84 of the same authority, the difference between factor and broker is thus stated: "Section 84. A factor differs from a broker in some important particulars. A factor may buy and sell in his own name as well as in the name of his principal. A broker (as we have seen) is always bound to buy and sell in the name of his principal. A factor is intrusted with the possession, management, control, and disposal of the goods to be bought or sold, and has a special property in them, and a lien on them. A broker, on the contrary, usually has no such possession, management, control, or disposal of the goods, and consequently has no such special property or lien." 1 Bell, Comm. (4th Ed.) p. 386, § 409, in comparing the duties of factor and broker, says: "The character of factor and broker is frequently combined; the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase. Properly speaking, in these cases he is factor." Again, the relation of broker and factor is clearly stated by Story: "Sec. 100. Secondly, as to brokers. These, as we have seen, have an incidental authority to sign the contract for, and as the agent of both parties. A broker employed to effectes policy has an incidental authority to adjust losses upon it; and, if employed to settle losses, he has authority to refer a disputed loss to arbitration. A broker employed to buy or sell without limitation of price has the incidental authority to bind his principal by any price, at which he honestly buys or sells. So, a broker authorized to sell goods without any express restriction as to the mode may sell the same by sample or with warranty. Ordinarily, he cannot make the contract in his own name. but ought to do it in the name of the principal. There are exceptions, however, by the usages of trade, as in cases of policies of insurance, which are usually made

in the name of the policy broker, and he may then sue thereon. So he cannot buy or sell on credit, except in cases justified by the usages of trade. So a broker has ordinarily no authority virtute officii to receive payment for property sold by him; and, if payment is made to him by the purchaser, it is at his own risk, unless from other circumstances the authority can be inferred."

The leading case in which the distinction between a broker and that of a factor, and other agents, is carefully pointed out is that of Baring v. Corrie, 2 Barn. & Ald. 143. The court, by Abbott, C. J., said: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal. The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of his goods, and gives him authority to sell in his own name. But the broker is in a different situation. He is not trusted with the possession of the goods, and he ought not to sell in his own name. To the same effect Mr. Justice Holroyd observed, in the same case, that a factor 'is a person to whom goods are sent or consigned, and he has not only the possession, but, in consequence of its being usual to advance money upon them, he has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority, and it may be right, therefore, that the principal should be bound by the consequences of such sale, amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different. He has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and, besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound." Ewell's Evans, Ag. p. 4. Again, in Ewell's Evans, Ag. side page 122, the authority of a broker is most clearly stated, both as to acts authorized and pro. hibited. After giving fully what is the implied author. ity!of broker, it is stated: "A broker has no implied au. thority-(a) To buy or sell in his own name. The case of an insurance broker is an exception to this rule. He need not even state that he contracts as a broker. (b) To receive payment for goods sold for his principal. But an insurance broker has authority to receive payment of any loss that may occur on a policy effected by him, if the instrument remains in his hands." See, also, Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160; White v. Chouteau, 10 Barb. 202; Buckbee v. Brown, 21 Wend. 110; Dugan v. U. S., 3 Wheat. 172; Pott v. Turner, 6 Bing. 702; State v. Duncan, 10 Lea, 75. It would seem from the authorities that the only exception to the rule that a broker cannot contract in his own name is in the matter of insurance policies. The appellant cites and relies upon as holding a contrary doctrine, the cases of Knapp v. Simon, 96 N. Y. 284; Saveland v. Green, 36 Wis. 612. In these cases, however, it appears that the broker made the contract in his own name at the request or with the knowledge of the principal.

The distinction between the powers of a broker and that of a factor is supported by reason as well as by authority. A factor has the possession of the goods; frequently has a lien upon them for moneys advanced. He has one of the indices of title. The contract is made upon his credit, and, although in his name, it

may be enforced both as against himself and against his principal, and be enforced both by him and his principal against the other contracting parties. An ordinary agent, acting in the scope of his authority, may bind his principal when the contract is made for principal's benefit, although made in the name of the agent, and the principal may enforce the contract, or it may be enforced against him. Although the con. tract may have been made upon the credit of the agent, the other contracting party may, when he discovers the principal, elect to pursue the principal instead of the agent, and in some instances he may pursue both. Mechem, Ag. \$5 558, 977; Lawson, Cont. \$ 197. It is true that the principal is bound to indemnify his agent for all acts lawfully done in the execution of his authority. This includes all expenses properly incurred, and extends to all acts done by the agent in the course of his agency in which he has incurred or undertaken a liability or sustained damages. Lawson, Cont. § 179. But the principal is not liable to the agent for acts ultra vires, or in excess of his authority, unless the acts have been ratified. A broker occupies a peculiar relation to the contracting parties. He frequently represents both, and is often entitled to a commission for buying and a commission for selling in the same transaction. He has no possession that can mislead one of the contracting parties. If he were permitted to make contracts in his own name for his principal, and without the principal's knowledge, he would be in a position to take advantage of a rise or fall in prices. The contract being in his own name, he might claim the profits, and, in the event of loss, cast it upon his principal. His powers might be much abused, and the interests of the principal sacrificed. It is for these reasons that the policy of the law forbids a broker from contracting in his own name without the knowledge or consent of the principal.

LIABILITY OF EMPLOYERS FOR THE NEGLIGENCE OF CONTRACTORS.

As this is essentially a building age, the liability of employers for the negligence of contractors is a question of every-day application, and therefore of the highest importance. It is a question, too, involving many niceties of distinction which are well worth the care and consideration of the student of the law. It is my purpose to present in this essay a brief exposition of the principles and rules which govern the subject; and while I shall, when necessary, quote authority to support them, I have deemed it more fitting to the task in hand to devote greater attention to discussion than to the enumeration of cases to sustain any particular view. Although the law upon the subject is pretty well settled, there are one or two rules which have been rejected by some of the courts, and only accepted by others after they had expressed a doubt as to their wisdom and expediency,

because the judges felt themselves bound by precedent and authority.

The general doctrine may be stated as follows:

An employer is not responsible for the negligence of a contractor or his servants.¹ A contractor, within the meaning of the rule, is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for others without being subject to their control in respect to the details of the work.² He furnishes his own assistants, and it is immaterial whether he executes the work according to his own ideas, or in accordance with a plan previously furnished him by the person for whom the work is done.³

Qui facit per alium facit per se is one of the fundamental maxims of the law. At first presentation it would seem to apply in the case of contractors, but not so when the reason of the rule is thoroughly understood. The master's liability for the acts of his servant is based on the fact that the servant performs the will of the master, not merely as to the general result to be accomplished, but also in the specific details of the work. The servant is subject to his orders and directions at all These directions may be altered or entirely changed, but the servant must obey He must obey them both as to the final purpose in view, and as to the manner in which every portion of the work is to be done. The master acts through the servant, and the result is just the same, in contemplation of law, as if the master himself were performing the service; hence his liability for the acts of his servant. With this explanation we can readily see why this rule should not apply in the case of contractors. The contractor is engaged in an independent business. He is not subject to the control of his employer. He does not receive directions as to the manner of performing the details of the work. He has bargained to bring about a certain result. In doing this he either exercises his own discretion, or proceeds in accordance with certain plans. In either case he can do each portion of the work just as he pleases. All that is required of him is that the whole shall correspond with the designs

furnished him. Besides, the contractor employs his own assistants. The employer has no voice in this whatever. It will be seen, therefore, that the distinction between the two cases is very plain and pronounced. However, it may sometimes happen that the employer retains control over the contractor or his servants, and this gives rise to the first exception to the general rule.

Exception 1. The employer will be liable if he reserve control over the contractor or his servants, or over the manner of doing the work.4 Such a reservation makes the contractor and his assistants the servants of his employer, and the maxim, Qui facit per alium facit per se, applies with full force and reason. However, a mere superintendence of the progress of the work, to see that it is done according to contract, is not such control as will make the contractor the servant of his employer.5 It is only when the control is so absolute as to make the discretion of the contractor subordinate to that of the principal, or to that of his architect, engineer or other superintendent.6

It was sought at one time to distinguish between real and personal property as to the liability of the owner for the negligence of contractors, some of the courts holding that no liability attached to the owner of personal property, but that the owner of real property should be liable on the ground that he should so use his property as not to injure others. I must confess that I cannot see the reason for such a distinction. I cannot understand why I should be responsible for the negligence of a house builder, and be exempt from liability for the negligence of a carriage manufacturer. That would only be carrying the doctrine to its logical conclusion, and there would be no such thing as independence of business. Every business man, while executing my orders for goods, would be my servant, and such a rule would involve us in inextricable confusion. No man would be exempt from suit. But the advocates of this theory say that it is intended to apply only to real estate. Even in that case, it seems to me that they misapprehend the true meaning of the rule that a person should so use his real estate as

⁶ Slater v. Mersereau, 64 N. Y. 138.





¹ Reedie & Hobbitt v. London & N. W. Ry., 4 Exch. 244; Linton v. Smith, 8 Gray (Mass.), 147.

² Harrison v. Collins, 86 Pa. St. 158.

^{*} Robinson v. Webb, 11 Bush (Ky.), 467; Hale v. Johnson, 80 Ill. 185.

⁴ Linnehan y. Collins, 137 Mass. 123; Cincinnati v. Stone, 5 Ohio St. 38; New Orleans, etc. R. R. Co. v. Hanning, 15 Wall. 649.

^b Clark v. Hannibal, etc. R. R. Co., 36 Mo. 202.

not to injure others, and that he cannot free himself of such responsibility by employing others to do the work. This rule, I take it, applies with good reason in three cases only, and they furnish the second, third and fourth exceptions to the general rule.

Exception 2. The employer will be liable if he contract to have a thing done which obviously exposes others to peril.⁷

Exception 3. The employer will be liable where the work results in a nuisance which flows directly from the work itself.8

In these cases the injury is not the result of the carelessness of the contractor or his servants. It is not caused by the improper manner in which the work is done. It is the obvious consequence of the nature of the work itself. And the liability of the employer does not rest upon the doctrine of respondeat superior. It rests upon entirely different grounds. He himself is guilty of negligence. He is making an improper or unlawful use of his property. And this, as I understand it, is what is meant by so using your real estate as not to injure others; simply that you should not make an unlawful or improper use of it. This is based upon the sound and equitable principle that every man should be responsible for his own negligence.

The fourth exception proceeds upon still another principle.

Exception 4. The employer will be liable if he is under a legal duty to see that the work is properly performed. This rule applies principally to work done under public authority, such as the construction of canals, the improvement of streets, etc. Public policy demands that such work should be properly executed, and will not permit the corporation to escape responsibility by delegating its powers to others.

These three exceptions, it seems to me, are the only instances where the employer should be held liable. The first two are based on the negligence of the employer; the last upon public policy. But we are told that the rule should be extended so as to make the employer pay damages for the negligence of a contractor in the performance of a lawful and

proper piece of work. Aside from the hardship of making a man responsible for the acts of those who are not subject to his control, a doctrine that outrages every principle of justice, I am of the opinion that such a rule would fail to accomplish the purpose of the The object and purpose of all law, with respect to torts, is prevention and not the payment of damages. Equity may prevent the commission or continuance of certain classes of torts by means of the injunction. It acts directly upon a person and compels him to do his duty. The object of the common law is just the same, but its method is different. It cannot anticipate an injury. It simply exacts damages from the party committing the injury. The fundamental purpose, however, is to prevent the injury, and damages are given as a sort of penalty, the theory being that the knowledge that a man will have to pay for his negligence will operate as a stimulus to the performance of duty. In every case prevention of the wrong is the end in view, and the payment of damages the means whereby that end is sought to be accomplished. This being the case, these means should be used where they will be most efficacious. Now we have every incentive for the employer to do his duty.

In addition to the exceptions to the general rule to which I have already adverted, there is still another of equal importance.

Exception 5. The employer will be liable if he knowingly employ an incompetent or untrustworthy contractor.10 This proposition is not supported by any well-adjudged case, but it seems to have met the approval of the text-writers, and it is certainly founded on good reason. It is another instance of negligence on the part of the employer. The employer having to respond in damages where the case comes under one of these exceptions, he will be prompted to secure a skillful and reliable contractor, and to use every means to prevent the work being of such a character as will result in a nuisance or obviously expose others to peril. Now, suppose he has taken all these precautions, will his liability for the negligence of the contractor tend to prevent the injury? Certainly not. He may live in one city and the work be performed in At any rate he can have no voice another. in employing or directing the contractor's

10 Lawrence v. Shipman, 39 Conn. 586.

⁷ Cooley on Torts, p. 646; Garman v. Steubenville, 4 Ohio St. 399.

⁸ Robbins v. Chicago, 4 Wall. 657.

Water Co. v. Ware, 16 Wall. 566; Bailey v. Mayor, etc. of New York, 2 Denio, 433; Logansport v. Dick, 70 Ind. 65.

servants. The matter has gone beyond his control. How, then, will the purpose of the law be best accomplished? Manifestly by placing the liability entirely upon him who has it in his power to prevent the injury; that is upon the contractor. He employs his servants; he directs and controls them; he superintends the work. Therefore, if we make him liable, he will be prompted to hire skillful and reliable assistants, and to give the work personal care and supervision. But if we adhere to the doctrine of respondeat superior, we make him responsible who has no power to prevent the injury, and let him escape who alone could bring about the result desired; in other words, we have utterly failed of our purpose.

Bush v. Steinman¹¹ is the case most frequently quoted in support of the real estate theory, but a thorough examination of the authorities upon which the court relied will show that they do not justify such a rule. That case, briefly stated, was as follows: The defendant contracted with a surveyor to repair his house for a stipulated sum; a carpenter having contracted under the surveyor to do the whole business, employed a bricklayer, and he again contracted with a lime-burner, by whose servant a quantity of lime was laid in the road. While the plaintiff and his wife were out riding their carriage struck the lime and was overturned and considerably damaged. The defendant was held liable, citing a number of English cases.¹² The first three of these are cases where the employer had control and supervision of the work, thus creating the relation of master and servant. There was no independent contract. The last is a case where the work necessarily injured the rights of others. Now, the case of Bush v. Steinman could not rest on the relation of master and servant; it was an independent contract. Nor could it rest upon the ground of work that necessarily injured others. Our conclusion must, therefore, be that it is not sustained by the cases cited. However, its discussion now is of very little moment, except to understand that the real estate theory was erroneous in its origin, for it is no longer the law, as will be seen by reference to the following cases, and many others which could be quoted:

In Hobbitt v. London, etc. R. R. Co., 18 the court say: "The case of Bush v. Steinman, where the owner of the house was held liable for the act of the servant of a subcontractor acting under the builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument in support of the liability of the defendants both in Laughler v. Pointer and in Quarman v. Burnett, but the circumstances of those two cases were not such as to make it necessary to overrule Bush v. Steinman. distinction in point of law did exist in cases like the present between fixed property and ordinary movable chattels, it was right to notice the point; but on full consideration we have come to the conclusion that there is no such distinction unless, perhaps, in cases where the act complained of is such as to amount to a nuisance, and, in fact, that according to the modern decisions Bush v. Steinman must be taken not to be the law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded."

In Robinson v. Webbl4 it was held that a contractor to build a house is not the servant of the lot owner, and that he alone is liable for his own negligence or the negligence of his servants. In this case the whole ground of distinction was gone over, and the authorities pro and con ably discussed. In speaking of the case of Bush v. Steinman, the court said: "This case has long since been overruled in England, but not until it had been recognized and followed by some of the courts of this country as well as in England."

In Blake v. Ferris¹⁵ we have the following language: "Upon examination of the whole case of Bush v. Steinman it would appear that the main proposition asserted by it is not the law in England nor in this State."

In Cuff v. Newark, etc. R. R. Co., 16 we find this remark: "After recognition as authority for a time Bush v. Steinman was overruled. At first its authority was restricted to liability for negligence in relation to real estate, making a distinction in this re-

n 1 B. & P. 408.

¹⁸ Stone v. Cartwright, 6 Tr. 411; Littleton v. Lonsdale, 2 H. Bl. 267; Michael v. Alestree, 2 Lev. 172; Rosewell v. Prior, 2 Salk. 460.

^{13 4} Exch. 254.

^{14 11} Bush (Ky.), 467.

^{15 5} N. Y. 48.

^{16 85} N. J. L. Rep. 17.

spect between the owners of real and personal property; finally this distinction was abandoned, and the authority of Bush v. Steinman was completely denied, and no case which was once authority has been more completely overthrown."

It will be seen, therefore, that there is no good authority, and certainly no good reason, for the distinction between real and personal property as to the liability of their owners for the negligence of contractors, and this is as it should be. The policy of our system of jurisprudence should be to make every man responsible for his own negligence, unless his conduct is controlled by others. This would promote independence of business and insure individual responsibility, a condition of affairs which would certainly result in fewer accidents and less suits.

The whole doctrine upon this question, as supported by authority and dictated by reason and justice, may be summed up in the following proposition:

An employer who has bargained with a reliable and skillful contractor, over whom he has no control, to do a piece of work which is neither unlawful nor necessarily dangerous in its character, nor such as he is under a legal duty to have properly performed, will not be responsible for the negligence of such contractor, his subcontractors or his servants, in the prosecution of such work.

WM. ROGERS CLAY.

Lexington, Ky.

CRIMINAL EVIDENCE—MURDER—BOY AS WITNESS—COMPETENCY—FEDERAL OFFENSE.

WHEELER V. UNITED STATES.

Supreme Court of the United States, November 11, 1895.

The decision of the question whether a very young boy has sufficient intelligence to be competent as a witness must rest primarily with the trial judge, and his determination will not be disturbed on review, unless it was clearly erroneous.

On a trial for murder, a boy nearly five and a half years old, being offered as a witness, stated on his voir dire that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him; that he was going to tell the truth; that his mother had told him that morning to "tell no lie." To the question what would be done with him n court if he told a lie, he replied that they would put him in jail, and to a question as to what the clerk said to him when he held up his hand, he answered: "Don't you tell no story." Held, that there was no error in admitting his testimony.

An indictment in the Circuit Court for the Easttern District of Texas for a murder committed in the Indian Territory sufficiently negatives the exception to the jurisdiction of the court contained in Rev. St. § 2146, when it charges that defendants were not Indians, nor citizens of the Indian Territory.

Mr. Justice BREWER delivered the opinion of the court:

On January 2, 1895, George L. Wheeler was by the Circuit Court of the United States for the Eastern District of Texas adjudged guilty of the crime of murder, and sentenced to be hanged; whereupon he sued out this writ of error. Three errors are alleged: First, that the indictment is fatally defective in failing to allege that the defendant and the deceased were not citizens of any Indian tribe or nation. It charges that they were not Indians, nor citizens of the Indian Territory. The precise question was presented in Westmoreland v. U. S., 155 U. S. 545, 15 Sup. Ct. Rep. 243, and under the authority of that case this indictment must be held sufficient.

Another contention is that the court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. Moore v. U.S., 150 U.S. 57, 14 Sup. Ct. Rep. 28; Holder v. U.S., 150 U.S. 91, 14 Sup. Ct. Rep. 10; Blitz v. U.S., 153 U.S. 308, 14 Sup. Ct. Rep. 924.

The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to him on his voir dire, said, among other things, that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and, in response to a question as to what the clerk said to him when he held up his hand, he answered, "Don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record, we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.

The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In Brasier's Case, 1 Leach, Crown Cas. 199, it is stated that the question was submitted to the 12 judges, and that they were unanimously of the opinion "that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath; for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court." See also 1 Greenl. Ev. § 367; 1 Whart. Ev. §§ 398-400; 1 Best, Ev. §§ 155, 156; State v. Juneau, 88 Wis. 180, 59 N. W. Rep. 580; Ridenhour v. Railway Co., 102 Mo. 270, 13 S. W. Rep. 889, and 14 S. W. Rep. 760; McGuff v. State, 88 Ala. 147, 7 South. Rep. 35; State v. Levy, 23 Minn. 104; Davidson v. State, 39 Tex. 129; Com. v. Mullins, 2 Allen, 295; Peterson v. State, 47 Ga. 524; State v. Edwards, 79 N. C. 648; State v. Jackson, 9 Or. 457; Blackwell v. State, 11 Ind. 196.

These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

We think that, under the circumstances of this case, the disclosures on the voir dire were sufficient to authorize the decision that the witness was competent, and therefore there was no error in admitting his testimony. These being the only questions in the record, the judgment must be affirmed.

NOTE. — Testimony of Children. — Owing to the grave consequences attending testimony in any case to

the one party or the other, and to the fact that the evidence may deprive one of life, liberty or property, the courts are accustomed to proceed with the greatest caution when it is proposed to put a child of tender years on the witness-stand to give testimony in any given cause. One very wholesome reason of the reluctance in courts to permit such testimony to be introduced is that the very young mind, as a rule, is not sufficiently developed to comprehend the gravity and solemnity of an obligation under oath, not only as to the moral turpitude attending all false swearing, but the consequences, grave and serious as they may often be, to parties litigant, of such testimony. They are not well up in the ways of the world or cognizant of the pivotal qualities their evidence might have in a case of the most gigantic importance. Nor can the importance or insignificance of the case have any bearing in determining whether the child possesses that necessary degree of intelligence or that sense of fear that would be engendered in a mature person of the future consequences in after life of "swearing falsely against his neighbor." Under most or perhaps all the constitutions a witness must believe in a Supreme Being before he is competent to testify. It is clear that the very young, as a rule, can have little or no accurate conception of such a Being though the cases reveal some astonishing instances of understanding in children in this respect. Very few, if any, cases are to be found where a witness not over four years old has been permitted to testify. But the principal case announces the correct rule when it is held that no abuse of discretion in the trial court being shown the appellate court will indulge the presumption that the nisi prius judge resorted to proper measures to ascertain the child's intelligence and competency generally before permitting it to testify. So it has been held that a child twelve years old may testify. People v. Smith, 86 Hun, 485. And where a boy thirteen years old upon examination was found to possess fair intelligence and understood the difference between truth and falsehood and comprehended the orthodox idea of future rewards and punishments, it was held that he was a competent witness though he further stated that he did not know what would be done with him here for swearing falsely: "Who knew he was sworn to tell the truth and that it was wrong to tell or swear a lie and that if he told or swore a lie he would go to the bad place." It was very properly held that the trial court had not abused its discretion in permitting the witness to testify. Partin v. State (Tex. Civ. App.), 30 S. W. Rep. 1067. And in a recent case in Kentucky it was held that "The intelligence of the witness is the true test of competency and that must be determined by the court, while the weight to be given to the evidence is for the jury. A child may be ignorant of God and of the evil of lying, and of the punishment prescribed therefor, both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed.' White v. Commonwealth, 28 S. W. Rep. 840. It would certainly seem that the court goes far enough in admitting the testimony of the child in this case if we accept the usual requirement of a belief in a Supreme Being as a requisite to competency of any witness, but it seems that in this State under express constitutional enactment "all persons are competent as witnesses, so far as any religious test is concerned." Bush v. Commonwealth, 80 Ky. 244. The common law rule is that an infant at the age of fourteen years is presumed to have sufficient understanding until the contrary appears, but under that age no such presumption exists, "and therefore inquiry is to be made

as to the degree of understanding which the child offered as a witness may possess, and if he appears to have sufficient natural intelligence and to have been so instructed as to comprehend the nature and effect of an oath he is admitted to testify, no matter what his are may be. Greenleaf on Ev., Sec. 367. And this language is quoted with approval in Flannagan v. State, 25 Ark. 92. In the case of Warner v. State, 25 Ark. 447, a sentence of death brought about by the testimony of a girl under nine years old was sustained. So in a bill for a divorce where the evidence of children of the parties from seven or twelve years old was relied on to sustain the allegations and decree, it was held that the children having been carefully examined in the court below in regard to their capacity to testify as witnesses and having been found fully capable they were competent, and that they were properly permitted to testify (Freeny v. Freeny (Md.), 31 Atl. Rep. 304), the court also citing the above section of Greenleaf on Evidence. In the case of State v. Juneau, 88 Wis. 189, the Supreme Court of this State thus lays down the rule in harmony with the principal case: 'It seems to be the settled law that after four years of age a child is not incompetent to testify as a witness by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence which is to be determined by the trial court by examination of the child in court. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of an abuse of its discretion." In this case the child was four years and nine months old when the offense of which she testified was committed, and at the time of testifying five years and five months old. Where a girl eight years old had been to school and who upon being examined as to her competency stated that she knew she should tell the truth and that if she did not God would punish her, it was held that she was properly permitted to testify. State v. Sawtelle (N. H.), 32 Atl. Rep. 831. A child thirteen years old is competent to testify where she knows it is wrong to swear falsely, and who is properly instructed by the court as to the consequences of falsely testifying. McAmore v. Wiley, 49 Ill. App. 615. An infant ten years old who has been taught that it is wrong to tell a lie and that those who should swear falsely will be punished (People v. Linzey, 79 Hun, 23), a negro child who was chief prosecuting witness in a felony case upon being asked on her voir dire what would become of her if she should swear falsely, replied that she would go to jail here and to hell when she died. The witness was held to be competent, the court very properly remarking that "there is no better test as to apprehend results of falsehood. Comer v. State, 20 S. W. Rep. 547. Indeed the "nature of an oath" seems to have been admirably comprehended in the simple answer of this little negro. A boy twelve years old who stated on examination that it was wrong to tell a lie and if he should do so he would be punished, is a competent witness. Parker v. State, 21 S. W. Rep. 604. Likewise a witness nine years old who has never been in court and can't tell when he was born but knew that an oath was administered to insure the telling of truth, is competent where his evidence showed a degree of intelligence satisfactory to the trial judge. State v. Doyle, 17 S. W. Rep. 751. In a case where a boy and a girl, aged eleven and nine, respectively, were prosecuting witnesses in a felony trial, they were both found to be of sufficient capacity to testify. The court thus disposed of the question: "No fixed rule can be laid down as to the age a child

must be to entitle it to testify in a court of justice. The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony." Davis v. State, 31 Neb. 247. A boy twelve years of age who possesses the average intelligence of a boy of this age and who satisfies the court that he comprehends the obligation of an oath is competent. State v. Severson, 79 Iowa, 750. And in Missouri where there is a statute provides that "a child under ten years of age incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly," the court held that in law a child not ten years old is under this statute, presumptively incompetent, but that the issue of such competency is peculiarly one for the trial judge, and not for the jury, and the lower court having permitted the witness to testify after objection by reason of his youth, that this was equivalent to a ruling that the court was satisfied upon inspection and observation that he was competent under the statute. Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270. In a proper case a young witness may be instructed under the supervision of the court as to the effect, solemnity and consequences of an cath. This is usually done before the witness testifies before the grand jury, but may be done after indictment. Commonwealth v. Lynes, 142 Mass. 577. It is even within the discretion of the court to continue a case with directions that the child should in the meantime be properly instructed. Holst v. State, 28 Tex. App. 1; Taylor v. State, 22 Tex. App. 529; Commonwealth v. Lynes, 142 Mass. 577. If the witness offered understands the nature of an oath he is competent though but nine years old. It is not necessary that he knows what becomes of any one who swears falsely or the effect of an oath. Moore v. State, 79 Ga. 498. The question of competency is one for the court, and not for the witness himself. Id.; State v. Michall, 37 W. Va. 565. That the court should be first satisfied of the competency of a witness only seven years old from proper examination is essential, and to permit a child of such tender years to testify without an examination into her competency is reversible error. Hughes v. Ry. Co., 65 Mich. 10. But if the competency of the witness sufficiently appears during the examination upon the stand to the satisfaction of the court this will suffice though there was no examination beforehand. State v. Douglas, 53 Kan. 669. child five years old who has no conception of the Deity or of a future state is not competent, though in answer to questions propounded by the court she stated that she would go to jail and the bad man would get her. State v. Michall, 87 W. Va. 565. Under a statute of Texas which provides that "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated or who do not understand the obligation of an oath," are incompetent to testify, it was held in a capital case that a boy of eleven years possessing average intelligence though he did not comprehend the obligation of an oath, but knew it was wrong to tell a lie, and right to tell the truth, was competent, the trial judge having satisfied himself of his competency by an examination. Hawkins v. State, 27 Tex. Civ. App. 273. But where an infant of tender years is offered as a witness, and upon examination in open court he or she is found not to comprehend the nature and obligation of an oath, it was held error in a felony case for the witness to be taken to the office of one of the attorneys for the prosecution, and there instructed as to the nature,



obligation and consequences of an oath to the defendant. Taylor v. State, 22 Tex. App. 529. Where a child was in her sixth year at the time of the events she testified about, and barely seven when offered as a witness, who did not know that she had been sworn when she held up her hand and the oath was administered to her: did not know how old she was; had never been to school; did not know what would be done with her if she should tell a story in the court house, nor where she would go if she should be a bad girl and die, she was held incompetent as a witness in a criminal case under the Texas statute above mentioned. Holst v. State, 23 Tex. App. 1. A child but little over nine years old was offered as the principal witness in a murder case. Upon objection to his testimony by reason of his age, and that he was a deaf mute, it appeared that the transactions of which he was to testify took place a few months before he was nine; that he had never been to school for the deaf and dumb; that he could not tell what would be done with him if he should tell an untruth as a witness; could not be made to understand that he would be punished if he should swear falsely; it could not be ascertained from the boy what he was doing at the place of the murder, and who could only make known that the murder was committed, who were killed, and who did the killing, and nothing more. It was held upon appeal, by a divided court, reversing the court below, that the witness was not competent because of a lack of necessary understanding. Territory v. Duran, 3 N. M. 184. This result is doubtless proper. For while the innocence and want of designing and unscrupulous purposes in testifying tends, in a sense. to make the very childishness of a witness a kind of protection against perjury, yet it is necessary for the courts to ascertain by the known and approved methods, that a child, offered as a witness. possesses sufficient intelligence and understanding as to the facts, as well as such an apprehension of the evil and dire consequences of giving false testimony as would be necessary in other witnesses. An oath to a child is often more sacred and fearful than to an adult. They know little of the falsehoods of the world and present a pleasing instance of the adage, that to the pure all things are pure. Indeed the confiding innocence and purity of purpose of a child is proverbial, and is instanced and commended in the Holy Writ.

Nashville, Ark.

W. C. RODGERS.

JETSAM AND FLOTSAM.

THE NATURE OF RAILROAD TICKETS.

Two recent cases in minor courts bring up interesting questions concerning the nature of railroad tickets. In Evansville & T. H. R. R. Co. v. Cates, 41 N. E. Rep. 712, the Appellate Court of Indiana held that where a passenger demands and pays for a ticket to A, and by a mistake of the ticket agent is given a ticket to B only, with which he enters the train without noticing the error, he has a right to ride to A on making proper explanation to the conductor, and can recover from the company for ejection by the conductor at B. This case is not without support (see Georgia R. R., etc. Co. v. Dougherty, 86 Ga. 744; 8 Wood on Railroads, § 249), but the weight of authority is against it, and it seems to have no foundation in principle. It involves a misconception of the true character of a railroad ticket. If it were true that the passenger made his contract with the ticket agent and the ticket was handed over merely as a receipt, then he would perhaps have had a contract right to be carried to his intended destination. But, as was pointed out in 1 Harvard Law Review, 17, the ticket agent has no authority to make contracts, his duty is merely to sell tickets. The ticket is the contract, and by its terms the passenger is bound; and in a case like that under discussion, while he doubtless has a right of action against the company for selling him the wrong contract, he has no action for being put off the train at the terminus provided by that contract.

Courts have fallen into error, it would appear, from failure to distinguish between the case of a ticket which is, on its face, not good for the journey intended by the passenger, and that of a ticket which is apparently good for the intended journey, and declared to be so by the ticket agent, although by the regulations of the company it is in fact not good. In the latter case the contract is ambiguous, and the passenger, under the circumstances, surely has a right to insist on the interpretation given by the company's agent; but that is no reason why he is not bound by the ticket in the former case, where the interpretation of the contract is perfectly clear. (See Hutchinson on Carriers, § 580).)

The analogy between railroad tickets and bills and notes has often been remarked, and is treated of at length in the article in the Harvard Law Review referred to above. A ticket is not a consensual but a formal contract; and although assignable in the absence of words of limitation, it is, like other negotiable instruments, not assignable in part. The second of the two recent cases is of note in this connection. In Curlander v. Pullman Palace Car Co., a case decided in the Superior Court of Baltimore, and reported in 28 Chicago Legal News, 68, the novel question was raised as to the right of a purchaser of a sleeping car section, who leaves the train before reaching his destination, to transfer the use of the section to another passenger for the rest of the journey. The court held that he had that right. This decision can apparently be supported only on the ground that a sleeping car ticket is radically different from a railroad ticket; that it is not a formal contract of transportation, but rather evidence of the purchase of certain space in the sleeping car for the specified journey. The existence of so marked a distinction between the two sorts of tickets may well be doubted .-Harvard Law Review.

CORRESPONDENCE.

DETERMINATION OF CONSTITUTIONAL QUESTIONS BY THE EXECUTIVE.

To the Editor of the Central Law Journal:

In the article on the Sugar Bounty Case in the last number of the 'American Law Review, the proposition is advanced that an executive officer can pass on the constitutionality of a statute only in those cases "in which some consequences personal to the individual will attend upon his decision." If, by enforcing the statute, the officer might incur a personal liability for a few cents, he may pass on its constitutionality. If there would be no such personal liability he must enforce the statute as it stands, though its enforcement will result in the loss of thousands of dollars to the people. The result reached should cause one to doubt the reasoning on which the distinction is based. That reasoning is this: The conformity of an act of congress to the organic act is a question of law. The

determination of questions of law is reserved for the courts. If, therefore, [there be any case in which an executive officer may pass on the constitutionality of a statute, "that case must be exceptional in its nature, and must be founded upon a special and adequate reason to withdraw it from the general order." Such special and adequate reason is found only in those cases "in which some consequences personal to the officer will attend upon his decision." The construction of a statute is a question of law. The determination of questions of law is reserved for the courts. If, therefore, there be any case in which an executive officer may construe a statute, "that case must be exceptional in its nature, and must be founded upon a special and adequate reason to withdraw it from the general order." Such special and adequate reason is found only in those cases "in which some consequences personal to the individual will attend upon his decision." It is not true that the determination of questions of law is reserved for the courts. In certain cases, the final determination of such questions is reserved for the courts. If the courts sustain a statute, executive officers must enforce it. In advance of a final determination by the courts, the officer must decide for himself. He passes on the constitutionality of the statute "only for the purpose of regulating his own conduct in accordance with the true law." The duty of the officer to the people is of as much importance, at least, as his personal interest. If his private interest will justify him in passing on the constitutionality of the statute, the public interest will also justify him.

BOOK REVIEWS.

WALKER'S AMERICAN LAW.

This is the tenth edition of a work which first made its appearance in 1837 and which was at once accorded a place in American legal literature by the side of Blackstone and Kent. Indeed it may be said to be, in a measure, an American successor to Blackstone, in so far as it applies the principles of the common law to American institutions, as revealed by American authorities. The student of law has found this volume a valuable assistant in his studies as a supplement to Blackstone. It does not seem necessary here to enter into a detailed statement of its contents, for there must be few American practitioners or students who are not familiar with it and aware of its great merit. It will suffice to say that the present edition is revised by Clement Bates of the Cincinnati Bar, and that a few new sections have been added to the text and very considerable additions have been made to the notes. It is in the shape of one volume of eight hundred and fifty pages, well indexed, printed and bound. Published by Little-Brown & Co., Boston.

THOMPSON ON PRIVATE CORPORATIONS.

We have heretofore published an extended review of this masterly commentary on the Law of Private Corporations (41 Cent. L. J. 15). At that time but four volumes had come from the press. The fifth volume is before us. It contains much important and valuable matter. Its main themes are Corporate Powers, the Doctrine of Ultra Vires, Corporate Bonds and Mortgages, Torts and Crimes of Corporations, Insolvent Corporation, Dissolution and Winding Up, and Receivers of Corporations. It is unnecessary to add anything to the very hearty indorsement we gave to the treatise on its first appearance. The enthusiasm with which the work has been generally received by

the profession is proof of its intrinsic merit. We dare say that it will ultimately be found in the library of every modern practitioners. We are informed that volume six, which will complete the set, will be issued shortly. Published by Bancroft-Whitney Co., San Francisco, Cal.

DEMBITZ ON LAND TITLES.

This work bears testimony to the long and wearisome labor consumed in its preparation. There is little in the range of subjects embraced in this work which has escaped the diligent study and consideration of the author. In fact, the author's sense of duty to bring the book "down to date" is so high that he seems to regret having omitted the Acts of the State Legislatures passed during the spring and winter of 1895, his manuscript having gone to the publishers "toward the end of June."

As the American law of real estate is, in all its practical workings, the creature of statute, it is questionable whether a survey of the entire law applicable to all the States can be prepared without giving a mass of details of little general value.

The author, however, has arranged the great number of statutes and decisions in a manner unusually satisfactory. Much historical matter is given which can scarcely be found in any other text-book, and throughout the work is characterized by a certain simplicity of style which appeals to the reader in a manner quite unique.

The style has none of the heaviness which characterizes the otherwise authoritative work of Mr. Washburn, if it necessarily lacks the brevity and conciseness of some of the English authors. But brevity and conciseness are impossible where the effort is conscientious to bring the book down to date, for scarcely has the law upon certain important subjects been settled before the legislature has changed it by subsequent enactments. From the irreconcilable conflicting and appalling mass of statutes and decisions it is difficult indeed to form a general statement of the law. Mr. Dembitz has succeeded to a remarkable degree toward approaching this end.

Volume I contains eight chapters, the first being an introduction on the scope of ithe work, a brief and admirable sketch on the development of English Law in America, and of the other than English sources of the law and chapters on Description and Boundary, Estates, Title by Descent, Title by Grant, Title out of the Sovereign, Title by Devise, and Incumbrances. Volume II contains chapters on Title by Marriage, Powers, the Registry Laws, Estoppel and Election, Judgments Affecting Land, Title by Judicial Process and Title by Prescription, with a list of cases cited comprising some 12,000 cases and an elaborate index of some seventy pages.

So far as we have been able to discover the statutes of all the States have been carefully examined, and this fact will make these volumes acceptable to the profession throughout the United States. The work has no local features, and it would be impossible to discover any preference of examination of the statutes or decisions of any particular State.

A long step towards uniformity of statutes respecting land titles has been taken by the author. There are no great obstacles to the consummation of this uniformity. The citizen of one State now regards the other States as affording quite as desirable fields for investment in real estate as does his own particular State, and such investments would largely increase if the varying and often conflicting statutes were reconciled or removed. The general consensus of the

people is certainly in favor of uniformity, and there are practically no good reasons for the numerous and important differences which now exist. The Code of New York, for 'example, prepared by David Dudley Field, although at first rejected by his own State, was transplanted to and adopted by Callfornia and proved entirely suitable to the conditions there prevailing, and there seems no weighty objection to statutory provisions affecting land titles being the same in Maine as well as in Kansas. One of the greatest benefits of the work of Mr. Dembitz is this guide and impetus towards uniformity of legislation.

The work is encyclopædic in its character, and nothing of any importance has been omitted. The style is lucid and vigorous, and the practitioner with these volumes before him has practically the open sesame

to all the law upon the subject.

We heartily commend the work to the profession, to legislators, and to that large number of men engaged in the real estate business who, in its clearly expressed statements, will find a liberal education in this important branch of law. It is a pleasure to state that the references to the reports are remarkably accurate, and that the cases are cited not only in the volume of the State reports, but also in the publications of the West Publishing Company, which makes them accessible to many who have not the different State reports. The publishers have done their work in a very satisfactory manner. These volumes are destined, we believe, to an abiding place in the confidence of the profession. Published by West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Elements of Damages. A Handbook for the Use of Students and Practitioners. By Arthur G. Sedgwick. Boston: Little, Brown & Company. 1896.

The Elements of Torts. By Thomas M. Cooley, LL.D. Chicago: Callaghan & Company. 1895.

Handbook of the Law of Torts. By Edwin A. Jaggard, A. M., LL. B. Professor of the Law of Torts in the Law School of the University of Minnesota. In two volumes. St. Paul, Minn. West Publishing Co. 1895.

Text-Book of the Patent Laws of the United States of America. By Albert H. Walker, of the Hartford Bar. Third Edition. New York: Baker, Voorhis & Company. 1895.

The Principles of the American Law of Bailments.
A Companion to the Author's Work on Contracts.
By John D. Lawson, LL.D., Professor of Common Law in the University of the State of Missouri. St. Louis: The F. H. Thomas Law Book Co. 1895.

American Electrical Cases, Being a Collection of all the Important Cases (Excepting Patent Cases) Decided in the State and Federal Courts of the United States from 1873 on Subjects Relating to the Telegraph, the Telephone, Electric Light and Power, Electric Railway, and all Other Practical Uses of Electricity, with Annotations, Edited by William M. Morrill, Author of Competency and Privilege of Witnesses," "City Negligence," etc. Volume IV. Albany, N. Y.: Matthew Bender, Law Publisher. 1896.

Man.

HUMORS OF THE LAW.

Last week the editor of this paper says: "Edison has been beaten in his phonograph suit."

Too bad Mr. Edison should have received chastisement in the wearing apparel of his most particular fancy. Possibly the assault was spontaneous and he had no chance to change for a more ordinary suit.

"This map of your new railroad is imperfect," said the Judge.

"Imperfect, your Honor?"

"Yes, sir. There's your station, there's your tank, and there's your coal chute. Now, where in thunder is your receiver.

If it is not true, the lawyer who told this story is a good one. Attorney Hogan, it seems, was called some time ago to the county jail by a poor actor who had been arrested for jumping his board bill. He related a pitiful tale of woe, crying at the same time.

"Never mind, my boy," said the genial attorney, "if you cry like that before the jury we have a good case.",

In a jury trial in a small town not many miles from civilization, the rural gentlemen into whose hands the fate of the plaintiff was placed were so stubbornly divided that they were some twenty-odd hours in reaching a verdict. As they left the court after having rendered their verdict, one of them was asked by a friend what the trouble was.

"Wasi," he said, "six of 'em wanted to give the plaintiff \$4,000, and six of 'em wanted to give him \$3,000, so we split the difference an' gave him \$500."

A liquor case was on trial, and one of the officers who had made the raid testified that a number of botties were found on the premises.

"Liquor, your honor."

"What kind of liquor?"

"I don't know, sir."
"Didn't you taste it or smell of it?"

"Both, your honor."

"What! do you mean to say that you are not a judge of liquor?"

"No, sir; I'm not a judge; I'm only a policeman."

The witness was excused from answering any further questions.

WEEKLY DIGEST

of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except these that are Published in Full or Commented upon in our Notes of Recent Decisions.

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- 1. ADMINISTRATION—Executors—Purchasers of Property of the Estate.—Though How. Ann. 8t. 6042, provides that the executor making a sale shall not be interested in the purchase of any part of the estate sold, and that all sales made contrary thereto shall be void, a reconveyance by the purchaser at an executor's sale to the executor is not void against one claiming thereunder in good faith and without notice.—Otis v. Kenmedy, Mich., 65 N. W. Rep. 219.
- 2. ADMINISTRATION Preferred Claim. Where an agent collects rents for his principal, deposits the money in bank to his own account, and keeps a running account between him and his principal, which is settled once a year, on the death of the agent the amount due the principal is not a trust fund, which constitutes a preferred claim against his estate.—CHAPPEL V. CRAIG, IOWA, 65 N. W. Rep. 146.
- 3. ADMINISTRATION—Probate Practice.—A proceeding under Code Civ. Proc. § 1654, providing that any person claiming to be heir to a decedent may file a petition to the probate court praying it to declare the rights of all persons in the estate, is not a civil action, within section 668, requiring that judgments shall be entered in the "judgment book;" and the entry of a decree in such a proceeding in the minute book of the probate court is sufficient.—BLYTHE v. AYRES, Cal., 42 Pac. Rep. 641.
- 4. ADVERSE POSSESSION—Color of Title.—Where land was sold under an execution, the return to which described the land, gave the purchaser's name, and showed the payment of the purchase price, the purchaser acquired such color of title as would, by adverse possession, ripen into perfect title.—NEAL V. NELSON, N. Car., 28 S. E. Rep. 428.
- 5. ADVERSE POSSESSION—Continuity.—The mere fact that, while land was held by adverse possession, the United States obtained judgment canceling the patent because of the patentee's fraud, which was afterwards set aside, did not, by revesting the title in the United States, destroy the rights acquired by such possession against the patentee and his successors, so that the statute of limitations would run against the patent title only from the time of setting aside the judgment, where the possession was uninterrupted while the judgment was in force.—CASEY v. ANDERSON, Mont., 42 Pac. Rep. 761.
- 6. ADVERSE POSSESSION—Mistake as to Title.—One settling on land to acquire it under the homestead statute, erroneously believing it to be vacant public land, may, by such occupancy, acquire title by adverse possession against the true owner.—LONGLEY V. WARREN, Tex., 33 S. W. Rep. 804.
- 7. APPEAL Bond Obligees.—One of several joint judgment defendants in an action of debt in justice

- court, may, when such defendants are not adversely interested, appeal without making his codefendants obligees in his appeal bond.—Martin v. Lapowski, Tex., 33 S. W. Rep. 800.
- 8. APPEAL Costs—Briefs.—Under Code Civ. Proc. 1887, § 494, providing that there shall be allowed to the prevailing party in the Supreme Court his necessary disbursements in the action, a party is entitled to the cost of printing his brief.—EYAN V. MAXEY, Mont., 42 Pac. Rep. 760.
- 9. APPEAL—Mandate. Where a case is remanded with specific directions, the court below has no power to do anything not authorized by such directions.—REES V. McDaniels, Mo., 33 S. W. Rep. 178.
- 10. APPEAL—Notice.—Where, in an action to foreclose a mortgage, the contract is found usurious, and judgment rendered, as provided by Hill's Ann. Laws, § 3899, in favor of the State for the use of the common school ffund, the State does not thereby become a "party" to the action, so as to require notice of appeal to be served on the State.—BARGER v. TAYLOR, Oreg., 42 Pac. Rep. 615.
- 11. APPEAL Parties.—Parties defendant who were dismissed from the action before the cause was submitted to the jury, without the consent of plaintiff, are necessary parties to an appeal by their codefendants.—CAREY V. OAKES, Wash., 42 Pac. Rep. 621.
- 12. APPEAL—Review.—A judgment in a law action tried by the court, where no objections were made and exceptions saved to any ruling of the court, and no instructions were asked or given, will not be reviewed.—Hill v. Kingsland, Mo., 38 S. W. Rep. 162.
- 18. APPEAL—Time of Taking.—Code, art. 5, § 6, provides that appeals from a court of law shall be taken within two months from the date of the judgment: Held that, where a verbal order for an appeal is given out of court and after the expiration of the term, the entry of the appeal must be made within the time limited by statute, or the appeal will be dismissed.—GAINES V. LAMKIN, Md., 38 Atl. Rep. 459.
- 14. APPEAL FROM PROBATE—Judgment.—A judgment of distribution of a decedent's estate will not be disturbed on appeal by a person not interested in the estate.—IN RE BLITH'S ESTATE, Cal., 42 Pac. Rep. 648.
- 15. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where an assignee for ithe benefit of creditors, knowing that the trust property is subject to liens in an amount greater than its value, invokes the aid of equity in the settlement of the trust, the property so incumbered cannot be charged with any costs which would not necessarily have been incurred by the lienholders had no suit been brought by the assignee.—KENTUCKY NAT. BANK V. LO. ISVILLE BAGGING CO., Ky., 33 S. W. Rep. 101.
- 16. Assignment for Benefit of Creditors.—Though an assignor for the benefit of creditors expressly reserves his exempt property, and retains the proceeds of sales made on the day of the assignment to an amount legally exempt, the deed of assignment will be declared void at the instance of creditors, unless the sum so retained was selected by the assignor himself as exempt property.—MAHORNER v. FORCHEIMER, Miss., 18 South. Rep. 570.
- 17. Assignment for Benefit of Creditors—Retention of Rent.—Since a deed of assignment purporting to convey all the assignor's lands, tenements, and "hereditaments" carries with it, as a necessary incident, the rents of the lands conveyed, the retention of notes given for rent, and their subsequent delivery by the assignor to a third person, is ineffectual to defeat the assignee's rights thereto, and does not, therefore, affect the validity of the assignment.—Allen v. Smith Bros. Co., Miss., 18 South Rep. 579.
- 18. ASSIGNMENT FOR BENEFIT OF CREDITORS—Unlawful Preferences.—Where an insolvent corporation aids and abets in the issuance and levy of attachments by certain creditors, and assigns certain choses in action, while executing a general assignment, resulting, in a

tew moments after levy of the attachments, in its actual execution and delivery, the attachments and levies and the assignment of the choses in action constitute a part of the general assignment.—POLLAK CO. v. MUSCOGER MARDF'G CO., Ala., 18 South. Rep. 611.

19. ATTACHMENT—Lien — Prior Unrecorded Deed.—Under Sayles' Civ. St. art. 4832, providing that all sales of land shall be void, as to creditors without notice, unless they are recorded, one who claims under an attachment levied before a prior deed was recorded has the burden of showing that when the attachment was levied he had no notice of the deed.—L. & H. BLUM LAND CO. V. HARBIN, Tex., 38 S. W. Rep. 158.

20. ATTACHMENT—Summons—Service on Corporation—Under Code Civ. Proc. § 638, providing that personal service of the summons must be made on a defendant on whom an attachment is granted within 80 days of the granting thereof, leaving a copy of the summons, complaint, and other papers, on which an attachment was granted against a corporation, with the person in possession of the property levied on, is not sufficient service of the summons, though such person loaned the papers to defendant's general manager, who notified its directors and attorney of the levy.—Kieley v. Centeal Complete Combustion Manuf'G Co., N. Y., 42 N. E. Rep. 260.

21. ATTORNEY—Compensation—Lien on Judgment.—Though Gen. 8t. § 85, gives an attorney a lien on a judgment recovered by him for fees due from the judgment creditor, a judgment debter who pays the judgment without notice of the attorney's intention to claim the lien will be protected against it.—Colorado State Bank of Durango v. Davidson, Colo., 42 Pac. Red. 687.

22. Banks—Officer—Liability for Deposits.—A bank depositor, on rumors of its insolvency, went to withdraw his deposits, but was informed by the vice-president and director that the bank was perfectly solvent, and that "we have got all the money you want. You need never have any fears of this bank as long as I am in it." Such depositor, relying on such representations, permitted his deposits to remain. It was in fact insolvent when the representations were made: Held, that such vice-president and director was personally liable to such depositor for the money lost by the failure of the bank.—Townsend v. Williams, N. Car., 28 S. E. Rep. 461.

23. Building and Loan Associations—Insolvency.—In case of the insolvency of a building and loan association, borrowing members should be charged with the amount actually received by them, with 6 per cent. interest, and credited with the amount paid by them, whether paid as fines, penalties or weekly dues.—STRAUSS V. CAROLINA INTERSTATE BUILDING & LOAN ASSM., N. Car., 22 S. E. Rep. 450.

24. CARRIBES — Live Stock — Contract — Measure of Damages.—The measure of damages to a shipment of cattle, from negligence of the carrier, is the difference between their value in the condition in which they arrive and that in which, but for the negligence, they would have arrived, though they are not shipped for sale, but for pasturage.—GULF, C. & S. F. Ry. Co. v. STANLEY, Tex., 33 S. W. Rep. 110.

25. CARRIER—Negligence of Connecting Carrier.—As Rev. St. 1899, § 944, provides that, whenever any property is received by a carrier for transportation from one place to another, such carrier shall be liable for the negligence of any other carrier to which such property may be delivered, a carrier contracting to transport eattle to a point beyond the terminus of its line cannot, by contract, exempt itself from liability for the negligence of the carrier completing the transportation.—MCCANN v. EDDY, Mo., 33 S. W. Rep. 71.

38. CARRIERS OF PASSENGERS—Exemplary Damages.—Exemplary damages will not be awarded sgainst a railway company because, by reason of a breaking down of a defective engine, it failed to carry a passenger to whom it had sold an excursion ticket back to his starting point, though the company's equipments were

inadequate, as the passenger's action is ex contractu, and not in tort, no personal injury or indignity being inflicted on him.—HANSLEY V. JAMESVILLE & W. R. Co., N. Car., 23 S. E. Rep. 448.

27. CHATTEL MORTGAGE—Execution Purchaser With Notice.—A chattel mortgagee cannot subject to hismortgage part of the mortgaged property held by one as purchaser at an execution sale, made with notice of the mortgage, when the property was in possession of the mortgagor, where the property had already been received by the mortgagee, together with that held by him under replevy bond, and on which the mortgage was a lien, and is sufficient to satisfy the mortgage debt.—ROSE V. MARTIN, Tex., 33 S. W. Rep. 294.

28. CONSTITUTIONAL LAW—Delegation of Legislative Power—Municipal Charters.—Act March 4, 1895, conferring upon cities of a given class the right to make laws for their local self-government, subject to the general laws of the State, is not invalid as a delegation of legislative powers.—REEVES v. ANDERSON, Wash., 42 Pac. Rep. 625.

29. CONSTITUTIONAL LAW—Form of Indictment—Embezziement.—2 How. Ann. St., § 9421, providing that the indictment may merely allege the embezziement of money, under which a conviction may be had for the embezziement of a check, draft, etc., is not unconstitutional in that the indictment does not advise defendant of the charge against him, defendant having the right to have the charge made certain by examination or bill of particulars.—PEOPLE v. HANAW, Mich., 65 N. W. Rep. 231.

30. CONSTITUTIONAL LAW—Statutes—Title of Act.—Act March 3, 1869, entitled, "An act to regulate the sale of tickets, the rate of fare to be charged, and taxes and licenses to be paid by street railroad companies in the City of St. Louis," in providing, in section 4, that "each car shall be furnished with such adjustable gates or guard" as shall effectually prevent passengers from getting on or off by the front platform, violates Const. art. 4, § 32, providing that no law shall relate to more than one subject, and that shall be expressed in itstitle.—WITZMAN V. SOUTHERN RY. CO., Mo., 33 S. W. Rep. 181.

31. CONTRACT—Agreement to Pay Draft. - One who writes another, at a certain city, "If you are still there and need the money, you can make draft on me for \$500, and I will pay it," without indicating the city to which it is addressed, is liable to a bank cashing the addressee's draft, though it is drawn in a city other than that to which the letter was addressed, and the letter was written in reply to one from the addressee asking for funds to enable him to leave the city to which the letter was addressed; the bank having no notice of the purpose for which the money was to be used or the city to which the letter was addressed.—POSEY v. DENVER NAT. BANK, Colo., 42 Pac. Rep. 684.

32. CONTRACT—Ambiguities.—Where a contract is concluded between the parties by letters, if, in a letter written by one of them, there be any ambiguity or contradiction in terms, doubts as to its meaning will be resolved against the writer.—GRAFF v. D. M. OSBORNE & Co., Kan., 42 Pac. Rep. 704.

33. Contract—Breach—Measure of Damages.—Where, in consideration of extension of time to pay purchase money of mining property, the vendee gives notes eured by deed of trust on the property, and agrees with the vendor that he will, till payment of the debt, work the mine in mine fashion, the measure of damages for breach of such agreement, for which the vendor only has a cause of action, is the injury to the security.—Belmont Mining & Milling Co. v. Costigan, Colo., 42 Pac. Rep. 647.

34. CONTRACT—Consideration.—Held, that there was a good consideration—the compromise of a disputed claim—for the execution by defendant and delivery to plaintiff of an agreement to make a grain separator, previously purchased by the latter, fulfill and comply with the terms of a warranty given when the separator

was ordered.—Hansen v. Gaar, Scott & Co., Minn., 65 N. W. Rep. 254.

- 85. CONTRACT—Evidence.—In an action on a contract, evidence that the contract was filed in a prior action before a justice, since deceased, and that his successor, the custodian of his docket, and counsel were unable, after search, to find it, rendered a copy of the contract admissible.—STANLEY V. ANDERSON, Mich., 65 N. W. Rep. 247.
- 36. CONTRACT—Written Contract—Parol Evidence.— It may be shown by parol that a written contract was discharged by a new, additional or substituted agreement.—Calliope Min. Co. v. Herzinger, Colo., 42 Pac. Rep. 668.
- 37. CONTRACT TO SINK WELL—Performance.—In an action on a contract by which plaintiff agreed to sink a well on defendant's land which would furnish sufficient water for defendant's stock, but which contained no stipulation as to the quality of the water, piaintiff can recover on proof that the agreed quantity was furnished, though the water was not suitable for the stock to drink.—BLUM v. BROWN, Tex., 38 S. W. Rep. 145.
- 38. CONVERSION—What Constitutes.—Where a person sends a draft to a corporation, to be discounted, and the proceeds used to pay a note of the corporation on which the sender was liable as indorser, and the president of the corporation, though ignorant that the draft was sent for such purpose, uses the proceeds to pay other debts of the corporation, he is liable to the sender for conversion of the draft.—KIDDER V. BIDDLE, Ind., 42 N. E. Rep. 298.
- 39. CORPORATIONS—By-law—Voting by Stock.—A corporate by-law providing that, "at stockholders' meetings, each stockholder shall cast one vote for each share of stock owned by-him," is valid, particularly as Const. § 207, authorizes the cumulative system of voting.—PROCTOR COAL CO. v. FINLEY, Ky., 38 S. W. Rep. 186.
- 40. CORPORATIONS—Deceased Stockholder.—The summary proceeding by execution to enforce the individual liability of a stockholder in an insolvent corporation, cannot be employed to enforce such liability against the estate of a deceased stockholder, which is in course of settlement in the probate court.—ACHENBACH V. POMEROY COAL CO., Kan., 42 Pac. Rep. 734.
- 41. COEFORATION—Dissolution.—Though the shares of a corporation, after its creation, may be held by a less number of shareholders than that which the law would have required as a condition precedent to the organization of the same corporation, the corporation continues to exist. Neither the want of officers by reason of failure to elect or by death, nor the burning of the mill which it was the object of a corporation to carry on, will, of themselves, work a dissolution of the corporation.—IN RE BELTON, La., 18 South. Rep. 642.
- 42. CORPORATIONS—Foreign Insurance Companies—Service of Process.—When a foreign insurance company has filed with the superintendent of insurance of this State, as required by the statute, its written consent that an action may be commenced against it by the service of process upon such superintendent, and it thereafter does business in this State because of the permission so obtained, it is estopped from questioning the jurisdiction of a court acquired by the issuance of a summons to, and its service on, the superintendent of insurance, in the form and manner prescribed by such statute.—Long Island Ins. Co. v. Great Western Mfg. Co., Kan., 42 Pac. Rep. 738.
- 43. CORPORATIONS—Insolvency—Equity Jurisdiction.

 The property of an insolvent corporation is not a trust fund in the hands of the corporation, for its creditors, so as to give equity jurisdiction to administer it as a trust estate.—BARRETT V. POLLAK CO., Ala., 18 South. Rep. 615.
- 44. CORPORATIONS—Transfer of Stock.—Under Gen. St. § 269, providing that no transfer of stock shall be valid unless it shall be entered on the books of the

- company within 60 days from its date, a charge that a sale and delivery of stock without transfer on the books of the company within 60 days is good as to all persons having notice thereof was error, on an issue between an attaching creditor of the person in whose name the stock stood and a purchaser of the stock; the only demand by the purchaser for an entry of the transfer having been made before some of the stock had been assigned to him and before certificates for the rest had been issued.—FIRST NAT. BANK OF LONG-MONT v. HASTINGS, Colo., 42 Pac. Rep. 691.
- 45. CORPORATIONS—Venue of Action Residence.—A corporation is not a citizen, inhabitant, or resident of a State in which it has not been incorporated, within the meaning of Act Aug. 18, 1898, ch. 866, requiring a civil suit to be brought in the district of which defendant is an inhabitant, or, where the jurisdiction is founded on diverse citizenship, in the district of the residence of either plaintiff or defendant.—IN EB KEASBEY & MATTISON CO., U. S. S. C., 16 S. C. Rep. 278.
- 46. CORPORATIONS—Water Companies—Forfeiture of Charter.—The failure of a water company to elect directors or officers, or to hold any meetings, or to perform any corporate act, for nearly eight years, and an attempt to sell and surrender all its property to another corporation, is a willful violation of corporate duties, entitling the State to demand a forfeiture of its charter.—CITY WATER CO. V. STATE, Tex., 88 S. W. Rep. 259.
- "47. COURTS—Judges—Disqualification.—A judge of the court of civil appeals, who is a taxpayer in a certain city, is not interested in an action against such city for personal injuries caused by its negligence, within the meaning of Const. art. 5, § 11, providing that no judge shall sit in any case in which he may be interested.—CITY OF DALLAS V. PEACOCK, Tex., 88 S. W. Rep. 220.
- 49. COURTS—Liability for Judicial Acts.—A mayor is not civilly liable for ordering the imprisonment of a person for contempt, while acting as judge of the mayor's court, though the order was erroneous, and made through malice.—SCOTT v. FISHBLATE, N. Car., 28 S. E. Rep. 486.
- 49. CREDITORS' BILL—When Lies.—An action in the nature of a creditors' bill may be maintained under section 481 of the Civil Code, for the purpose of subjecting to the payment of a judgment a county warrant in the hands of a county clerk, which cannot be reached by an execution, or by the ordinary proceedings in aid thereof; but, before the judgment creditor can avail himself of such remedy, it must appear that the debtor has no personal or real property, subject to levy on execution, sufficient to satisfy the judgment.—CLARKE V. BERT, Kan., 42 Pac. Rep. 788.
- 50. CRIMINAL EVIDENCE—Abortion. Defendant and L, were jointly charged with manslaughter by abortion committed at L's house. There was evidence that the premature birth resulted from accidental causes, and the evidence of guilt was circumstantial: Held, that it was not error to admit evidence that defendant produced other abortions at L's house within about a year previous to the one charged. PEOPLE V. SEAMAN, Mich., 65 N. W. Rep. 203.
- 51. CRIMINAL EVIDENCE—Assault—Intention.—In a prosecution for aggravated assault by a teacher on his pupil, the evidence showing that the assault was so severe as to draw blood from the pupil in a number of places, the pupil offering no resistance, evidence of the intention of the teacher in chastising the pupil is ad missible.—Kinnard v. State, Tex., 83 S. W. Rep. 234.
- 52. CRIMINAL EVIDENCE—Confession.—Voluntary testimony given by one to escape liability in a civil action against him for embezziement is admissible in a criminal prosecution therefor; Code Proc. § 1808, providing that a confession under inducement is admissible.— STATE V. HOPKIES, Wash., 42 Pac. Rep. 627.
- 53. CRIMINAL EVIDENCE—Confessions.—Where a wife, on threats of her husband to leave her, confesses to having committed incest, such confession, being a con-

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fidential communication, is inadmissible, and its subsequent repetition to a third party, under similar threats, in the presence of the husband, is incompetent.—STATE v. BRITTAIR, N. Car., 23 S. E. Rep. 483.

- 5i. CRIMINAL EVIDENCE—False Pretenses.—On a trial for obtaining money by falsely representing that defendant was agent for a collection company which had a branch office at Lexington, testimony that the witness was informed by the police that there was no such office there is incompetent.—QUICK v. COMMONWEALTH, Ky., 25 S. W. Rep. 77.
- 55. CRIMINAL EVIDENCE Robbery Conspiracy. Where there is evidence that several persons jointly charged with assault in perpetrating robbery were seen together the day before the robbery, on the separate trial of one, evidence of the condition of another the day after the robbery, as identifying him, and therefore defendant, as his companion of the day before, as having been engaged in the robbery, is admissible.—PROPLE V. CLEVELAND, Mich., 65 N. W. Rep. 216.
- 56. CRIMINAL EVIDENCE—Seduction Acts of Un-Chastity.—On a prosecution for defiling a female confided to one's care, evidence that defendant's general character for chastity was bad was not admissible to impeach him as a witness.—STATE V. SIBLEY, Mo., 83 8. W. Rep. 167.
- 57. CRIMINAL LAW—Conviction—Affirmance.—A conviction for obtaining property by false pretenses, presented for review on transcripts of the record without argument, will be affirmed where the evidence clearly warranted the findings.—STATE V. COOPER, IOWA, 65 N. W. Rep. 155.
- 18. CRIMINAL LAW—Embezziement.—In a prosecution under Comp. Laws 1887, § 1770, providing for the punishment of any agent of any corporation who "shall embezzie or fraudulently convert to his own use any money of another which shall come into his possession by virtue of his employment," an indictment alleging that defendant, as agent of an insurance company, received for the company money as premiums for insurance, which he failed to pay over or account for, is insufficient for failure to allege that the money received was in fact the money of the company.—STATE V. STEARES, Oreg., 42 Pac. Rep. 616.
- 59. CRIMINAL Law—Forgery.—An indictment for forgery, which charges an intent to defraud generally, may be sustained by proof that the name signed to the forged instrument was that of a fictitious person.—JOHNSON V. STATE, TEX., 33 S. W. Rep. 281.
- 60. CRIMINAL LAW—Forgery—Variance.—An information for forgery in the third degree, drawn under section 185 of the crimes act (paragraph 2272, Gen. St. 1869), described the destroyed instruments, by their purport, as two certain promissory notes, one made by "J. B. Reppy," for \$90, and the other by "J. L. Cecil," for \$75; but the proof was that the \$90 note was made by J. I. Rippey, and the \$75 note by J. S. Cecil, and that \$4 had been paid and credited on the latter. No evidence was offered tending to show the identity of "J. S. Reppy" with "J. I. Rippey," nor that of "J. [L. Cecil" with "J. S. Cecil," and objection as to these variances was duly and seasonably urged, but no application was made to amend the information: Held, that the variances, being in no way cured, were fatal.—\$72428 V. WOODROW, Kan., 42 Pac. Rep. 714.
- 61. CRIMINAL LAW—Indictment—Amendment. The indorsement by the grand jury of the indictment as a "thru" bill instead of a "true" bill is merely error in matter of form, and therefore the court may under Bev. 8t. § 1064, cause such an indictment, on objection thereto, to be forthwith amended.—STATE v. WILLIAMS, La., 18 South. Eep. 647.
- Et. CRIMINAL LAW—Judgment—Validity.—After being statemed to five years' imprisonment, and serving six days, defendant was brought before the court during the same term, and, on his agreeing to pay into court the costs of prosecution judgment was suspended:

 Med, that the court had power at a subsequent term, on Gefendant's failure to pay such costs, to sentence

- him to imprisonment for one year.—STATE V. WHITT, N. Car., 23 S. E. Rep. 452.
- 63. CRIMINAL LAW—Keeping House of Ill Fame.—A man may be guilty of keeping a house of ill fame, though the illicit intercourse is had only with his wife, and she is the only female inmate.—STATE v. YOUNG, Iowa, 65 N. W. Rep. 161.
- 64. CRIMINAL LAW Misdemeanor Waiver of Jury Trial.—A jury trial cannot be waived in a criminal prosecution for a misdemeanor.—State v. Tucker, Iowa, 65 N. W. Rep. 152.
- 65. ORIMINAL LAW Murder Defense of Dwelling House.—Where deceased, with a weapon in his hands, attacked and entered the dwelling house occupied by defendant and his wife, and defendant retreated to a loft to escape deceased, and deceased first fired at defendant, defendant was justified in taking deceased's life.—Saylor v. Commonwealth, Ky., 88 S. W. Rep. 186.
- 66. CRIMINAL LAW—Murder—Use of Intoxicants.—The use of liquors by one who has contracted an appetite therefor, though such use is involuntary, is no excuse for homicide, if the quantity taken was not sufficient to stupefy him, or cause him to lose control of his faculties.—COMMONWEALTH V. GILBERT, Mass., 42 N. E. Rep. REC.
- 67. CRIMINAL LAW-Perjury Circumstantial Evidence.—Though Code Cr. Proc. art. 746, provides that no person shall be convicted of perjury except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, the falsity of the statement can be established by circumstantial evidence, in the manner required by the statute.—Plummer v. State, Tex., 33 8. W. Rep. 226.
- 68. CRIMINAL LAW—Rape—Corroborating Evidence.—Under Code, § 4560, requiring, to convict one of rape, that the testimony of the person injured must be "corroborated by other evidence tending to connect the defendant with the commission of the offense," complaint cannot be made of an instruction that the corroborating evidence must be evidence tending to strengthen and corroborate the injured person.—STATE v. FRENCH, IOWA, 65 N. W. Rep. 156.
- 69. CRIMMAL LAW—Banks—Receiving Deposits—Insolvency.—An indictment under Rev. St. 1889, § 3581, charging a bank officer with receiving a deposit, knowing that the bank was insolvent, is not defective because each count concludes with the words, "did take, steal, and carry away."—STATE v. SATTLEY, Mo., 88 S. W. Rep. 41.
- 70. CRIMINAL LAW—Robbery.—An information which charges the defendant with having robbed another of a designated sum of lawful money, the currency of the United States, charges astatutory offense, within the intendment of Rev. St. § 810; and, as the consequence is that it, being in the words of the statute, or those certain and equivalent having been employed, is valid and sufficient.—STATE v. HENRY, La., 18 South. Rep.
- 71. CRIMINAL LAW Waiver of Jury Trial.—Under Code, § 4847, relating to criminal trials in district courts, and providing that issues of fact shall be tried by a jury, and section 4850, providing that an issue of fact must be tried by a jury of the county in which the indictment is found, a jury earnot be waived in a criminal proceeding prosecuted by indictment.—STATE V. DOUGLASS, IOWA, 65 N. W. Rep. 151.
- 72. CRIMINAL PRACTICE—Assault With Intent to Rape.

 —An indictment for assault with intent to rape will not be quashed though intent be not well alleged, as under such indictment he may be convicted of a simple assault.—COMMONWEALTH v. MCCARTHY, Mass., 42 N. E. Rep. 886.
- 78. CRIMINAL PRACTICE Burglary.—An indictment under St. § 1164, providing that, if any person shall break into any storehouse, whether such place be or not a depository for goods, with intent to steal, etc., need not allege that there were, at the time of the

breaking, any goods in the storehouse.—Hale v. Com. MONWEALTH, Ky., 33 8. W. Rep. 91.

- 74. CRIMINAL PRACTICE—Charging Several Offenses.

 -Under Code Cr. Proc. art. 438, providing that an indictment may contain several counts charging the same "offense," a count for burglary and conspiracy to commit the burglary may be joined.—DILL V. STATE, Tex., 38 S. W. Rep. 126.
- 75. CRIMINAL PRACTICE Forgery of Check.—Under Rev. St. § 924, making checks subjects of forgery, and section \$247, providing that in an information for forgery it shall be sufficient to set forth the purport and value of the instrument forged, it was not necessary that an indictment for forging a check allege the name of the bank upon which it was drawn.—Santolini v. State, Wyo., 42 Pac. Rep. 746.
- 76. CRIMINAL PRACTICE—Homicide.—Under a statute defining murder as the unlawful killing of a person with malice aforethought," and murder in the first degree as all murder perpetrated by means of poison, etc., "or by any other kind of willful, deliberate, malicious and premeditated killing," etc., an indictment for murder in the first degree is sufficient which charges that defendant did "unlawfully, willfully, and of his malice aforethought, and after premeditation and deliberation, kill B, by shooting him with a certain gun loaded with gunpowder and leaden bullets, with the felonious intent to then and there kill him, etc.—Turner v. State, Ark., 33 S. W. Rep. 104.
- 77. CRIMINAL PRACTICE Robbery. An indictment alleging that defendants, being armed, made an assault upon a certain person, with the intent to kill and maim said person if he should resist defendants, and that defendants put said person in fear of his life, and did rob said person of certain property, sufficiently charged the crime of robbery, and was not bad for duplicity.—STATE V. CALLAHAN, IOWA, 65 N. W. Rep. 150.
- 78. CRIMINAL TRIAL—Witness Credibility.—Where the credibility of a witness is attacked by proof that he has been arrested for a felony, evidence of his good character for truth is admissible.—FARMER V. STATE, Tex., 83 S. W. Rep. 282.
- 79. CRIMINAL TRIAL—Witness—Impeachment.—It is a general rule that a party cannot impeach the testimony of his own witness.—STATE v. VICKERS, La., 18 South. Rep. 839.
- 80. DEATH BY WRONGFUL ACT—Damages.—In an action for causing death, an instruction giving in years the life expectancy of deceased, and directing the jury that in estimating actual damages they should consider the probable net earnings of deceased during that period, taking into consideration his habits and capacity to earn, gave undue prominence to the fact of expectancy, separated from the other facts in evidence, as that deceased's health and habits were only fairly good, and that he had been unable to work continuously.—McClurg v. Ingleheart, Ky., 33 S. W. Rep. 80.
- 81. DEED BY RAILROAD—Description.—A deed by a railroad company describing the property as "ail the railroad" of the grantor through certain counties, and "all its lands, and rights of way, depot and depot grounds, together with all the real estate of said railroad company, wherever situated," is sufficient to transfer title to a tract of land in one of the counties named, a part of a larger tract acquired for a right of way, on which the company had placed a depot and tracks.—FORDYCE v. BAPP, Mo., 33 S. W. Rep. 57.
- 82. DBED—Delivery.—No delivery can be said to have been made of a deed found in the possession of the grantor at the time of his death, accompanied by a letter requesting that it be given to the person named as grantee, after the death of the grantor, without other evidence bearing upon the fact of delivery; and the grantee can take nothing under, and is not entitled to possession of such undelivered instrument.—LAWN v. DONOVAN, Kan., 42 Pac. Rep. 744.
- 83. DEED-Delivery.—The redelivery of a delivered but unrecorded deed to the grantor, and his destruc-

- tion of it, do not revest him with the title, in the absence of proof that the grantee redelivered the deed for the purpose of revesting the title, or with the intention of having it destroyed.—GILLESPIE V. GILLESPIE, Ill., 42 N. E. Rep. 305.
- 84. DEED—Delivery—Presumption.—A deed is presumed to have been delivered at its date.—KENDRICK V. DELLINGER, N. Car., 28 S. E. Rep. 488.
- 85. DEED-Mineral Rights-Condition Subsequent.—Where a conveyance of mineral rights in land is defeated by the grantee's failure to perform the particular acts stipulated to be done by him in the instrument itself, and which form the real consideration therefor, a re-entry by the grantor is unnecessary.—HAWKIMS V. PEPPEE, N. Car., 28 S. E. Bep. 434.
- 86. DEED-Rule in Shelley's Case.—The rule in Shelley's case applies to a deed to persons named, "to have and to hold the same to their use during the term of their natural lives, and then to their heirs after them."

 —NICHOLS V. GLADDEN, N. Car., 23 S. E. Rep. 459.
- 87. DEED—Stipulation to Build House—Incumbrance.

 —A stipulation in a deed that a certain kind of a house would be erected on the premises, and would be placed at a certain distance from the street, with reversion to the grantor, his heirs and assigns, in case of breach, constitutes an incumbrance, and not merely an easement in favor of the grantor's residence, which lay across the street.—LOCKE V. HALE, Mass., 42 N. E. Rep. 881.
- 88. DEED OF TRUST—Sale Under.—Gen. St. ch. 63, § 22, provides that no sale of land by virtue of a deed of trust to secure debts shall be valid, or pass the title to the property, unless the sale shall be in pursuance of a judgment, or the maker of such deed shall join in a writing evidencing the sale: Held, that such statute does not render void a trustee's sale made without the consent of the grantor's in a trust deed, where it appears from the face of the instrument and the transaction that it was not intended to be a revocable instrument, but was designed to pass the absolute fee, so that the trusts might be executed.—ABBOTT v. YEAGEE, Ky., 33 S. W. Rep. 195.
- 89. DESCENT—Tenants in Common—Dower.—1 Starr & C. Ann. St. ch. 39, § 10, declares that, in case of the birth of a child after a testator has made his will, "the devises and legacies by such will granted shall be abated in equal proportions to raise a portion for such child" equal to what he would receive had no will been made: Held, that where a testator devised land to his wife and three children, and then had a fourth child born to him, such child inherited an undivided one-fourth interest in the land, subject to its mother's dower.—SALEM NAT. BANK V. WHITE, Ill., 42 N. E. Rep.
- 90. DOWER—Seisin of Husband.—Testator gave property in trust to executors to secure an annuity left his widow and advances to be made to his children, to continue only until his youngest child should become of age, when he directed sufficient property should be set aside to produce the annuity, and the residue thereof divided among the children: Held, that the trust ceased at the majority of the youngest child, and the property then vested in the children, subject to the lien of the annuity in case of a deficiency of personalty, so that the widow of a child dying after that event was entitled to dower in her husband's share.—CLARK V. CLARK, N. Y., 42 N. E. Rep. 275.
- 91. EJECTMENT-Title-Possession.—A deed without any evidence of the possession, by the grantor, of the premises conveyed, is not sufficient evidence of title to warrant a recovery in an action of ejectment. The giving of a deed to the premises is no evidence of title in the grantor.—FLORIDA SOUTHERN RY. CO. v. BUET, Fla., 18 South. Rep. 581.
- 92. ELECTIONS—Ballots.—Under a statute declaring that, when one desires to vote for all the nominees of a particular party, he may do so by placing a cross opposite the emblem of the party, but when he desires to

vote a mixed ticket he shall place a cross opposite the names of the candidates for whom he elects to vote, a cross having been put opposite the emblem of a party, and one opposite the name of each of the candidates of such party, with certain exceptions, the ticket will not be counted for candidates of that party against whose names crosses are not put.—Young v. Simpson, Colo., 42 Fac. Rep. 666.

93. ESTOPPEL-By Becord.—Where land is sold on default in the payment of the purchase price, and the purchaser dies before the sale is confirmed, and the owner agrees in open court that the deed be made to the heirs of the purchaser, he is estopped to afterwards claim that the purchaser purchased under an agreement to reconvey to him on payment of the amount bid.—FLEMMING V. STROHECKER, N. Car., 23 S. E. Rep. 440.

34. EVIDENCE—Cross-examination,—One party having introduced evidence that a certain person signed a paper without reading it, the other party is entitled to question him as to the circumstances under which he signed it, and why he did not read it.—White Sewing Mach. Co. v. Hicks, Tex., 33 S. W. Rep. 137.

95. EXECUTION—Exemptions.—A widow living alone is not the head of a family, within Code, § 3072, permitting a debtor who is resident of this State, and the "head of a family," to hold certain property exempt from execution, though she once had others living with her who depended on her for support.—EMERSON V. LEONARD, IOWA, 65 N. W. Rep. 153.

%. EXECUTION SALE—Bona Fide Purchaser.—A purchaser at execution sale against one to whom real estate has been conveyed through mistake, but without any knowledge, actual or constructive, of such mistake, is likewise entitled to protection as an innocent purchaser.—LUSK v. REEL, Fla., 18 South. Rep. 582.

97. FEDERAL COURTS—Diverse Citizenship.—The provision in Act March 8, 1887, ch. 378, as corrected by Act August 18, 1888, ch. 866, that when the jurisdiction is founded on diversity of citizenship, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, confers merely a personal privilege, and the right of a defendant to object that the action is brought in a district of which some of the defendants are not inhabitants, is waived by his entrance of a general appearance without taking the objection,—INTERIOR CONST. & IMP. CO. V. GIBNEY, U. 8. S. C., 16 S. C. Rep. 272.

98. FRAUDS, STATUTE OF—Sale of Fixtures.—A sale of a gimill situated on land is not within the provision of the statute of frauds, requiring the sale of land to be evidenced by a memorandum in writing.—BROWN v. BOLAND, Tex., 33 S. W. Rep. 273.

29. Frauds, Statute of—Contract of Employment for One Year.—A contract of employment for one year, to commence when the employee secures a release from a former employment, is not within the statute of trauds, where his release on the date of the contract was a possibility, though not in fact secured till a later date.—Baltimore Breweries Co. v. Callahan, Md., 38 atil. Rep. 460.

100. FRAUDS, STATUTE OF-Promise to Pay Debt of Another.—Where plaintiff performed work for one who contracted with defendants to do it, and after the work was completed defendants orally promised to pay therefor, plaintiff cannot recover, though such promise was unconditional.—BIXBY v. CHURCH, Oreg., 42 Pac. Rep. 613.

101. FRAUDS, STATUTE OF—Sale.—In an action for the price of lumber furnished a third person, where the evidence showed merely that after part of it was delivered defendant told plaintiff that he would pay for it, the promise was within the statute.—HENRY v. RIZER LUMBER CO., Tex., 33 S. W. Rep. 278.

102. FRAUDULENT CONVEYANCES.—A deed made in consideration of marriage is valid, as against existing steditors of the grantor, though not delivered until after the marriage is consummated, in the absence of

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bad faith on the part of the wife.—Wood & Huston Bank v. Read, Mo., 33 S. W. Rep. 176.

103. FRAUDULENT CONVEYANCES—Attachment Lien.—
nder Code, § 508, allowing a creditor to attack a fraudulent conveyance of his debtor's property, "or other
device resorted to for the purpose of defrauding creditors," and declaring that "the creditor in such case
shall have a lien upon the property described therein
from the filing of his bill, except as against bona fide
purchasers before the service of process upon the defendant in such bill," where a creditor attacks fraudulent attachments of his debtor's property, he does not
acquire a lien superior to other attachments, the validity of which is not attacked, and which were levied before the filing of his bill.—LEVY V. MARX, Miss., 18
South. Rep. 575.

104. FRAUDULENT CONVEYANCES—Ohange of Possession.—An insolvent debtor sold to plaintiff his goods, which were capable of speedy removal, but retained possession for two days thereafter, and was apparently carrying on business as before the sale, with the same business sign, until the goods were seized under attachment: Held, that the sale was fraudulent as to creditors of the selier.—State v. Goetz, Mo., 88 S. W. Rep. 161.

105. FRAUDULENT CONVEYANCES—Parties in Pari Delicto.—A party who has conveyed, by bill of sale, his goods, for the purpose of defrauding his creditors, cannot be permitted, in a court of justice, to question the sale, although it appear that no consideration was received therefor.—KAHN v. WILKINS, Fla., 18 South. Rep. 584.

106. FRAUDULENT CONVEYANCES—Subsequent Creditors.—The taking of a note for a debt owing at the time of a voluntary conveyance by the debtor, after the conveyance, in which subsequent indebtedness is also included, does not render the entire indebtedness a subsequent indebtedness, so as to prevent the creditor from suing to set aside the conveyance.—Trezevant v. Terrell, Tenn., 83 S. W. Rep. 109.

107. GUARDIAN—Appointment—Failure to Give Bond.
—The appointment of a guardian, who duly takes the oath required, and receives letters of guardianship in due form, issued by the probate court, is not rendered absolutely void by his failure to give a bond, as required by § 7, ch. 46, Gen. St. 1839.—HUNT v. INSLET, Kan., 42 Pac. Rep. 709.

108. HIGHWAYS—Prescription — Obstruction.—Under Act June 28, 1683, which declares that all roads which have been used by the public for twenty years are public highways, the fact that a road so used for twenty years was originally laid out as a private way makes no difference.—TOWNSHIP OF MADISON V. GALLAGHER, Ill., 42 N. E. Rep. 316.

109. Homestead—Deed to Wife.—A deed from a man to his wife of land in which he has a homestead estate, does not pass title to such estate, when possession is not abandoned or given pursuant to the deed, since a homestead can be conveyed without change of possession only by deed executed by both husband and wife.
—Anderson v. Smith, Iil., 42 N. E. Rep. 306.

110. HOMESTEAD—Tenancies in Common.—A homestead cannot be created by a cotenant in lands held as such cotenant.—ROSENTHAL v. MERCED BANK, Cal., 42 Pac. Rep. 640.

111. HUSBAND AND WIFE—Homestead—Mortgage.—A mortgage by a husband and wife of their homestead to secure a debt of the husband, is void.—ODUM v. MENA-FEE, Tex., 38 S. W. Rep. 129.

112. HUSBAND AND WIFE—Sale by Husband—Improvements on Land.—Where husband and wife have made improvements on land, their rights in which, if any, can be protected only by possession, sale of the improvements by the husband alone, accompanied by his putting the purchaser in possession of the land without any objection by the wife, passes whatever interest they have, even if it be admitted that any of their property rights constituted an interest in land.—Fow-LER v. Burke, Wash., 42 Pac. Rep. 624.

113. Injunction—Bond—Damages—Attorney's Fees.
—In an action on an injunction bond, plaintiff is entitled to recover as damages the amount paid as counsel fees for services rendered in dissolving the injunction.
—Belmont Mining & Milling Co. v. Costigan, Colo., 42 Pac. Rep. 650.

114. Insurance — Conditions — Waiver.—A condition in a policy that it shall be void if gasoline be "kept, used or allowed" on the premises, does not prevent the keeping in the building of gasoline to be used in filling gasoline torches for use in removing paint from the building in order to repaint it.—Smitt v. German Ins. Co. of Freeport, Ill., Mich., 65 N. W. Rep. 236.

115. Insurance — Conditions — Waiver by Agent. — Where a policy provides that no officer or agent shall have power to waive any of its conditions, except by writing, and that no privilege affecting the insurance shall be claimed by the assured unless so written, after it has been accepted by the assured, a parol waiver of any of the provisions of the policy by the agent from whom the insurance was obtained, is a nullity.—EGAN v. Westchester Fire Ins. Co., Oreg., 42 Pac. Rep. 612.

116. Insurance — Defense of Fraud — Proof.—An instruction requiring the facts relied on to prove the defense of fraud in an action on a fire policy to "admit of no other reasonable explanation," is erroneous, since it requires it to be established beyond a reasonable doubt.—Knop v. National Fire Ins. Co. of Hartford, Conn., Mich., 65 N. W. Rep. 228.

117. Insurance—Waiver of Conditions.—Where a fire insurance policy required assured to give immediate notice to the company of any loss, and two days after a fire assured notified the company's agent thereof, who notified the company, which sent an adjuster to the scene of the fire, and after the proofs of loss were filed the company demanded further proofs, the condition as to notice to the company was waived.—MILWAUKEE MECHANICS' INS. CO. V. STUART, Ind., 42 N. E. Rep. 290.

118. Intoxicating Liquors—Illegal Sale.—The sale of two pints of whisky, in separate flasks, to the same purchaser, delivered at the same time for the price per quart, is not within Sand. & H. Dig., § 4856, prohibiting sales of liquors in quantities less than one quart.— BACH V. STATE, Ark., 53 S. W. Rep. 210.

119. INTOXICATING LIQUORS—Sale.—In a prosecution for sale of liquors a witness testified that he sent for whisky by defendant; that; he told him to bring him some liquor; that he forgot how much money he gave him, but defendant brought him a quart of whisky and that he paid him nothing for bringing it: Held, that the evidence showed a sale by defendant.—STATE v. SMITH, N. Car., 28 S. E. Rep. 449.

120. Intoxicating Liquors—Sales by Social Club.—A club organized, in good faith, for the promotion of social intercourse and the encouragement of literature and art, in selling intoxicants, in a private manner, only to its members and non-resident greats, but not with a view to profit, is not liable for the tax imposed by Sayles' Clv. St. art. 3226a, on persons engaged in the occupation of selling liquors.—STATE v. AUSTIN CLUB, Tex., 33 S. W. Rep. 118.

121. JUDGMENT — Collateral Attack. — In a collateral

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proceeding, a judgment irregularly tendered cannot be assailed on that ground, provided the court which rendered such judgment had proper jurisdiction.—HOUGH V. STOVER, Neb., 65 N. W. Rep. 189.

122. JUDGMENT — Correction — Affidavit for Attachment.—Where, in attachment, a judgment is rendered for plaintiff for his debt, refusing foreclosure of the attachment lien, and overruling a motion to quash the attachment, the court cannot, at a subsequent term, in passing on a motion to correct the entry of judgment, reopen the case, and render another judgment, quashing the attachment.—ROGERS V. EAST LINE LUMBER CO., Tex., 33 S. W. Rep. 812.

128. JUDGMENT — Justice Court. — A judgment of a justice of the peace, though silent as to service of cita-

tion, will be presumed to be valid, on collateral attack, until the contrary is shown, either from the record, or by evidence aliunde.—HAMREL V. DAVIS, Tex., 33 S. W. Red. 251.

124. JUDGMENT—Res Judicata.—A former judgment, between the same parties, cannot be held to be res judicata upon a matter controverted in a second action, when the causes of action are not the same, and when it does not appear from the face of the record that such matter was determined in the former case, nor that its determination was necessarily involved in the judgment.—SCOTT v. WAGNER, Kan., 42 Pac. Rep. 741.

125. JUDGMENT—Restraining Execution.— In the absence of fraud or mistake, the district court cannot enjoin the collection of a judgment of a county court having jurisdiction of the parties, where both courts have concurrent jurisdiction of the subject of the action.— PUBBLO CHICAGO LUMBER CO. V. DAKZIGER, Colo., 42 Pac. Rep. 663.

126. JUDGMENT BY CONFESSION— Enjoining Enforcement.—The enforcement of a judgment entered by confession under Rev. 8t. § 2896, providing that, on entering such a judgment, plaintiff shall file an answer signed by defendant's attorney, will not be enjoined at the suit of an attachment creditor of defendant merely because plaintiff's attorney signed the name of defendant's attorney to the answer, during the absence of the latter and at his request, where the debt on which the judgment was founded was a valid one.—John V. Farwell Co. V. Hilbert, Wis., 65 N. W. Rep. 172.

127. JUDGMENT BY DEFAULT — Evidence. — It is not proper to render a final judgment after a default entered in a suit on a bond without the production of the bond, or proper evidence of it, as the original cause of action must be produced on the final hearing, or a proper account made of its absence.—West v. Fleming, Fla., 18 South. Rep. 587.

128. JUDGMENT LIEN—Defective Abstract.—Where a judgment was rendered by a justice against a firm and an individual member thereof, an abstract of said judgment, reciting merely that the plaintiff recovered judgment against the two persons therein named, did not show that a judgment was obtained against either the firm or said member, and the record thereof did not create a lien.—Hamilton v. Beard, Tex., 38 S. W. Red. 252.

129. JUDGMENT LIEN—Homestead. — Where a judgment lien has attached to land, no subsequent occupation of the same as a homestead by the debtor affects the extent or validity of the lien.—ALDRICH V. BOICE Kau., 42 Pac. Rep. 636.

130. LANDLORD AND TENANT — Assignee of Lease.—Where a lessee builds show windows in such manner as would make them part of the realty if built by the owner, but, by agreement with the owner, the lessee has the right to remove them, an assignee of the lease is entitled to their use for the unexpired term without compensation to his lessor. — Weltman v. August. Tex., 83 S. W. Rep. 158.

181. LIBEL — Action by Corporation — Pleading. — A declaration in an action for libel alleged that the publication was made when plaintiff was trying to contract with a city for the construction in it of plaintiffs system of filtration, and falsely stated that alum was used in plaintiff's system, and that it was doubtful whether water having passed through plaintiff's process was healthful: Held, that it was sufficient on demurrer.— Morrison-Jewell Filtration Co. v. Lingane, R. I., 33 Atl. Rep. 452.

132. LIBEL—Privileged Communications.—Where an attorney is a candidate for village assessor, words published by a tax payer, charging him with incompetency in his profession, are not privileged.—MATTICE v. WILCOX, N. Y., 42 N. E. Rep. 270.

133. Malicious Prosecution—Probable Cause.—Representations made to prosecutor by a brakeman of the train of which accused was conductor, and which had been repeatedly robbed, that on his being detected by

accused while robbing a car he divided the property stolen with accused, shows, as a matter of law, probable cause for the prosecution, irrespective of the truth of such representations.—MEYER V. LOUISVILLE, ST. L&T. BY. CO., Ky., 338. W. Rep. 98.

134. MASTER AND SERVANT—Assumption of Risk.—In an action against a master for injuries received in an accident while driving defendant's horse, due to the viciousness of the horse and rottenness of the harness, it appeared that both defects were known to plaintiff; that defendant, a few days before the accident, promised to get a new harness; and that on the day of the accident, when plaintiff litched up, there was a new harness in the barn, and no evidence that plaintiff could not have used it: Held, that defendant was not liable.—Levesque v. Janson, Mass., 42 N. E. Rep. 835.

135. MASTER AND SERVANT—Assumption of Risk.—One employed by the owner of a railroad to repair a bridge under which the road runs, knowing that trains would be operated during the work, and that it would be necessary to work on the track, and clear it of timber when a train approached, who, when a train running 18 miles an hour had approached to within 80 feet of him, untertook, at the call of the engineer, to remove a skid from the track, cannot recover for injuries from being struck by the train.—WRITT V. GIRARD LUMBER Co., Wis., 65 N. W. Rep. 178.

136. MASTER AND SERVANT—Assumption of Risk—Defective Appliances.—Where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances, which, although dangerous, are not of such a character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence.—Dehning v. Detroit Bridge & Iron Works, Neb., 65 N. W. Rep. 186.

137. MASTER AND SERVANT—Contributory Negligence.—Where a blow-off pipe from a steam bolier was connected with a manhole, which was also used to clean out a sewer on defendant's premises, an employee, in cleaning out said sewer, in the discharge of his duty, and who knew the condition of things, was guilty of contributory negligence in failing to notify the person having charge of said boiler not to blow off steam.—MCLEAN V. CHEMICAL PAPER CO., Mass., 42 N. E. Rep. 330.

188. MASTER AND SERVANT—Dangerous Appliances—Assumption of Risks.—In an action by a servant for injuries caused by a premature explosion of dynamite while blasting, where it was shown that defendant knew that the tools furnished plaintiff were unsuitable and dangerous, and the evidence as to contributory negligence was conflicting, a verdict for plaintiff will not be disturbed.—Ohio Val. Ry. Co. v. McKinley, Ky., 38 S. W. Rep. 186.

139. MASTER AND SERVANT—Fellow-servants.—A car repairer and a switchman are fellow-servants, within the rule exempting a master from liabilities for injuries sustained by one fellow-servant through negligence of another, unless made so by statute.—SMITH V. CHI. CAGO, M. & ST. P. RT. CO., Wis., 65 N. W. Rep. 188.

140. MASTER AND SERVANT—Fellow-servants.—A rail road engineer and a porter on the train are not fellow-servants.—CINCINNATI, N. O. & T. P. RY. CO. V. PAL-MER, Ky., 33 S. W. Rep. 199.

141. MASTER AND SERVANT — Fellow-servants. — The foreman of a drill crew, who works with the rest of the crew in moving cars in a railroad yard and placing them on floats, and who is subordinate to the yard master, who employs and discharges all employees in the yard, is a fellow-servant of the other members of the orew.—Central R. Co. OF New Jersey v. Keegan, U. S. S. C., 16 S. C. Rep. 269.

142. MASTER AND SERVANT — Negligence — Defective Appliances.—A servant engaged in stringing wires on belephone poles cannot recover from his master dam. ages for injuries received from falling from a tree, by reason of a limb breaking, which he had climbed in or

der to arrange the wires which passed through the tree.—YEARSLEY V. SUNSET TELEPHONE & TELEGRAPH Co., Cal., 42 Pac. Rep. 638.

148. MECHANIC'S LIEN—Liability of Contractor—Assumption by Owner.—In an action by a material man against a contractor for immber furnished for a house, it is no defense that the owner assumed the debt, unless there was a novation which released defendant.—ALDRITT V. PANTON, Mont., 42 Pac. Rep. 767.

144. MINES AND MINING—Location—Conclusiveness of Patent.—The granting by the United States of a patent to a mining claim is conclusive of the sufficiency of the location notice.—CHAMBERS v. JONES, Mont., 42 Pac. Rep. 758.

145. MINING LEASE—Assignment.—Where one to whom an interest in the lease of a mine is assigned agrees to pay all costs and assessments on his own interest and that of his assignor, he is not liable for a deficiency of receipts for a certain month, and incurs no liability if, during the whole period of the lease, there are funds available for expenses.—Shaw v. Horner, Colo., 42 Pac. Rep. 689.

146. MORTGAGE—Foreclosure.—In this case, which is a bill for foreclosure of mortgage, the evidence summarized, upon which it is held that there can be no doubt that the specific draft claimed to have been secured by the mortgage was paid before suit was brought, and that the proof falls to show that complainant was the holder and owner of such draft, either at maturity or at the time of bringing suit.—PEREZ v. BANK OF KBY WEST, Fla., 18 South. Rep. 550.

147. MORTGAGE—Foreclosure—Transfer of Equity.—After the sale of a lot to the plaintiff upon the foreclosure of its mortgage thereon, the defendant mortgage, for the sole purpose of extending his time for the redemption of the premises 500 days, procured his equity therein to be transferred to a third party, and received from such party 100 separate and independent mortgages, which were recorded at different hours in the office of the register of deeds of the proper county, and filed therein 100 independent notices of his intention to redeem the lot from such sale: Held, that the mortgages and notices were void as to the plaintiff, a cloud upon its title, and that it can maintain this action for the removal of the cloud.—NEW ENGLAND MUT. LIFE INS. Co. v. CAPEHART, Minn., 65 N. W. Rep. 258.

148. MORTGAGE—Reformation.—The owner of a lot mortgaged it and then conveyed it to a purchaser, who assumed the mortgage. All the parties to these transactions supposed that a house stood on this lot, but the house in fact stood on an adjoining lot, which the purchaser also bought after he had discovered the mistake: Held, that the mortgage should be treated as covering the lot on which the house actually stood, and not the other one.—WAY v. ROTH, Ill., 42 N. E. Rep. 321.

149. MUNICIPAL BONDS—Election.—The validity of municipal bonds is not affected by an apparent irregularity, which does not operate as an evasion of any provision of law, or a departure from the proposition ratified by the voters.—STATE v. MOORE, Neb., 65 N. W. Red. 193.

150. MUNICIPAL CORPORATIONS—Action to Abate Nuisance.—An incorporated city can maintain an action to abate a nuisance caused by the emptying of a private sewer into a creek running through the city, without regard to trespass on the city's property, or that of any citizen.—City of Belton v. Central Hotel Co., Tex., 88 S. W. Rep. 297.

151. MUNICIPAL CORPORATION—Charter.—The word "charter," as used in Sp. Laws 1891, ch. 6, § 1, may be defined "as the enabling acts under which a municipal corporation exercises its privileges and performs its duties and obligations, including all matters in which the municipality has a direct interest, and the right to regulate and control." These acts must necessarily include all laws relating to the material affairs and

direct interests of the municipality.—STATE v. ERMENTRAUT, Minn., 65 N. W. Rep. 251.

152. MUNICIPAL CORPORATIONS—Defective Sidewalks.

—A charge that the duty of defendant to discover the defect was greater than that of an ordinary observer was proper where it was also charged that defendant was not liable for latent defects unless it knew of them, or by reasonable diligence could have known of them.

—LIMAN V. CITY OF GREEN BAY, Wis., 65 N. W. Rep. 167.

158. MUNICIPAL CORPORATION—Defective Sidewalk.—Laws 1882, ch. 169 (Green Bay City Charter), requiring a lot owner to keep the sidewalk adjacent to his lot in safe condition, and providing that, if a sidewalk is out of repair, the owner shall be notified by the superintendent of streets, who, if necessary, shall make the repairs at the owner's cost, does not make a lot owner liable for personal injuries caused by a defect in the sidewalk adjacent to his lot.—Toutloff v. City of Green Bay, Wis., 65 N. W. Rep. 168.

154. MUNICIPAL CORPORATION — Discretion of City Council.—The power vested in a city council to improve streets will not be reviewed by the courts, except for abuse of discretion established beyond a reasonable doubt.—MORSE v. CITY OF WESTFORT, Mo., 38 S. W. Red. 182.

155. MUNICIPAL CORPORATIONS—Excavation of Streets—Damages.—Under the constitutional provision that no person's property shall be taken, "damaged" or destroyed for or applied to a publicuae without adequate compensation being made, where a city, in grading streets, leaves large and dangerous holes in the streets, it is liable to owners of abutting lots for damages, if any, to such lots.—CITY OF SAN ANTONIO v. MULLALY, Tex., 33 S. W. Rep. 256.

156. MUNICIPAL CORPORATIONS—Intoxicating Liquors
—Licenses.—An ordinance requiring persons selling
liquor in quantities of five gallons or more to take out
wholesale dealers' licenses, and excepting from such
requirement those who have taken out retail dealers'
licenses, is invalid, as making an unjust discrimination
between persons within the same class.—CITY OF
CAIRO V. FEUCHTER, Ill., 42 N. E. Rep. 308.

157. MUNICIPAL CORPORATIONS—License to Builder to Occupy Street—Agreement to Indemnify City Against Loss—Liability.—One who has executed to a city an agreement, in consideration of a license to a society to occupy part of the street in front of its property, where it was erecting a building, that the society should comply with the terms of the license and indemnify the city from loss by reason of its occupancy, is not relieved from liability because the society did not give a written agreement to the city as required by an ordinance.—City of Springfield v. Boyle, Mass., 42 N. E. Rep. 333.

158. MUNICIPAL CORPORATION—Limitation of Power to Contract.—A city is not liable for an improvement erected according to contract, where the contract was made in violation of a constitutional provision.—Norly. CITY OF SAN ANTONIO, Tex., 33 S. W. Rep. 263.

159. MUNICIPAL CORPORATION—Public Improvements—Assessments.—Where the shape and dimensions of a corner lot raise a presumption that it fronts on a particular street while vacant, such presumption continues after it has been improved, unless rebutted by the style and character of the improvements.—CITY OF TOLEDO V. SHEILL, Ohlo, 42 N. E. Rep. 323.

160. MUNICIPAL CORPORATION — Sidewalks—Ordinances—Revocation.—An ordinance declaring that no person shall place merchandise on a sidewalk beyond three feet from the front line of the lot, does not vacate the three feet of the sidewalk, but merely grants a revocable license.—CITY OF DENVER V. GIRARD, Colo., 42 Pac. Rep. 662.

161. MUTUAL BENEFIT INSURANCE—Membership Certificate.—In an action by the beneficiary of an insurance certificate against a benefit society, the introduction of the certificate is prima facte evidence of

decedent's good standing in the society, though an allegation in the complaint that decedent performed all the conditions of the certificate is denied by the answer, which alleges that at the time of his death decedent was suspended from the society for non-payment of assessments.—KUMLE v. GRAMD LODGE, ANCIENT ORDER OF UNITED WORKMEN OF CALIFORNIA, Cal., 42 Pac. Rep. 634.

162. NEGLIGERCE—Expert Testimony.—A physician who treated plaintiff after he was run into by defendant's train, and who had stated that plaintiff complained of certain pains, may give his opinion as an expert as to whether plaintiff was injured, and the nature and extent of his injuries, and whether, in his opinion, the complaints were real or simulated; but cannot give as a reason for his opinion his confidence in plaintiff.—Austin & N. W. Ry. Co. v. McElmurry, Tex., 33 S. W. Rep. 249.

163. NEGLIGENCE—Liability of Receiver.—A receiver operating a railroad under the appointment and direction of a court of equity is within the provisions of Gen. St. 1894, § 2701, known as the "Fellow-servant Act," and is liable to an employee who is injured by the negligence of a co-employee.—Mikkelson v. Truesdale, Minn., 65 N. W. Rep. 260.

164. NEGOTIABLE INSTRUMENT — Action on Forged Note—Ratification.—In an action on a note against the alleged maker it appeared that defendant was president of a bank, and that in his absence the cashier executed the note, put on it the bank's and his own indorsement and sent it to the cashier of another bank; but there was no proof that defendant, the bank, or even the cashier, obtained any benefit from the money obtained for the note by the cashier to whom it was sent: Held, that defendant was not liable on the ground of ratification.—First Nat. Bank of Stevens Point, Wis., v. Martin, Kas., 42 Pac. Rep. 713.

165. NEGOTIABLE INSTRUMENT—Action on Note—Defenses.—It is no defense to an action by an innocent purchaser of a note for value against the maker that the payee is a fraudulent association.—REYMOLDS V. ROTH, Ark., 83 S. W. Rep. 105.

166. NEGOTIABLE INSTRUMENT—Bona Fide Holder.—A grantor of land with general warranty cannot claim to be a bona fide holder of a note given for the purchase price by a subsequent purchaser, and assigned to her by her grantee in payment for the land, the title to the land having failed.—NATIONAL EXCH. BARK v. JACKSON, Tex., 33 S. W. Rep. 277.

167. NEGOTIABLE INSTRUMENT—Drafts—Dishonor—Notice.—The failure of the holder of a draft to give reasonable notice of dishonor to the drawer and indorser, is not excused by the insolvency of the drawee.—NATIONAL BANK OF ASHEVILLE V. BRADLEY, N. Car., 23 S. E. Rep. 455.

168. NEGOTIABLE INSTRUMENT — Irregular Indorsement—Parol Evidence.—In an action on a note payable to plaintiff's order and signed by one member of a firm individually, parol evidence is admissible to show that an indorsement thereon in the firm name was made before the note was delivered to or indorsed by the payee, thereby fixing the liability of the firm as a comaker, notwithstanding the words, "We hereby waive notice, demand, protest and all other formalities," were written above such indorsement.—RICHAEDSOF v. FOSTER, Miss., 18 South. Rep. 573.

169. NEGOTIABLE INSTRUMENT — Promissory Note — Piedge.—Where the maker of a negotiable promissory note pays the same to the original payee without requiring the production and surrender of the paper, he is liable to pay it again to an innocent holder who acquired title to it in good faith and for value, before maturity, unless the payee was the holder's general agent for the collection of such papers, or had special authority to collect in the particular instance, or the money collected in fact reached the holder's hands.—BANK OF THE UNIVERSITY V. TUCK, Ga., 23 S. E. Rep. 467.

170. NEW TRIAL-Review .- Rev. St. 1889, § 2241, pro viding that "only one new trial shall be allowed to either party, except: First, where the triors of the fact shall have erred in a matter of law; second, where the jury shall be guilty of misbehavior," does not prohibit the granting of a new trial to a party for insufficiency of the evidence to support the verdict, however many new trials may have been granted him on other grounds.—Kreis v. Missouri Pac. Rt. Co., Mo., 33 S. W. Rep. 64.

171. OFFICE AND OFFICERS — Commissioner of Elections—Misconduct in Office.—In order to properly exercise an executive function, it is often a requisite preliminary to hear evidence to guide and direct the judgment of the executive as to the course to pursue; and it is not necessary, under our constitution, to refer all such questions to the courts .- MCMASTER V. HERALD, Kan., 42 Pac. Rep. 697.

172. OFFICE AND OFFICERS - Eligibility of Minor .-There being no law prescribing the qualifications of deputy county clerk, a minor is eligible to hold the office, and under Sayles' Civ. St. art. 1146, providing that deputies may perform all such official acts as may be lawfully done by the clerk in person, is authorized to administer an oath to an applicant for a marriage license.-HARKEBADER V. STATE, Tex., 83 S. W. Rep.

178. OFFICE AND OFFICER-Malconduct in Office.-The charter of the city of Galveston authorizes the city council to remove any officer for malconduct in office: Held that, where such council removed the city recorder for an act which did not constitute malconduct in office, mandamus was the proper remedy.—Johnson V. CITY COUNCIL OF GALVESTON, Tex., 88 S. W. Rep. 150.

174. OFFICERS-Reward for Arrests .- A town marshal, whose duty it is to make arrests, cannot recover a reward offered for the arrest of persons accused of crime.—RILEY V. GRACE, Ky., 88 S. W. Rep. 207.

173. PARENT AND CHILD - Custody of Child.-While the statute provides that the father, if a suitable person, shall have the custody of the person and the care of the education of his minor child, yet this is not an absolute legal right, beyond the control of the courts. -STATE v. FLINT, Minn., 65 N. W. Rep. 272.

176. Partition - Joint Patentees under Parol Contract. - Where several persons occupying separate parts of a tract of public land separately make improvements on the respective parts occupied by them, and take out a patent to the whole tract in their joint names, with the verbal understanding that each shall own in severalty the part occupied by him, and, after the patent is issued, each with the consent of the others, exercises sole control over his separate tract, and pays the taxes thereon, each acquires the equitable title to the tract occupied by him .- MATHES V. NISSLER, Mont., 42 Pac. Rep. 768.

177. PARTITION-Substitution.-In case of the death of a cotenant, his or her heirs or devisees become cotenants with the other joint owners; and, where such death happens during the pendency of a suit for partition, it is necessary that the heirs or devisees be made parties defendant before proceeding with the partition.—LYON V. REGISTER, Fla., 18 South. Rep.

178. Partition-Waiver of Homestead.-In an action by a widow for partition of decendent's entire estate, as community property, plaintiff's failure to assert any claim of homestead is a waiver of her homestead rights .- MOORE v. MOORE, Tex., 33 S. W. Rep. 217.

179. PARTITION SALE-Failure to Comply with Bid. The commissioner appointed in proceedings for partition sale to sell the property may, for the use of the owners of the land, sue the purchaser at the sale, he having refused to complete the purchase.—GRIEL V. RANDOLPH, Ala., 18 South. Rep. 609.

180. PHYSICIANS-Statutory Regulations.-McClain's Code, § 2582, providing that any itinerant vendor of any drug, who shall by writing or printing profess to cure diseases by any drug, shall pay a license fee, does not

apply to a regular physician advertising himself as a specialist in certain diseases, and undertaking to effect cures for a certain consideration, because he uses his own medicine, instead of writing prescriptions to be put up by a druggist .- STATE V. BONHAM, Iowa, 65 N. W. Rep. 154.

181. PRESUMPTION-Foreign Law.-It will be presumed, in the absence of proof, that the law of a foreign State is the same as the law of the State where the action is brought .- TEMPLE v. DODGE, Tex., 83 S. W. Rep. 222.

182. PRINCIPAL AND SURETY-Wife as Surety .- A married woman, by signing a note jointly with her huspand, and mortgaging her land as security for the loan made to him, does not become the surety of the husband, and personally liable, but the pledge of her estate is valid, and therefore an extension of time granted the husband does not discharge her land from liability for the repayment of the loan .- TIPTON V. TRADERS' DEPOSIT BANK, Ky., 33 S. W. Rep. 205.

188. PROHIBITION-Pleading .- The allegation in the petition of a relator, praying for relief through a writ of prohibition, that he has no remedy in the premises otherwise than through the special relief asked, is a mere conclusion of law, carrying with it no force, in the absence of a statement of facts going to show the correctness of that conclusion .- STATE V. ELLIS, La., 18 South. Rep. 636.

184. PUBLIC LANDS - Relinquishment of Claim.-The filing in the land office in 1864, by one who had entered certain land as a homestead, of a writing, signed by him, stating that he relinquished all his right and title to the land in favor of another person, restored the land at once to the public domain, though the entry was not canceled until 1871.—Keane v. Brygger, U. S. S. C., 16 S. C. Rep. 278.

185. QUIETING TITLE — Evidence of Possession.—A party, by turning a cow into an inclosed lot and removing bill boards therefrom, does not acquire such possession of the land as will sustain an action to remove a cloud from the title.-MCREE v. GARDNER, Mo., 88 S. W. Rep. 166.

186. RAILROAD COMPANIES-Carrying Passenger Beyond Destination .- Where a station is duly called by the brakeman, and a passenger, relying on the promise of the conductor to notify her personally when the train arrived there, falls to hear it announced, and is carried past, her whole attention being occupied at the time by a sick child, the carrier is not responsible, unless the conductor had knowledge of the child's illness, or of the necessity that might require the mother's exclusive attention to its needs, when he made the promise.—Chicago, R. I. & T. Rr. Co. v. Boyles, Tex., 33 S. W. Rep. 247.

187. RAILROAD COMPANIES - Electric Street Cars -Contributory Negligence.—Failure of a person to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not an exclusive right of way, is not negligence, as a matter of law .- ROBBINS V. SPRINGFIELD ST. RY. Co., Mass., 42 N. E. Rep. 334.

188. RAILROAD COMPANIES-Fires .- The inference of negligence arising from the fact that the fire was set by sparks from defendant's engine is overcome by undisputed evidence that the engine was properly constructed and equipped, was carefully inspected the day before the fire, and found to be in proper order, and was properly managed .- MENOMONIE RIVER SASH & Door Co. v. Milwaukbe & N. R. Co., Wis., 65 N. W. Rep. 176.

189. RAILROAD COMPANIES-Fire-Pleading.-In an action against a railroad company to recover damages by a fire communicated while the defendant was operating its railroad, where the only fault charged is that "the defeudant so carelessly and negligently managed and controlled its locomotive and train that fire escaped therefrom," and the plaintiff proved the setting out of the fire by the defendant's locomotive, it did not then devolve upon the defendant to prove that the locomotive was sufficient, and in good condition and repair, but only that it was carefully and properly managed and controlled.—ATCHISON, T. & S. F. B. CO. V. AYERS, Kan., 42 Pac. Rep. 722.

190. RAILROAD COMPANIES—Injury to Brakeman—Defective Track.—In an action by a brakeman against a railroad company for injuries from the derailing of an engine by a rock on the track, where it appeared that defendant's road ran through a rocky gorge, subject to rock falls, and that two months prior to the accident blasting, to widen the road, had been done, since which time, up to the accident, trains had been safely run, and there was no evidence as to how the rock got on the track, except that there was a hole in the bluff twelve or fifteen feet from the road-bed, about the size of the rock, which was inspected only from the track, it was error to refuse a nonsuit.—DENVER & R. G. B. CO. V. MCCOMAS, Colo., 42 Pac. Rep. 676.

191. RAILEOAD COMPANIES—Injury to Child.—In an action against a railroad company for injuries to a child 10 years old, while playing on cars in its yard, where the complaint alleged that defendant had for a long time allowed children to play in its yard, and there was evidence that plaintiff had previously played there without objection, and that defendant's foreman saw plaintiff there before the accident, and that plaintiff was in view of the engineer of the switch engine which caused it, it was proper to charge that a railway company, in operating its cars, is bound to use ordinary care to avoid injuring a person on its premises by its permission or invitation.—Texas & P. Rt. Co. v. Brown, Tex., 35 S. W. Rep. 146.

192. RAILEOAD COMPANIES—Injury to Passenger—Contributory Negligence.—The fact that a passenger on a street car, injured by a trapdoor in the floor giving way beneath her, knew when she stepped on it that the car had been stopped a short time before because it was ont of order, and saw the trapdoor raised and put back, does not render her guilty of contributory negligence, where the evidence shows that she had no knowledge that the door was defective.—Washington v. Spokane St. Ry. Co., Wash., 42 Pac. Rep. 629.

198. RAILROAD COMPANIES—Killing Stock.—Under Act March 31, 1874 (2 Starr & C. Ann. St., p. 1927), requiring railroad companies to maintain fences on both sides of their tracks, it is no excuse for not fencing a road at a point outside of any municipality that the road can be merely safely and conveniently used if unfenced at that point.—TOLEDO, St. L. & K. C. R. CO. V. FRANK-LIN, Ill., 42 N. E. Rep. 319.

194. RAILEOAD COMPANIES—Killing Stock.—Whether a distance of half a mile along the track of a railroad which was not fenced was reasonably necessary for depot grounds, so as to absolve the company from ilability for damages for cattle killed on such portion of the track, is a question of fact.—GROSSE v. CHICAGO & N. W. Ry. Co., Wis., 65 N. W. Rep. 185.

195. RAILEOAD COMPANIES—Right of Way.—Where a right of way of a certain width is conveyed to a railway company, the owner of the fee may put the land to all uses consistent with the exercise by the company of its rights and performance of its duties.—OLIVE V. SABINE & E. T. RY. CO., Tex., 33 S. W. Rep. 139.

196. BAILROAD COMPANIES—Street Railway—Liability for Injuries.—An electric street railway company is not liable, in the absence of a collision with its car, on account of its failure to stop its car, for injuries caused by a horse driven on the street becoming frightened, no unnecessary noise having been made for the purpose of frightening the animal.—DOSTER V. CHARLOTTE ST. RY. CO., N. Car., 23 S. E. Rep. 449.

197. RAILROADS—Sale of Bonds—Mortgage Covenant.
—An action to compel a railway corporation to make good its covenant in a mortgage to devote the proceeds of the bonds secured thereby to the improvement of the mortgaged property, for the benefit of future bondholders, cannot, after such bonds are sold under an agreement by which the covenant is in effect abrogated, be maintained in equity by one who subsequently buys some of the bonds in the market, not re-

lying on the mortgage covenant, but upon his own judgment, after full inquiry, with knowledge of the exact situation, and who shows no actual or prospective loss by the transaction.—Belden v. Burke, N. Y., 42 N. E. Rep. 261.

198. EEAL ESTATE AGENT—Commissioners.—Where defendant denied that he agreed to pay plaintiffs a commission for selling his property at a certain price, as claimed by plaintiffs, evidence of one to whom defendant had given an option prior to the alleged agreement, that he was able and willing to pay said price without any deduction therefrom, was competent to disprove the contract.—DEXTER v. Collins, Colo., 42 Pac. Rep. 664.

199. RECEIVER—Action by Foreign Receiver—Pleading.—A complaint by the receiver of a corporation of another State, appointed by a court of that State, for a debt claimed to be due plaintiff by virtue of his appointment, which does not allege that plaintiff, either by the order appointing him or by the statutes of such State is authorized to sue, does not show that plaintiff has legal capacity to sue.—Swing v. White River Lumber Co., Wis., 65 N. W. Rep. 174.

200. RECEIVERS—Joinder as Parties.—It is not error to refuse an application to make a receiver of a corporation party to an action by it for injunction begun before his appointment, the application being made, not by him, but by attorneys for the corporation, and just before the cause is to be called for trial, under circumstances that would necessitate its going over the term if the application were granted, though the receiver was appointed six months before, and no excuse is shown why application should not have been made earlier.—ST. LOUIS, C. G. & FT. S. RY. Co. v. HOLLADAY, Mo., 33 S. W. Rep. 49.

201. RECEIVERS—Sale of Business.—In a suit for the dissolution of a partnership, in which a receiver was appointed, the court, pendente lite, may order a sale of the business and good will of the partnership, the partnership being insolvent, and the business being carried on by the receiver at a loss.—WULFF v. SUPERIOR COURT OF SAN JOAQUIN COUNTY, Cal., 42 Pac. Rep. 639.

202. REFERENCE-Right to Jury Trial.—Where, against defendant's objection, the issues were sent to a referee for trial, and the referee filed 14 findings of fact, some of which related to questions of fact not in issue under the pleadings, and defendant filed exceptions to the findings, a demand at the end of his exceptions for a jury trial on all the issues raised thereby was too general to entitle him to such a trial.—KEYSTONE DRILLER CO. V. WORTH, N. Car., 28 S. E. Rep. 427.

203. REPLEVIN — Affidavit—Amendment.—Where the original affidavit in an action of replevin contains a defective statement of the necessary averments of the plaintiff's rights or claims, it may be amended, to make clear or certain that which was indefinite or uncertain.—COMMERCIAL STATE BANK V. KETCHAM, Neb., 63 N. W. Rep. 201.

204. REPLEVIN—Parties.—In an action of replevin, the right to the possession of the property is essentially involved, and the party entitled thereto must be the real plaintiff in the suit, and cannot maintain it for the use of another. If a party who sues for the use of another has the legal title, and is entitled to recover in his own name, the fact that a usee's name is inserted in the pleadings should not alone defeat recovery. The usee may be considered as no party to the action, and his name treated as surplusage.—ROOF v. CHATTAMOGA WOOD SPLIT PULLEY CO., Fla., 18 South. Rep. 597.

205. SALE—Conditional Sale.—A written instrument purporting to be a lease of personal property, which states its value, and authorizes the lessor to take possession on default in rent, will be held a contract of conditional sale, where it appears that the rent reserved will in a short time equal the given value of the property.—HAM V. CERNIGLIA, Miss., 18 South. Rep. 377

206. SALE OF TIMBER—Replevin.—A vendor of standing timber, who retains title to all logs cut from the land, and lumber manufactured from the logs, until the purchase price is paid, may maintain replevin upon the vendee's default in such payment.—HYLAND v. BOHR MANUF'G CO., Wis., 65 N. W. Rep. 170.

207. SCHOOLS — Whipping Scholar — Malice.—An instruction on a prosecution against a teacher for whipping a scholar, declaring him guilty if he inflicted a permanent injury, or did the whipping with malice, is erroneous in defining malice as "bad temper, high temper, or quick temper."—STATE V. LONG, N. Car., 28 S. E. Rep. 431.

208. SLANDER—Malice — Presumption.—A statement that a chaste female "looked like a woman who had miscarried" does not *per se* imply malice.—STATE v. BERTON, N. Car., 28 S. E. Rep. 452.

209. SPECIFIC PERFORMANCE—Evidence.—In an action for specific performance of a contract for the sale of land it was proper to exclude evidence of declarations made after the execution of the contract by one who, prior to its execution, acted as intermediary between the parties, in the absence of evidence that he was agent of either party after the contract was executed.—POMEROY V. FULLERTON, MO., 33 S. W. Rep. 178.

210. SPECIFIC PERFORMANCE — Restraining Conveyance.—In an action by a vendee to compel the delivery of a deed held in escrow, and to restrain the vendor from conveying the land, where a preliminary injunction is granted, and a decree is made requiring the delivery of the deed on the payment by plaintiff of a certain sum at a certain time, and plaintiff makes default in such payment, it is proper to amend the decree by dissolving the injunction and directing delivery of the deed to the vendor, and vesting the title in him.— Carson Min. Co. v. Hill, Colo., 42 Pac. Rep. 678.

211. Taxation—Restraining Collection.—A complaint to enjoin the collection of a tax, which merely alleges that defendant had notified plaintiff that the tax was due and must be paid on a certain date; that the assessment and levy were illegal and void; that plaintiff had paid his taxes for the year claimed, and had a receipt, and that if defendant is permitted to collect the tax, it will work great and irreparable damage to plaintiff, does not state a cause of action, the suit being commenced before the date fixed by defendant for payment.—INSURANCE CO. OF NORTH AMERICA V. BON-BER, Colo., 42 Pac. Rep. 681.

212. TAXATION—Theaters and Shows—License.—The legality of a tax is contested when it is alleged that there is no law under which the license or tax can be imposed.—STATE V. LUNDIE, La., 18 South. Rep. 686.

213. Tax Sale—Description of Land.—The notice of a tax sale of land described the land as a tract owned by H, containing 64 acres, called the "T B Tract," described in a certain recorded deed. The deed called for a tract containing 103 acres. H had conveyed the land, one person at the time owning 50 acres of the tract, another 25 acres, another 38: Held, that the sale was invalid, on account of the indefinite description of the land.—RICHARDSON V. SIMPSON, Md., 33 Atl. Rep. 457.

214. Tax Sale—Validity.—Rev. St., par. 2694, providing that the owner of property offered for sale for taxes may designate what portion he wishes sold, and that if he fails to do so the collector "may designate it," and a person who will take the least quantity and pay the taxes, etc., shall be declared the purchaser, is mandatory, and the collector is bound to designate some portion of the tract, and offer it for sale first.—Jacobs v. BUCKALEW, Ariz., 42 Pac. Rep. 619.

215. TELEGRAPH COMPANY—Failure to Send Telegram.—How. Ann. St. § 3706 (Acts 1851, Act No. 59, § 14), imposes the duty on telegraph companies to transmit messages with impartiality and good faith, under a penalty of \$100 for each neglect or refusal to do so: Heid, that a judgment for the recovery of such penalty is erroneous, where the finding of bad faith is not sup-

ported by the evidence, and there is a finding that the message was misplaced by defendant's agent, and so escaped the attention of the operator.—WEAVER v. GRAND RAPIDS & I. R. Co., Mich., 65 N. W. Rep. 225.

216. TOWN COMPANIES—Contract.—Where a town company induced L to remove his store building and stock of goods, at great expense, from a village, a short distance, to a new town site, by a contract of guaralty, made by its general agent in the usual way, that a railroad would be constructed and in operation to the town site within a given time, such company cannot be relieved from liability for a breach of the contract on the ground of the want of power to make it, nor because the board of directors did not formally confer authority on the general agent to enter into it.—Are. Kansas Valley Town & Land Co. v. Lincoln, Kan., 42 Pac. Rep. 706.

217. TRESPASS-Instructions.-In an action against a tenant for destruction of crops by defendant's cattle. and for damages for forcible entry, it appeared that the land consisted of a pasture and of cultivated land in separate inclosures belonging to defendant's landlord; that plaintiff was a trespasser, and in the actual occupancy only of the cultivated land; that defendant obtained peaceable possession of the pasture and turned his cattle on it, and that they escaped from it to the cultivated land and destroyed the crops. The court charged that a forcible entry is an entry by any one on the premises without the consent of the person having the actual possession: Held, that such instruction, though not applicable to the pasture land, may have been applicable to the entry on the cultivated land, and could not be said to be erroneous .- HEIRONI-MUS V. DUNCAN, Tex., 88 S. W. Rep. 287.

218. TRESPASS TO TRY TITLE—Defenses.—It is no defense to an action of trespass to try title by one claiming under foreclosure of a deed of trust given by defendant that defendant bought the land from the State, and had not entirely paid for it, both parties claiming under a common source of title.—Bradford v. STONE-ROAD, Tex., 33 S. W. Rep. 156.

219. TRUST—Parol Trust—Enforcement.—Where complainant purchased land in his wife's name, with the parol understanding that it was to be occupied as a home by complainant and wife, so long as each should live, but the wife devised the property to others, complainant cannot enforce a trust against the devisees, as How. Ann. St. § 6179, provides that no estate or trust in lands shall be created unless by operation of law or deed in writing.—CHAPMAN v. CHAPMAN, Mich., 65 N. W. Red. 215.

220. TRUST AND TRUSTEE—Deposit and Withdrawal of Trust Funds.—Where a trustee deposits with a firm the trust funds in his own name in the usual course of business, and it is paid out to him or on his order, without any knowledge by the firm that the money is not his until after his death, and it has probated its claims against his estate, such firm is not liable to the beneficiaries for the money deposited.—TENNY V. PORTER, Ark., 83 S. W. Rep. 211.

221. VENDOR AND PURGHASER—Bona Fide Purchasers.—Where a vendee of land, by deed from husband and wife, conveyed it to plaintiff, who examined the title papers, and was ignorant of any fraud practiced on the wife, the fact that the vendors were in possession at the time plaintiff purchased was insufficient to charge him with notice, he having been told that the land would shortly be vacated.—HICKMAN v. HOFF-MAN, Tex., 38 S. W. Rep. 257.

222. VENDOR AND PURCHASER—Delay of Purchaser—Rights of Parties.—Where a contract for the sale of land described the land as that occupied by the vendor, but stated that it contained a certain number of acres, and on the tender by the vendor to convey the land occupied by him, the vendee refused to accept a deed thereof unless there was deducted from the price a sum proportionate to the number of acres therein less than the number stated in the contract, and, after the

vendee had litigated the question for a number of years, it was decided that he was not entitled to such deduction, and he then offered to pay the price without deduction, the pendency of the litigation, though carried on in good faith and by advice of counsel, did not excuse his delay in tendering performance, where meantime the value of the property had increased five-fold.—DOCTER V. FURCH, Wis., 65 N. W. Rep. 160.

228. VENDORS AND PURCHASERS — Notice— Equitable Lien.—A stranger to the title, at the landowner's request, executed to him a deed of trust on the land, which was recorded, to secure a note payable to the owner, who negotiated the note: Held, that a purchaser of the land, having actual knowledge of the existence of the deed of trust, who merely required the owner to enter a satisfaction thereof of record, without the production of the note or deed of trust, took with notice of and subject to the equitable lien of the assignee of the note.—BARRETT V. BAKER, Mo., 83 S. W. Rep. 162.

224. VENDOR AND PURCHASER—Specific Performance.—Where A makes a written contract for a sale of real property to B, which is forthwith placed on record, and afterwards conveys the property to C, who buys with constructive notice of the rights of B under his contract: Held, that an action to compel a conveyance of the legal title, after full performance of his part of the contract by B, may be maintained against C, and that A is not an indispensable party to the action.—TOPEKA WATER SUPPLY CO. v. ROOT, Kan., 42 Pac. Rep.

225. VENDORS' LIENS—Priority.—Plaintiff, who held two notes secured by vendor's lien on land, sent the one first due to W for collection, and W sent it by express to a certain town with instructions to the express company to deliver it on payment to a certain person who was an indorser. Such indorser procured the company to transfer it to B, who paid the amount due, which was sent to plaintiff through W. Neither plaintiff nor W knew that B took up the note: Held, that B's vendor's lien was postponed to plaintiff's lien securing the second note due.—GODDARD v. PEEPLES, Tex., 38 S. W. Rep. 314.

226. WAREHOUSEMAN—Negligence.—Where personal property is delivered to a warehouseman, who fails to deliver it upon demand, these facts constitute prima facte negligence on the part of the warehouseman, unless he shows that the goods were lost or stolen and the manner of such loss or theft, which facts he must prove with reasonable certainty.—GEO. C. BAGLEY ELEVATOR CO. V. AMERICAN EX. CO., Minn., 65 N. W. Ren. 264.

227. WATERS-Diversion-Railroad.—In an action for the diversion of surface water or the water of natural streams by the construction of railway lines, surveys of the locality, made under order of the court, must be introduced, and accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing, on penalty of liability to dismissal of appeal or affirmance of judgment on the ground that it is impossible to review the alleged errors.—WHICHARD V. WILMINGTON & W. R. Co., N. Car., 28 S. E. Rep. 487.

228. WILLS.—In a suit for construction of a will by which a testator first devised all his personal property to a daughter, and, after providing that she was to have no share in the balance of his estate, devised it to his other children, it appeared that when the will was made the testator owned, and had, by an unrecorded written agreement, contracted to sell a tract of land, the vendee to pay the purchase price "according to the last will" of testator, to his "heirs;" that before his death the testator deeded the land to the vendee, and took a promissory note for the price: Held, that the note did not pass to the daughter, under the bequest to her of all the personal property, but must be distributed according to the terms of the will, to the remaining eight children.—FRICK v. FRICK, Md., 33 Atl. Rep. 462.

229. WILL—Attestation—Execution.—Under Rev. St. 1889, § 8870, providing that every will shall be attested by two or more witnesses, subscribing their names to the will in the presence of the testator, the signatures of the witnesses, without the attestation clause, is sufficient.—BERBERET v. BERBERET, Mo., 83 S. W. Rep. 61.

280. WILLS—Construction.—Testator gave a certain farm "to W and his children forever, but if W shall die leaving no child" the farm was devised to J: Held, that W took a fee-simple, to be defeated only in case he died without children; the words "his children forever" being words of limitation and not of purchase, creating an estate tail, which by statute was made a fee-simple.—HOOD V. DAWSON, Ky., 538. W. Rep. 75.

231. WILLS—Description of Devisees.—Where a will devises to one a life estate, with remainder "to his descendants, if any, in fee, according to the laws of descent and distribution," otherwise to a charitable institution, a mother and a brother and sister of the half blood of the devisee cannot claim the remainder in fee as "descendants and heirs-at-law" of the devisee.—Tichenor v. Brewer's Ex'r, Ky., 33 S. W. Rep. 86.

232. WILLS—Letter.—As Rev. St. 1894, § 2746 (Rev. St. 1881, § 2576), provides that no will shall affect any estate unless it be attested and witnessed, a letter written by the testator to his wife, relative to the disposition of his property, not attested in the manner required by statute, cannot be considered as a will.—ORTH V. ORTH, Ind., 42 N. E. Rep. 277.

288. WILLS—Nature of Estate.—Testator left all his real estate to his wife for life, to go to his children or their descendants at her death, and in another clause provided that, if his wife should die before the youngest child became of age, the two oldest sons should take charge of the property, and care for the family until such child should attain its majority, whereupon the land was to be sold, and equally divided between testator's children or their descendants: Held, that immediately on testator's death, the children acquired a vested remainder, though the beneficial interests might, on the termination of the life estate, be further postponed until the majority of the youngest child.—BYRNE V. FRANCE, Mo., 33 S. W. Rep. 178.

234. WILL—Testamentary Capacity.—Absolute sanity is not always the test of testamentary capacity, and where it is shown that a will was executed by a testatrix whose mind was impaired by old age and enfeebled by apoplectic attacks, followed by partial paralysis, so that she was unable to understand to a reasonable degree the effect and operation of the will upon her property and those entitled to receive it, a finding of incapacity will be sustained.—HUDSON V. HUGHAN, Kan., 42 Pac. Rep. 701.

235. WITNESS — Impeachment. — While the general rule is that a witness cannot, for the purpose of impeaching his credibility, be cross-examined as to collateral matters, yet his feelings, and his disposition to conceal or pervert the truth, in the particular suit in which he is called, are not collateral matters within the meaning of the rule.—ALWARD V. OAKS, Minn., 53 N. W. Rep. 270.

236. WITNESS — Privileged Communications. — Code Civ. Proc. § 1881, subd. 2, providing that an attorney cannot be examined, without the consent of his client, as to communications made to him by the client in the course of professional employment, does not preclude an attorney who witnessed a will be had drawn for decedent from testifying as to testator's mental capacity and instructions in regard to the will, as, by requesting him to witness the will, decedent waived the provisions of the statute.—In RE MULLIN'S ESTATE, Cal., 42 Pac. Rep. 645.

237. WRIT OF ERROR—When Lies.—A writ of error will not lie to review an order of the circuit court affirming one of the probate court requiring an executor to furnish a further bond and to render an account.—IN RE SANBORN, Mich., 65 N. W. Rep. 209.



Central Law Journal.

ST. LOUIS, MO., FEBRUARY 14, 1896.

The annual meeting of the Illinois State Bar Association, held in Springfield on January 23d, was successful both in point of attendance and interest manifested. president, Oliver A. Harker, delivered the annual address embodying the fruits of his observations for many years as a practitioner and judge. Judge Henry W. Blodgett read an interesting paper giving his reminiscences of the early Cook county bar. Judge James H. Cartwright discussed "The Art of Brief Making." Assistant Attorney-General Martin L. Newell, the law writer and editor of the appellate court reports, discussed "The Art of Writing Law Books." Hon. James C. Courtney, of Metropolis, read an interesting paper on "The Unwisdom of the Common Law." One of the most entertaining papers was one by Judge James H. Cartwright on "The Briefs and Arguments that Help the Court." A special address by Myron H. Beach on "Some Peculiarities of the Law of Fire Insurance" is noteworthy, as being in the line of a practical review of some interesting questions and cases upon the subject of insurance.

The remarkable spectacle of a half dozen antagonistic receivers for different portions of the same railroad systems has been presented to those who, for the past few months, have watched the affairs of the No-thern Pacific R. R. Co. The incident is without parallel in the history of railroad bankruptcies, and threatened to disrupt the property into a number of separate sections. Since the United States Court in the District of Washington asserted concurrent jurisdiction in the foreclosure and receivership with the court of the Wisconsin district, and proceeded to appoint its own receivers for the part of the road within its district (the example being followed by other district judges), progress in relation to the plan of reorganization has been totally arrested. The situation became so grave and the conflict of authority between the different local courts of the United States of so serious a nature that the matter was taken to the United States Supreme Court, which tribunal

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was asked to recommend to the judges of the various circuits through which the road runs, that some one court be designated as having primary jurisdiction. In behalf of the application the argument was advanced that in consequence of the conflict of authority between the courts the road is practically threatened with dismemberment by the appointment of different receivers for every judicial circuit through which the road runs.

Fortunately the Supreme Court judges just reached a prompt solution of the whole trouble. They have cided that the federal court for District of Wisconsin, by which the receivers were originally appointed, and in which the foreclosure suit was started, has jurisdiction, and ought to be recognized as the court having primary cognizance of the matter. Following this is the declaration that the courts of other districts along the line, while protecting the rights of local creditors, should make their proceedings of an ancillary character and subordinate them to those of the court of primary jurisdiction.

It now seems that the appointees of the Wisconsin district judge will be recognized as sole receivers. The judges say, in references to the question presented, that they are of the opinion that "proceedings to foreclose a mortgage placed by a railroad company upon its lines extending through more than one district should, to the end that the mortgaged property may be effectively administered, be commenced in the circuit court of the district in which the principal operating offices are situated, and in which there is some material part of the railroad embraced by the mortgage; that such court should be the court of primary jurisdiction and of principal decree, and the administration of the property in the circuit courts of other districts should be ancillary thereto."

NOTES OF RECENT DECISIONS.

WILL—INHERITANCE BY ONE CAUSING THE DEATH OF TESTATOR.—The case of Ellerson v. Westcott, 42 N. E. Rep. 540, decided by the New York Court of Appeals, was an action for partition brought by the sister of a decedent, claiming that she and the other heirs at law were entitled to real estate of which her brother died seized. A paper pur-



porting to be a will was attacked in the complaint as originally drawn for alleged lack of testamentary capacity, fraud and undue influence, and because it was claimed that such will was void for uncertainty, and that its provisions offended against the statute of perpetuities. After issue had been joined, a motion to amend the complaint was made, setting up the fact that the wife of the decedent, who was a beneficiary under his alleged will and a party to the action, had caused his death, by poison or by other means, for the purpose of realizing the benefits given her by the will. Such motion was made, relying upon the doctrine advanced by the court of appeals in Riggs v. Palmer, 115 N. Y. 506, 29 Cent. L. J. 461, as establishing the proposition that where a legatee or devisee, under a will, to prevent a revocation or to anticipate the enjoyment of the benefit conferred, puts the testator to death, the felonious act makes the legacy or devise void. But the court did not think such contention was justified by the facts of this case. The case of Riggs v. Palmer was an action by an heir at law of a testator against a devisee and legatee who had murdered the testator to obtain the possession of the property given him by the will, to cancel the provisions for his benefit, and to have it adjudged that he was not entitled to take under the will, or to share, as distributee or otherwise, in the estate of the testator; and the relief was granted. But the court did not decide that the will was void. Riggs v. Palmer, the court says, is an authority that a court of equity will intervene and deprive her of the benefit of the devise. It will defeat the fraud by staying her hand and enjoining her from claiming under the will. But the devise took effect on the death of the testator, and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The court, in a proper action, will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution, and deprive her of the use of the property. It will be remembered that the doctrine of Riggs v. Palmer has been antagonized by a number of decisions since rendered in other States. See 39 Cent. L. J. 217, 41 Cent. L. J. 377.

CONTRACT BY NATIONAL BANK — ULTRA VIRES.—In Dresser v. Traders' National Bank. 42 N. E. Rep. 567, decided by the Supreme Judicial Court of Massachusetts it was held that under Rev. St. U. S., § 5136, cls. 3, 7, empowering a national bank to make contracts and to exercise all powers necessary to carry on the banking business, an agreement by a national bank to procure a person applications for insurance, if he would procure for it a customer, is ultra vires. It was further held that, in an action for breach of such a contract, the bank may set up the defense of ultra vires. The court said in part:

Two questions are then presented: First, whether a bank can agree to pay money to a third person for the purpose of securing a customer, and second, if it can do so, whether it can agree to furnish to such third person, for such a purpose, fire insurance to a specific amount. We should be slow in answering the first question in the affirmative. Such a mode of doing business is so inconsistent with sound principles of banking that it would seem that the directors would not be justified in thus spending the money of the stockholders. But it is unnecessary to decide this question, as we are of opinion that the second question must be answered in the negative. As we understand the declaration, the officers of the bank, acting in its behalf, were to go about, either personally or by an agent, seeking for persons who wished to insure their property, and, when they had found them, put the matter in the bands of the plaintiff, who would cause insurance to be made, and thus earn a commission. We are of the opinion that this would be so far outside the legitimate purposes for which national banks are organized that the contract declared on must be deemed to be ultra vires of the defendant corporations. Davis v. Railroad Co., 181 Mass. 258; Weckler v. Bank, 42 Md. 581; Norton v. Bank, 61 N. H. 589.

It is, however, contended by the plaintiff that it is settled by the decisions of the Supreme Court of the United States that if a national bank acts in excess of its powers, this can be taken advantage of only by the government, and not by a party to an action. See Gold Mining Co. v. National Bank, 96 U. S. 640; Bank v. Matthews, 98 U. S. 621; Bank v. Whitney, 103 U. S. 99; Fortier v. Bank, 112 U. S. 439, 5 Sup. Ct. Rep. 236. But these are cases where a national bank lent money in excess of its corporate powers, or where an action was brought on a note for which the bank had taken as collateral security something which, by law, it was not authorized to take, or where a bank sought to realize upon such security. In Bank v. Townsend, 139 U. S. 67, 76, 11 Sup. Ct. Rep. 496, Mr. Justice Harlan, speaking of Bank v. Matthews, which is the leading case on this subject. says: "The decision went upon these grounds: That the bank parted with its money in good faith; that the question as to the violation of its charter by taking title to real estate for purposes unauthorized by law could be raised only by the government, in a direct proceeding for that purpose; and that it was not open to the (original) plaintiff in that suit, who had contracted with the banks to raise any such questions in order to defeat the collection of the amount loaned." See, also, Thompson v. Bank, 146 U.S. 240, 18 Sup

Ct. Rep. 66. Whether the plaintiff can maintain an action upon an implied contract to pay him the fair value of his services is not open on the pleadings before us, and has not been argued. We are not called upon, therefore, to decide whether the same rule which obtains where a corporation has received money or property under a contract which it is beyond its power to make, and which may be recovered back on an implied contract, applies to the case before us. See Davis v. Railroad Co., 131 Mass. 258, 275; L'Harbette v. Bank, 162 Mass. 137, 38 N. E. Rep. 368; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. Rep. 478; Norton v. Bank, 61 N. H. 589.

ACTIONS ON PENAL STATUTES.

What is a Penal Statute?—A penal statute is defined as one that inflicts a forfeiture or penalty for transgressing its provisions. The statutes here considered will be those upon which recovery is to be had in civil actionsnot statutes which impose a fine to be assessed in a criminal prosecution. Statutes which inflict a penalty to be recovered for the use of the public, in whole or in part, are obviously penal. But another class of statutes giving as remedies to parties aggrieved or affected by breaches of their provisions certain fixed sums to be recovered from any one violating such provisions, or imposing liabilities upon the violator of such provisions to be enforced by the party affected, have given rise to some discussion. It becomes important to ascertain the nature of such statutes for three reasons: First, because of the rule that actions upon penal statutes abate upon repeal of the statute; second, because of statutory provisions as to limitation of actions upon penal statutes; and, third, because of the rule that one State will not enforce the penal statutes of another State. A somewhat different rule appears to prevail in the latter case from that applied in the first two. The criterion generally adopted in the first two cases is this: Is the liability imposed by the statute as a punishment for its violation? If so, it is a penalty, and the statute is a penal statute, although it may give a remedy to the person injured at the same time. Where a statute creates a liability regardless of the amount or character of the damage and dependent solely upon the fact that its provisions have been violated, such statute is held penal as far as statutes of limitation or the

¹ Anderson's Dict. of Law.

effect of repealing statutes are concerned. This is clearly stated in Diversey v. Smith² (by Scholfield, J., at p. 384): "It is the effect and not the form of the statute that is to be considered, and when its object is clearly to inflict a punishment on a party for Jan 16 9. violating it—i. e., doing what is prohibited or failing to do what was commanded to be done —it is penal in its character, and the circumstance that in punishing remedy is likewise afforded to those having an interest in the observance of the statute is unimportant."3 This question has generally arisen in considering statutes imposing liability upon directors or stockholders in corporations for failure to comply with statutory requirements. Where double damages are imposed on railway companies for killing stock, or penalties are given to persons compelled to pay excessive fees to public officials, the nature of the statute would seem to be clear.4

Enforcement of Penal Statutes in Foreign Jurisdictions.-It is an established rule that the courts of one sovereignty will not execute the penal laws of another sovereignty, either directly or indirectly, in the form of judgments founded on such laws. But for the purpose of this rule the word penal has a different meaning from that given to it in other The rule in question is one of international law, and in applying it the word penal must be taken, not in its ordinary acceptation, but in its "international sense." Within the meaning of this rule, a penal law is one imposing punishment for an offense committed against the State, and the test is whether the wrong sought to be redressed is a wrong to the public or to an individual. Accordingly, it is held that the rule applies only to prosecutions for crimes and misdemeanors and to suits by the State to recover

² 105 III. 378.

⁸ To the same effect: Globe Pub. Co. v. State Bank, 41 Neb. 75, 59 N. W. Rep. 688, overruling prior cases in that State; Merchants' Bank v. Bliss, 35 N. Y. 412; Miller v. White, 50 N. Y. 137; Willes v. Suydam, 64 N. Y. 173; Gadsden v. Woodward, 103 N. Y. 242, citing other cases in that State; Chase v. Curtis, 113 U.S. 452; Mitchell v. Hotchkiss, 48 Conn. 9; Engine Co. v. Hubbard, 101 U. S. 188; Breitung v. Lindauer, 37 Mich. 217; Gregory v. German Bank, 3 Colo. 382; Larson v. James (Colo.), 29 Pac. Rep. 183; Cable v. Mc-Cune, 26 Mo. 371.

4 A. & N. R. R. Co. v. Baty, 6 Neb. 37. ⁵ Wisconsin v. Pelican Ins. Co., 127 U. S. 265; Martin v. Hunter, 1 Wheat. 304; U. S. v. Lathrop, 17 Johns. 4: Delafield v. Illinois, 2 Hill, 159; State v. Pike, 15 N. H. 88; Blaine v. Curtis, 59 Vt. 120.

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pecuniary penalties imposed for the violation of statutes.6 The question is exhaustively considered by Mr. Justice Gray, in Huntington v. Attrill. He quotes from an opinion of Lord Watson in the English Privy Council the following as explaining the principle involved: "The rule had its foundation in the well recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public, were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex loci, ought to be admitted in the courts of any other country. In its ordinary acceptation the word 'penal' might embrace penalties for infraction of general law, which did not constitute offenses against the State; it might for many legal purposes be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs which was the very essence of the international rule."7

Who May Sue on Penal Statutes.—The general rule is that an individual may not sue upon a penal statute unless the statute give him authority so to do. But there are two cases in which an individual is held to be so authorized: (1.) Where the penalty is given to the person injured or affected by the violation of the statute. In this case the person to whom the penalty is given may sue in his own name. (2.) Where a penalty is given to an informer who is expressly authorized to sue, or where a portion is given to the public or to some public institution, and the remainder to an informer in such language as shows an intention that the informer shall

sue for it.10 And it has been held that an informer may sue in his own name where a penalty is given to him in whole or in part for that reason alone, without any positive direction in the act imposing the penalty, on the ground that giving him a portion of the penalty indicates an intention that he sue for it.11 But in most cases where an informer has been allowed to sue there has been something in the wording of the statute in addition to giving the penalty or a portion of it to the informer which indicated an intention that he sue for it. "No special formula," says Powers, J., in Drew v. Hiliker,12 "is requisite to confer the right to sue. It is enough if it be seen that the intent was to confer the right." So where a penalty or a portion thereof is given to "the informer and prosecutor," "to anyone who will sue for it," "to the use of the complainant," etc., the informer has been held sufficiently authorized to sue.18 So where the penalty was declared to be "recoverable one-half to the use of the informer."14 But even in such cases the State may maintain a suit for the penalty. In C. & A. R. R. Co. v. Howard, 15 it is said: "The public alone do not have a right to this penalty unless they first sue for its recovery. If an informer sues he acquires an equal right with the public." The rule is that where a penalty is given in part to the public and in part to an informer, the State may prosecute for the whole unless an informer has begun an action, in which case the latter, if authorized by the statute, may sue for it on behalf of the State and of himself.16 It is held also that the informer cannot obtain his

⁶ Huntington v. Attrill, 146 U. S. 657.

⁷ 8 L. T. Rep. 341.

^{*} O. & R. V. R. Co. v. Hale, 45 Neb. 418, 63 N. W. Rep. 849; Fleming v. Bailey, 5 East, 313; Barnard v. Gosling, 2 East, 569; Colburn v. Swett, 1 Met. 232; Seward v. Beach, 29 Barb. 239; Smith v. Look, 108 Mass. 139

⁹ Bacon, Abr. Qui Tam Actions; Adams v. Cutright, 53 Ill. 361; Thompson v. Howe, 46 Barb. 187; R. R. Co. v. Cook, 87 Ohio St. 265.

¹⁰ Drew v. Hilliker, 56 Vt. 64; Nye v. Lamphere, 2 Gray, 294; C. & A. R. R. Co. v. Howard, 38 Ill. 414; Lynch v. Economy, 27 Wis. 69; Middleton v. Wilmington, etc. R. R. Co., 95 N. C. 167; U. S. v. Laescki, 29 Fed. Rep. 649; Winne v. Snow, 19 Fed. Rep. 507; Norman v. Dunbar, 8 Jones Law, 317; Kempton v. Savings Institution, 53 N. H. 581.

¹¹ C. & A. R. R. Co. v. Howard, 38 Ill. 414; Megargell v. Hazelton Coal Co., 8 Watts & Sergt. 342; City of Rockland v. Farnsworth (Me.), 32 Atl. Rep. 1012. See also Thompson v. Howe, 46 Barb. 287. Contra: O. & R. V. R. Co. v. Hale, 45 Neb. 418, 63 N. W. Rep. 849.

^{12 56} Vt. 64.

¹³ Drew v. Hilliker, 56 Vt. 64; Nye v. Lamphere, 2 Gray, 294; Megargell v. Hazelton Coal Co., 8 Watts & Sergt. 342; Lynch v. Economy, 27 Wis. 69; Middleton v. Wilmington, etc. R. R. Co., 95 N. C. 167.

¹⁴ U. S. v. Laescki, 29 Fed. Rep. 699.

^{15 38} Ill. 414.

¹⁶ Com. v. Howard, 13 Mass. 222; State v. Bishop, 7 Conn. 181.

share of the penalty unless his name appears of record as complainant.¹⁷

Aggregation of Penalties-Speculating in Penalties.—Whether more than one penalty can be recovered in one action depends entirely upon the language of the statute. Unless the statute directs to the contrary penalties are not to be held cumulative, and a recovery for one penalty only is permitted for all violations of the statute up to the commencement of the action. "It is a wholesome rule not to allow a recovery for aggregated penalties unless the language of the statute clearly requires it."18 But penal statutes very generally provide for such penalties, and where they use language requiring it, an accumulation of penalties is allowed and several may be recovered in one action. The usual language for this purpose is "each and every," or "each," or "every." Where a statute affixes a penalty to "every," or to "each," or to "each and every" violation, several penalties may be recovered in one action.19 That is, if the statute imposes a penalty for every act and there are several distinct acts, the several penalties incurred may be recovered in one action. It is not always easy to say what constitute distinct acts. Where a penalty of so much a day for each or for "every" day of default is imposed, it is held that each day's default incurs a penalty and that aggregated penalties may be recovered.20 So in the common case of statutes imposing penalties upon railroad companies for failure to ring or whistle at crossings, each failure is held to incur a penalty.21

17 State v. Smith, 49 N. H. 155.

18 Sturgis v. Spofford, 45 N. Y. 53; Fisher v. N. Y. Cent. R. R. Co., 46 N. Y. 654; Parks v. Nashville, etc. R. R. Co., 13 Lea, 1; U. S. v. Guaranty Co., 8 Benedict, 389; Atty. Gen. v. McLean, 1 H. & C. 750; Garrett v. Messenger, L. R. 2 C. P. 583; Parry v. Croydon Comr's, 15 C. B. 567; Chapman v. Chapman, 1 Root, 52; Barber v. Eno, 2 Root, 150.

**Deyo v. Rood, 3 Hill, 527; Bartolett v. Achey, 38
Pa. St. 273; Suydam v. Smith, 52 N. Y. 382; Grover v.
Morria, 73 N. Y. 474; R. R. Co. v. Cook, 37 Ohio St.
**25; Ry. Co. v. Moore, 33 Ohio St. 384, 393; State v. I.
**4 L. S. Ry. Co. 133 Ind. 64; Streeter v. C., M. & St. P.
R. R. Co., 40 | Wis. 294, 301; State v. K. C., etc. R. R.
Co., 32 Fed. Rep. 722; Holland v. Bothmar, 4 Term
Rep. 236; Brooks v. Miliken, 3 Term Rep. 509; R. v.
Matthews, 10 Mod. 26; R. v. Bleasdale, 4 Term Rep.

State v. K. C., etc. R. R. Co., 32 Fed. Rep. 722; Beard of Com'rs v. Erie Ry. Co., 5 Robt. (N. Y.) 366; Telede, etc. Ry. Co. v. Stevenson, 131 Ind. 203.

* C. & A. R. R. Co. v. Howard, 38 Ill. 414; People v. M. Y. C. Ry. Co., 18 N. Y. 78, 82.

So where a penalty was imposed for overcharges by officials, each item of overcharge was held to incur a separate penalty, which the court said might be incurred "a hundred times a day."22 And where a penalty of so much per tree was imposed for cutting trees on public land, it was held that several penalties were recoverable in one action.28 Other cases are given in a note.24 In several cases the courts have had under consideration what is called "speculation in penalties." Thus, in Fisher v. N. Y. C. R. Co.,25 a statute provided a penalty for collecting excessive fare of passengers. The plaintiff made a business of riding back and forth in defendant's trains, each time paying excessive fare, with no other object than to sue for penalties. It was held that this was speculating in penalties, and that but one penalty could be recovered. A similar case is Parks v. Nashville, etc. Co.26 In neither of these cases, however, did the statute sued on impose a penalty for "each," or for "every" violation, and the court remark this fact in each case and make it a ground of decision. In Suvdam v. Smith, 27 and Grover v. Morris, 28 each cases in which the statute provided for an aggregation of penalties by appropriate language, the Fisher case is distinguished on that ground. So in St. L. & S. F. R. R. Co. v. Gill,29 the plaintiff did exactly what was done in the Fisher case. The Fisher case was cited to the court, but under the statute sued on it was held that the plaintiff was entitled to recover a number of penalties. The court said that the statute was intended to deter railroad companies from making overcharges "by punishing every such act," which could only be done by allowing an aggregation of penalties. It is only in cases where for some other reason more than one penalty was not recoverable that courts have taken any notice of speculation in penalties. Where the statute imposes a specific penalty for each offense, it intends an aggregation of penalties, and whether or not there has been speculation in penalties is immaterial. The

22 Bartolett v. Achey, 38 Pa. St. 273.

28 People v. McFadden, 18 Wend. 896.



²⁴ Gibson v. Gault, 33 Pa. St. 44; Levy v. Gowdy, 2 Allen, 320; Dallas v. Hendry, 3 N. J. L. 973.

^{25 46} N. Y. 654.

^{26 1} Lea, 1.

^{27 52} N. Y. 382, 388.

^{28 78} N. Y. 474.

²⁹ 54 Ark. 101.

language of the statute is the thing to be considered, and is decisive. In State v. K. C., etc. R. R. Co., 30 the case was a very hard one, as the penalties of \$25 for each day of default amounted to \$30,000. Brewer, J., said: "It (the statute) does not impose a penalty simply for failure to construct a depot, but it says that for each day from and after a specified day the defendant shall forfeit and pay the sum of \$25. Now that language fails of meaning if after a lapse of years of delinquency but one penalty was recoverable. * * * Giving to this language the force which each word requires, it must be held that the legislature intended an accumulation of penalties and the delinquent cannot atone for its delinquencies by the payment of a single penalty."31

Effect of Repeal of Penal Statutes .- It is an established rule that an action upon a penal statute will abate upon repeal of the statute before final judgment unless the statute contains an exception as to pending suits.32 For the purposes of this rule the word penal is taken in its wider sense, and all remedies and liabilities given or created by statute which depend solely upon the statute and which are given or created by way of punishment for a violation of its provisions are held to be penal.33

Constitutionality of Penal Statutes.—Interesting questions as to the constitutionality of penal statutes arise in many States where there are constitutional provisions giving all penalties, or the proceeds of all penalties to the school fund. Some courts distinguish between statutes giving all or a portion of a penalty to an informer, and those giving a penalty by way of remedy to the person affected by a breach of the statute, and hold that the former are unconstitutional, while the latter are not within the constitutional provision.34 Other authorities refuse to make

3º 32 Fed. Rep. 722.

As to speculation in penalties, see also Streeter v.

C.. M. & St. P. R. R. Co., 40 Wis. 294, 301.

33 Globe Pub. Co. v. State Bank, 41 Neb. 175; Knox v. Baldwin, 80 N. Y. 610; Victory, etc. Co. v. Beecher, 97 N. Y. 651; Breitung v. Lindauer, 37 Mich. 217.

34 Dutton v. Fowler, 27 Wis. 430; Stone v. Lannon, 6

such a distinction.85 In States where the constitution directs payment of the "clear proceeds" or the "net proceeds" of all fines and penalties into the school fund it is held. that this authorizes the legislature to give a portion of the penalty to an informer, but not the whole penalty.26 Where no such words are used, it has been held that no portion of the penalty could be given to an informer.87 But other courts have put a different construction on such constitutional provisions, and have held that they refer solely to that portion of the penalty given to the public; that the provisions in question were intended to control the disposition of funds accruing to the public from such sources, and not to limit the power of the legislature to impose penalties as remedies to persons affected by violations of statutes or to give a portion to informers by way of inducement to enforce their provisions.38 The latter would seem to be the more correct view. The courts which hold to the contrary are forced to distinguish those statutes which give penalties to persons affected, though the same courts in other cases continually refer to such statutes as penal. 59 And it is difficult to perceive how it can be contended that if the words "all penalties" are to be taken literally and strictly they can be said not to include such cases. The remedies given by such statutes never bear any relation or proportion to the actual damage sustained. After the party specially affected by a violation of such a statute has received his actual damages, he is fully compensated. The remainder imposed by way of penalty goes to him because he brings the suit and as an inducement to him to bring it and secure enforcement of the law—and so as a quasi informer-and wherein is he any better than the informer who suffers actual damage

Wis. 597; Shields v. Klopf, 70 Wis. 73; Graham v. Kibble, 9 Neb. 182; A., T. & S. F. R. R. Co. v. State, 22 Kan. 1.

25 A. & N. R. R. Co. v. Baty, 6 Neb. 45; Barnet v. A. & P. R. R. Co., 68 Mo. 56; State v. W., St. L. & P. Ry. Co., 89 Mo. 562.

36 State v. W., St. L. & P. Ry. Co., 89 Mo. 562; Dutton v. Fowler, 27 Wis. 427.

37 A., T. & S. F. R. R. Co. v. State, 22 Kan. 1.

38 Katzenstein v. Raleigh, etc. R. R. Co., 84 N. C. 688, 693; Toledo, etc. R. Co. v. Stevenson, 131 Ind. 203; State v. I. & I. S. R. Co., 133 Ind. 69, and other Indiana cases referred to therein. See also Graham v. Kibble, 9 Neb. 182, 184; Barnet v. A. & P. R. R. Co., 68 Mo. 56. 39 Shields v. Klopf, 70 Wis. 73.

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³² Norris v. Crocker, 13 How. 329; Bank v. State, 12 Ga. 475; Chicago v. Adler, 56 Ill. 344; People v. Livingston, 6 Wend. 526; Com. v. Welch, 2 Dana, 330; Lewis v. Foster, 1 N. H. 61; Pope v. Lewis, 4 Ala. 487; Maryland v. B. & O. R. R. Co., 3 How. 534; Yeaton v. U. S., 5 Cranch, 281; Schooner Rachel v. U. S., 6 Cranch, 329; U. S. v. Preston, 3 Pet. 57; Com. v. Mar shall, 11 Pick. 350; Com. v. Kimball, 21 Pick. 373.

only as one of the public in a case where no one person sustains special injury? word penalty in such constitutional provisions must be held to have been used in its ordinary acceptation, and if so it includes all penalties, as well those given to persons supposed to be specially affected by breach of a statute as those given in whole or in part to common informers. And if this construction is placed on the word penalty, it follows, since no one will contend that the provisions in question are intended to prevent the imposition of penalties by way of remedies to persons injured, that the constitutional provisions must be held to refer solely to such moneys arising from the sources mentioned as are given to the public, and not to such penalties or portions thereof as are given to individuals—in whatever capacity. It would be hard to say which construction has the preponderance of authority in its favor; especially as the question is complicated by the differences in phraseology of the various constitutions which have been passed upon. Additional cases bearing on the question are given in a note.40

Liability to Penalties Where Default is Due to Act of Servant or Agent .- In an English case it was held that where a statute imposed a penalty upon mine owners for failure to properly use and inspect safety lamps, there being no proof of personal default, an owner was not liable for the act of an agent.41 But American courts generally hold to the contrary, though the matter doubtless depends somewhat upon the language of the statute sued on.42 Where the defendant is a corporation which can act only through servants and employees, and especially where the nature of the statute is such as to make it a matter of general public concern that it be observed, it is likely that the corporation would be held liable although its principal officers were in no way in default.

Matters of Practice and Procedure.—At common law it was necessary to describe the statute sued on in the pleadings with great particularity, and to allege that the liability

accrued "by force of the statute." It was also held necessary to allege that the defendant's acts were contra formam statuti.44 But it is generally held unnecessary to do more than to bring the case within the description of the statute,45 and a complaint in the language of the statute has been held sufficient. 46 An action to recover a penalty given by a penal statute, whether brought by an informer or by the State, is not a criminal prosecution, and the plaintiff's case need not be established beyond a reasonable doubt. The same rule prevails as to the quantum of evidence required as in other civil cases.47 The judgment rendered must be to the uses required by law and in accordance with the disposition of the penalty made by the statute, otherwise it is erroneous.48 Actions by common informers cannot be compromised without leave of court,49 and courts will not, as a rule, grant leave to dismiss except upon payment of the portion of the penalty given to the public.50 A release or discharge by an informer is void as to the portion of the penalty belonging to the public,51 and an informer can only satisfy the judgment as to his share.⁵²

ROSCOE POUND.

Lincoln, Neb.

48 Nichols v. Squires, 5 Pick. 168; People v. Bartow, 6 ('owen, 290.

44 Nichols v. Squires, 5 Pick. 168. Contra: People v. Bartow, 6 Cowen, 290; State v. Berry, 4 Halst. (N. J.)

45 Hudson v. State, 1 Blackf. 318; Fuller v. State, 1 Blackf. 65.

46 Com. v. Richardson, 142 Mass. 75.

47 Hitchcock v. Munger, 15 N. H. 97.

₩ Doss v. State, 6 Tex. 433.

⁴⁹ Rayham v. Rouncesville, 9 Pick. 44.

50 Brown v. Bailey, 4 Burr. 1929. 51 Minton v. Woodworth, 11 Johns. 474, 476.

52 Casswell v. Allen, 10 Johns. 118; Wardens v. Cope, 2 Ired. 44; Middleton v. Wilmington, etc. R. Co., 95 N. C. 167.

NEGLIGENCE OF ATTORNEY-LIABILITY TO THIRD PERSON.

BUCKLEY V. GRAY.

Supreme Court of California, Dec. 10, 1895.

- 1. An attorney employed to draw a will is not liable to a person who, through the attorney's negligence and ignorance in the discharge of his professional duties, was deprived of the portion of the estate which testator instructed the attorney should be given such person by the will.
- 2. Civ. Code, § 1559, providing that a contract made expressly for a third person may be enforced by him, does not authorize a suit for damages against an at-

⁴⁰ Lynch v. Economy, 27 Wis. 69; St. L., I. M. & S. Ry. Co. v. State, 55 Ark. 200; St. L., A. & T. Ry. Co. v. State (Ark.), 19 S. W. Rep. 572.

^d Dickinson v. Fletcher, L. R. 9 C. P. 1. ^d Chase v. N. Y. C. R. R. Co., 26 N. Y. 523, 528; Byron v. Crippen, 4 Gray, 314; Com. v. Emmons, 98 Mass. 6, 8.

torney by a person who, through the attorney's negligence, was deprived of the portion of an estate which a testator, who employed the attorney to draw his will, desired to be given to him.

VAN FLEET, J.: Action to recover for negligence of attorney in drafting and executing a will. The court below sustained a demurrer to the complaint, and, plaintiff, failing to amend, judgment was entered against him, from which he appeals. The complaint alleges, in substance, that on October 5, 1895, defendant, an attorney at law, was employed by Mrs. C. M. A. Buckley, the mother of plaintiff, to draw her will, which she desired and directed to be so drawn as to leave all the residue of her estate, after certain specific legacies, to her two sons, then living, the plaintiff and one John P. Buckley, to the exclusion of the children of a [deceased son of the testatrix; that in pursuance of such employment defendant on said day drew a will for said testatrix, and superintended and directed the execution thereof; that in the preparation of said will, and in directing the execution thereof, the defendant was guilty of gross carelessness and negligence in the performance of his professional duties, in this: that said will was so drawn as not to legally express the desires or direction of the testatrix as to the exclusion of said grandchildren, but in such manner that the latter were permitted to take of her estate; and that in directing the execution of said will this plaintiff, although named in said will as one of the devisees thereunder, was caused by the defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of said will as to the plaintiff void. It is further alleged that said John P. Buckley died before the testatrix; that thereafter, in May, 1891, said testatrix died without having revoked or altered said will; that the will was admitted to probate, and the estate of said testatrix duly administered; and that under the decree of distribution said grandchildren received one-half of said estate, amounting to \$85,000, in which amount plaintiff alleges himself damaged, and for which he asks judgment against defendant.

We think the demurrer was properly sustained. In our judgment the complaint clearly fails to state a cause of action against defendant in favor of the plaintiff. It is to be observed that the action is not by the client, but by a third party, her son. It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone, that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party

and the one injured; and one committing a malicious or tortious act, to the injury of another, is liable therefor, without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enters into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity. by contract or otherwise, by reason of which the former owes some legal duty to the latter. 2 Shear. & R. Neg. §§ 562, 574; Bank v. Ward, 100 U. S. 195, and cases therein cited; Roddy v. Railway Co., 104 Mo. 234, 15 S. W. Rep. 1112, and cases cited. In Bank v. Ward, supra, the general rule above adverted to is exhaustively discussed. and its limitations stated by Mr. Justice Clifford. for the court. That was a case where a third party sought to maintain an action against the attorney for damages resulting to him for relying upon the correctness of a defective certificate of title to a piece of real estate furnished by the attorney to a client, upon the faith of which the plaintiff had loaned money on the property. In holding that the plaintiff could not maintain the action, it is there said: "Beyond all doubt, the general rule is that the obligation of the attorney is to his client, and not to a third party, and. unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. Shear. & R. Neg. § 215. Conclusive support to that rule is found in several cases of high authority. Fish v. Kelly, 17 C. B. (N. S.) 194." And, after commenting upon the case of Fish v. Kelly, and the case of Robertson v. Fleming, 4 Macq. H. L. Cas. 167, 209, from the latter of which cases Lord Wensleydale is quoted as saying that "he, only. who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms,"-the learned justice proceeds: "Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, 'the limit of the doctrine relating to actionable negligence,' says Beasley, C. J., 'is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigous intricacies of the ill effects of the negligence of men may be followed down the chain of results to the final effect.' Kahl v. Love, 37 N. J. Law. 5, 8. * * * Cases where fraud and collusion

are alleged and proved constitute exceptions to that rule, and Parke, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. Longmeid v. Holliday, 6 Exch. 761-767. Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing, 'these cases,' say the court in that opinion, 'occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made;' and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party, even if the father or friend of the patient contracted with the wrongdoer." In Roddy v. Railway Co., supra, it is said: "The right of a third party to maintain an action for injuries resulting from a breach of contract between two contracting parties has been denied by the overwhelming weight of authority of the State and federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume;" citing Winterbottom v. Wright, 10 Mees. & W. 109, and a large number of other cases. "The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in Winterbottom v. Wright, 10 Mees. & W. 109, as follows: 'If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty. The other ground is thus stated in the New Jersey case above cited: 'The object of parties in inserting in their contracts specific undertakings, with respect to the work to be done, is to create an obligation inter esse. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts. Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them."

No authority has been brought to our notice contravening the rule as stated in the foregoing citations. Some, which at first glance might be

so taken, will be found upon analysis to fall within one or the other of the exceptions noted, and not to infringe upon the general doctrine. Within such class fall the cases relied upon by plaintiff to support his general right to maintain the action. This case comes strictly within the general doctrine as above stated. No fact is alleged bringing it within any of the exceptions thereto. It is not alleged that defendant did the act charged maliciously or through any evil intent, or with any fraudulent purpose, or that he did it in any affirmative sense. The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action. It is claimed, however, that the action can be maintained under the rule, expressed in Section 1559 of our Civil Code, that a contract made by one person with another for the benefit of a third person may be enforced by the latter, the argument being that the employment of defendant by plaintiff's mother to draw her will was clearly for plaintiff's benefit, inasmuch as the latter was one of the objects of her bounty, as expressed in her will; and a number of cases are cited which are supposed to bring the case within that rule. But in our judgment that provision has no application to this case. It is intended to apply to instances where the contract is made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract. Such is the language of the code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have come to our attention. The terms of Section 1559 are: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescindeit." This rule, we are told by Mr. Pomeroy (Rem. & Rem. Rights, § 139), was originally adopted prior to the reformed procedure, being based partly upon considerations of convenience and partly upon a liberal construction of the nature of the contract, and the purpose of which was to avoid circuity of action, and to enable the real party in interest to sue. That author proceeds to give us illustrations of its application, and each instance given is a case where the contract was in express terms made for the benefit of the third party, and by reason of which the latter became the real party in interest. No such application of the doctrine as is here contended for is even remotely hinted at. The contract between the plaintiff's mother and the defendant, which was the subject of the breach, cannot be said in any legal sense to have been expressly made for plaintiff's benefit. It was a contract for employment of defendant's services as an attorney to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire. Remotely, it is true, she intended plaintiff to be benefited as a result of such contract by providing for him in her will. Such provision, however, could create no vesfed right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff; not a right which made him in law a privy to the contract. To hold that, by reason of the provision for plaintiff in the will, the contract is to be considered one made expressly for his benefit, is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great. it was, so far as defendant is concerned, damnum absque injuria, against which the courts are powerless to relieve. In this view, it is not material to notice the other objections made to the complaint. The demurrer having been properly sustained, it follows that the judgment should be affirmed. It is so ordered.

NOTE.-The doctrine invoked in the principal case, that a man owes contractual duties only to those from whom the consideration moves and to whom he makes his undertaking is now clearly settled, though some courts in its application, for instance, to abstractors of titles, have failed to follow it. Thus an officer can be sued for falsely and fraudulently certifying an acknowledgment to a deed only by the party taking directly under the conveyance, and not by a subsequent purchaser of the property. Ware v. Brown, 2 Bond, 267. So a purchaser cannot sue a tax collector, for giving a tax receipt to the owner, for taxes not paid, which receipt being exhibited was acted upon by such purchaser, the land being afterwards sold by the collector for taxes. "The limit of the doctrine relating to actionable negligence," said the court, "is that the person occasioning the loss must owe a duty arising from contract or otherwise, to the person sustaining such loss. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results to the final effect." The case of Winterbottom v. Wright, 10 Mees. & W. 109, is a leading one on this subject. There the defendant had contracted with the postmaster-general to furnish a mail coach, and the plaintiff was injured by the defective construction of the coach. It was held that the defendant owed no duty to anyone else but the postmaster general, and was not liable. "If we were to hold that the plaintiff could sue in such a case," said the court, "there is no point at which such actions would stop. The only safe course is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." Longmild v. Holliday, 6 Exchequer, 761, holds that one who sells a defective article to be used for a particular purpose, for which it is not fit, is not in the absence of fraud liable for an injury caused to a third

person, by some defect, in the construction of such Collins v. Selden, L. R. 3 C. P. 495, is a still better illustration of this doctrine. There the defendants had negligently hung a chandelier in a public house, frequented, as they knew, by the public, and the chandelier falling, the plaintiff was injured. The court, in holding the defendants not liable, remarked that they could see no relation which the plaintiff bore to the defendants, whence a duty could result which had been infringed. The court in the tax case above cited, declared that the collector owed no duty to anyone, but those with whom he transacted the business. One who is injured by a run away horse, cannot sue the city maintaining the post to which the horse had been attached, and by reason of the defective condition of which, the horse was enabled to escape. Rockport v. Tripp, cited by Judge Cooley in his work on Torts, p. 70, note 1. In Thomas v. Winchester, 6 N. Y. 307, Big. Lead. Cas. 602, a wholesale druggist who sold to a retail druggist a package of poison labeled dandelion, was held responsible to one who purchased the same of the latter for dandelion. The court distinguished this case from the general rule, because the defendant knew his obligation was to use due care towards anyone that might purchase the drug. See Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337, for an application of the same exception to the general rule. Wellington v. Downer's Oil Co., 104 Mass. 64. In Dalyell v. Tyner, Ellis, B. & El. 899, may be seen an important qualification to Winterbottom v. Wright. There the defendant had contracted with B to let him his steamboat and crew, and by the mismanagement of the crew, a passenger was injured and it was held that the defendant was responsible. In Davidson v. Nichols, 11 Allen, 514, it is said that the builder of a railway carriage should be liable to every passenger injured by reason of its defective construction. In Losee v. Clute, 51 N. Y. 494, the manufacturer of a boiler was held not responsible to one injured by its explosion. In United Soc'y v. Underwood, 9 Bush, 609, the directors were held liable to depositors for their official neglect, whereby the bank became bankrupt, to the injury of the depositors. Hodges v. New England Screw Co., 1 R. I. 312; Lexington R. Co. v. Bridges, 7 B. Mon. 556; Salmon v. Richardson, 30 Conn. 360; Koehler v. Iron Co., 2 Black, 715; Conant v. Seneca Bank, 1 Ohio St. 310. It may be said however that the general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract. The following are some of the later cases not cited in the principal case: Exchange Bank v. Rice, 107 Mass. 37; Stoddard v. Ham, 129 Mass. 383, 37 Amer. Rep. 369; Reed v. Home Sav. Bank, 127 Mass. 295; Moore v. Moore, 127 Mass. 22; Lang v. Henry, 54 N. H. 57; Jackson v. Smith, 52 N. H. 11; Fugure v. Mutual Soc. of St. Joseph, 46 Vt. 362; Colt v. Ives, 31 Conn. 25, 81 Amer. Dec. 161; Edwards v. Clement (Mich.), 45 N. W. Rep. 1107. In 35 Cent. L. J. 108 and 112, will be found a valuable discussion of the question how far the manufacturer of a machine is liable for injury to a third person, the conclusion being that the duty of a manufacturer and vendor to make it of good material and workmanship does not extend beyond the person with whom he contracts, and that in the absence of a knowledge of the defect he is not liable for an injury caused by the explosion of a defectively constructed cylinder to one of the men attending the machine, with whom he had no privity of contract. Jaggard on Torts, which is the latest (1895) and most exhaustive treatise on the subject has

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this to say of the question: "In actions against members of the bar for negligence it is well settled that only the person with whom the attorney contracts can maintain the action, for it is to him alone that the attorney owes a particular duty." 2 Jaggard on Torts, p. 904, citing Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. Rep. 39; Savings Bank v. Ward, 100 U. S. 195; Fish v. Kelly, 17 C. B. (N. S.) 194. See, also, 2 Jaggard on Torts, § 260, et seq., for a valuable discussion of the various branches of this subject.

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- 1. ACCIDENT INSURANCE Employers' Liability Insurance—Notice of Injury.—The Fidelity & Casualty Company of New York issued an employers' liability policy to the Anoka Lumber Company, containing this clause: "The assured, upon the occurrence of an accident, and upon the notice of any claim on account of an accident, shall give immediate notice in writing of such accident or claim, with the fullest information available, to the company, at its office in New York City, or to the agent, if any, who shall have countersigned this policy:" Held, that the assured need not give such notice until an accident happens and a notice of a claim is made on account thereof.—Anoka Lumber Co. v. Fidelity & Casualty Co. of New York, Minn., 65 N. W. Rep. 353.
- 2. ADMINISTRATION—Executors and Administrators—Appointment.—On a contest between the public administrator and the father of an intestate for letters of administrator and the father of an intestate for letters of administrator and the wife of the father testified that the father's reputation for providence and sobriety was bad. The father denied that he drank to excess, and a number of witnesses testified that they had known the father for years, and considered him a soper and industrious man: Held, that an order granting letters of administration to the father would not be disturbed on the ground that the evidence showed that the father was "improvident."—IN RE CONNORS' ESTATE, Cal., 42 Pac. Rep. 206.
- 3. ADVERSE POSSESSION.—The holder of title to land derived from the United States is constructively in possession of the land until actually ousted or dis-

- seized.—Zirngibl v. Calumet & C. Canal & Dock Co., Ill., 42 N. E. Rep. 431.
- 4. APPRAL—Case Made.—Where a case made is served and acknowledged by the opposite party, a statement of something which occurred subsequent to said service cannot be a part of the legal "case made," for the reason that the said statement has not been served upon the opposite party.—ATCHISON, T. & S. F. R. Co. v. DITMARS, Kan., 42 Pac. Rep. 983.
- 5. APPEAL—Record.—A bill of exceptions not shown by the transcript to have been filed in the office of the clerk of the trial court is not part of the record on appeal.—UEKER v. BEDFORD BLUESTONE Co., Ind., 42 N. E. Rep. 459.
- 6. APPEAL—Remand of Cause.—If the circuit court mistakes or misconstrues the decree of the Supreme Court, and does not gives full effect to the mandate, its action may be controlled either upon a new appeal, if a sufficient amount is involved, or by a writ of mandamus to execute the mandate.—IN RE SANFORD FORK & TOOL CO., U. S. S. C., 16 S. C. Rep. 291.
- 7. APPLICATION OF PAYMENTS.—J, who owed the firm of F&F over \$100 on account, and in the same capacity \$175 evidenced by his past-due, unsecured, promissory note, having paid \$100 without manifesting any desire or preference as to which of the claims the money should be applied, it is held, in an action upon the promissory note, that said creditors had the right to use the money to extinguish the account, and that the debtor has no legal cause to complain.—FARGO v. JENNINGS, S. Dak., 65 N. W. Rep. 433.
- ASSAULT AND BATTERY—Evidence.—In a civil action for assault and battery, evidence of the general reputation of defendant for peace and quietness is not admissible.—VANCE v. RICHARDSON, Cal., 42 Pac. Rep. 909.
- 9. ATTACHMENT—Claim not Due.—It is only when the action is brought on a claim not due that the plaintiff is entitled to an attachment, on the ground that his debtor is about to remove his property with the intent "of hindering and delaying" him in the collection of his debt.—FOLEY-WADSWORTH IMPLEMENT CO. v. PORTEOUS, S. Dak., 65 N. W. Rep. 429.
- 10. ATTORNEY'S LIEN—Intervening Creditor's Lien.—Code, § 215, subd. 3, gives an attorney a lien for a general balance of compensation on money due his client in the hands of the adverse party in an action in which he is employed, from the time written notice, stating the amount and services, is given such adverse party; subdivision 4 provides that, after judgment, the notice may be given and made effective against the judgment debtor by entering it in the docket judgment, opposite the entry of judgment: Held that, where a judgment requires the claim of an intervening creditor of the plaintiff to be first paid out of the amount for which plaintiff has judgment, the right of the creditor is superior to the lien of an attorney.—WARD v. SHERBONDY, IOWA, 65 N. W. Rep. 413.
- 11. Banks Proceeds of Mortgaged Chattels Deposit.—In an action by a mortgagee of chattels to hold a bank for proceeds of the mortgaged property deposited in the form of a draft by the mortgagor (cashier of the bank) to his account, and applied by the bank to the debt of the mortgagor to it, the admissions of declarations of the mortgagor made after such application, while cashier of the bank, that the application by the bank was without his consent, and that he had sent the draft to the bank in good faith, that the mortgagee should have the money, is harmless error; the mortgagor having testified to the same effect, and the evidence being immaterial, the question being whether the bank had notice of the mortgagee's rights.—Rock Springs Nat. Bank of Rock Springs v. Luman, Wyo., 42 Pac. Rep. 874.
- 12. BENEVOLENT SOCIETIES—Constitution—Expulsion.
 —The fact that one discharged from membership in a voluntary benevolent association has not pursued the remedies for reinstatement provided by laws of the as-

sociation is a good defense in a civil action against the association for reinstatement. — LEVY V. MAGNOLIA LODGE, NO. 29, I. O. O. F., Cal., 42 Pac. Rep. 887.

- 18. BILL OF EXCEPTIONS—Time of Filing.—A bill of exceptions not filed till after the statutory time is not rendered sufficient by a statement, signed by the judge, following his signature to the bill, that the bill was presented to him on a certain date, which was within the time allowed for filing it, as the statute requires that such statement shall be contained in the bill.—DAVIS V. NATIONAL FORGE & IRON CO., Ind., 42 N. E. Rep. 473.
- 14. BUILDING AND LOAN ASSOCIATION.—A provision in the charter of a building and loan association, that "at no time shall more than one-half of the funds in the treasury be subject to the demands of withdrawing members," does not prevent a member who has given proper notice of his withdrawal from recovering judgment on claim for the amount paid in.—Printers' Building & Loan Ass'n v. Paxton, Tex., 83 S. W. Rep. 889.
- 15. BUILDING AND LOAM ASSOCIATIONS—Constitutional Law.—Act 1887 (Laws 1887, p. 114), providing, in regard to building and loan associations, that in determining whether the assets are sufficient to pay the face value of the stock, so that the maturity of the stock may be declared, the average premiums paid by borrowing members shall be credited on the non-borrowing stock, is unconstitutional, as applied to subscription contracts entered into before the passage of the act.—FISHER V. PATTON, MO., 33 S. W. Rep. 451.
- 16. Carriers—Misdelivery of Freight Connecting Lines.—Where goods consigned on commission are received by a railroad company to be carried beyond its own route, under an agreement between the connecting companies by which each company is entitled to a proportion of the freight, the company which carries the goods to their destination is liable to the consignor for a delivery to a person not authorized to receive them.—CAVALLARO V. TEXAS & P. RY. CO., Cal., 42 Pac. Rep. 918.
- 17. Carriers—Passengers—Trespasser on Engine.—Where a rule of a railway company prohibits persons riding on the engine, a person riding on a switch engine at the invitation of the engineer, who is aware that the engine is not intended for the carriage of passengers, cannot hold the company liable for injuries to him as a passenger.—WILCOX V. SAN ANTONIO & A. P. RY. Co., Tex., 83 S. W. Rep. 379.
- 18. CONDEMNATION PROCEEDINGS Instructions.—In condemnation proceedings by a natural gas and oil company for the purpose of laying pipes to convey natural gas, it is error to charge that the jury may consider the probability of injuries from fire or explosions which may result from the ordinary, prudent, and careful operation of the pipe line, in the absence of any evidence of the probability of such injuries.—INDIANA NATURAL GAS & OIL CO. v. JONES, Ind., 42 N. E. Rep. 487.
- 19. CONSTITUTIONAL LAW—Taxation.—Express Companies.—Rev. St. 1994, § 8484, providing for the assessment of the property of express companies within the State as a unit profit-producing system by taking the proportion of the entire value of its capital stock, less the value of all its property locally taxable without the State which the route mileage of the company within the State bears to the entire route mileage of the company, and from the amount so found subtracting the value of the property of the company locally assessable within the State, is constitutional.—STATE V. ADAMS EXF. Co., Ind., 42 N. E. Rep. 488.
- 20. CONTRACT—Construction.—An agreement recited that one party was the owner of certain patents, and was engaged in the manufacture and sale of articles covered by them and other articles, and that the other party desired to acquire the exclusive right to manufacture and sell "all the articles now manufactured and sold by" said party, and contained a grant of the

- first party's good will, business, and patents, and an agreement by the second party to pay the first party a percentage "of the net aggregate sales of the line of goods above mentioned, hereafter sold by the party of the second part." Held, that such percentage must be paid on the unpatented as well as on the patented articles.—A. B. DICK CO. v. SHERWOOD LETTER FILE CO., Ill., 42 N. E. Rep. 440.
- 21. CONTRACT Construction Right of Action.— There being a well-settled distinction between an agreement to indemnify and an agreement to pay, an action upon a breach of covenant to pay to a third party, at a specified time, a stipulated amount of money, and to cause certain real property to be released from the lien of a mortgage given by the plaintiff to secure the payment thereof, is maintainable by the promisee against the promisor, although the former has neither paid the money nor sustained actual injury by reason of the failure on the part of the former to perform his contract.—Callender v. Edmison, S. Dak., 65 N. W. Rep. 425.
- 22. CONTRACT Fraudulent Rescission.—A person may rescind and repudiate a contract, or he may affirm the contract, and recover upon a breach of warranty contained therein, if the contract contains a warranty, or he may affirm the contract, and recover whatever damages he may have sustained by reason of the fraud.—Kansas Refrigerator Co. v. Pert, Kan., 42 Pac. Rep. 948.
- 23. CONTRACT—Place of Performance.—Under a mortgage conditioned that the mortgager shall furnish the mortgagee and his wife, during life, comfortable rooms, food, clothing, medicine and medical attendance in sickness, and provide them with the necessaries and comforts suitable for persons of their age and situation in life, no place being specified where such support shall be furnished them, they are not obliged to receive it at the house of the mortgagor, but are entitled to have it furnished at such reasonable place or places as they may select.—Tuttle v. Burgett's ADM'R, Ohio, 42 N. E. Rep. 427.
- 24. CONTRACT—Promise to Pay Debt Discharged by Bankruptcy.—A mere promise by a debtor, who has been discharged in bankruptcy, to pay a prior debt "as soon as he could," is insufficient to support an action, without allegation and proof of the promisor's ability to pay the debt.—Tolle v. Smith's Ex'r. Ky., 33 S. W. Rep. 410.
- 25. CONTRACT BY LIMITED PARTNERSHIP—Validity.—
 Persons doing business as a limited partnership under
 the laws of the State of Pennsylvania cannot maintain
 an action to recover damages for the breach of a contract entered into for the purchase from them of certain goods of their manufacture, when the laws under
 which they were organized expressly prohibit them
 from contracting such liability in the manner attempted by the contract sucd upon.—Park Bros. &
 Co. v. Harwi, Kan., 47 Pac. Rep. 339.
- 26. CONTRACT WITH STATE—Assignment.—A contract made with the State to do the class of printing specified therein, under the provisions of chapter 99, Laws 1891, which does not contain any stipulation prohibiting its assignment, may be assigned.—CARTER V. STATE, S. Dak., 65 N. W. Rep. 422.
- 27. CONVERSION BY VENDOR—Liability of Vendee.—Where a vendee has converted and mingled with his own the logs of another, a notice by such other to the vendee of the conversion, and that the vendor is delivering the converted logs mingled with his own to him, and a demand by him for payment for the converted logs, made after part of the logs have been delivered, is sufficient to render the vendee liable in conversion for those delivered after, as well as before, the demand.—ANDERSON V. SUTHERLAND, Wis., 65 N. W. Rep. 365.
- 28. CORPORATIONS—Disclosure of Condition.—An Ohio corporation has not the right to refuse to make true disclosure of its condition in an action by stockholders

brought under chapter 5, tit. 1, div. 7, Rev. St., to obtain a judgment of dissolution. Hence an order upon officers of a corporation requiring them to file in court an inventory, etc., made in conformity to sections 5652 and 5678, is not an order affecting a substantial right, and is not reviewable on error.—ARMSTRONG V. HERMANCOURT BREWING CO., Ohio, 42 N. E. Rep. 425.

- 29. CORPORATIONS—Insolvency—Action by Creditor.—Where a receiver has been appointed for an insolvent corporation, a creditor cannot sue to enforce payment of anpaid stock subscriptions, the receiver not having refused to press such claim.—BIG CREEK STONE CO. v. SEWARD, Ind., 42 N. E. Rep. 464.
- 30. CORPORATION—Insolvent Corporation—Preference of Directors.—Directors who are general creditors of an insolvent corporation cannot, by deed of assignment, prefer themselves over other creditors.—W. P. NOBLE MERCANTLLE CO., Utah, 42 Pac. Rep. 869.
- 31. CORPORATIONS Liability of Stockholders.—The court has no power to entertain a motion for an order allowing execution against stockholders of a corporation under paragraph 1192, Gen. St. 1889, until the record of the case in which the motion is made shows that the corporate property has been exhausted.— CARBY LUMBER CO. V. NEAL, Kan., 42 Pac. Rep. 925.
- 32. CORPORATIONS—Officers Authority to Execute Notes.—One who is the principal business manager both of a firm and a corporation, and is in the habit of signing notes and obligations of the corporation as secretary and treasurer, can bind the corporation by signing its name to a bill or note for the accommodation of such firm, where there is no by-law or order of the corporation designating any person to sign its name.—NATIONAL BANK OF CYNTHIANA V. JOHN G. MATTINGLY & SONS, Ky., 33 S. W. Rep. 415.
- 33. CORPORATION—Shares of Stock—Payment.—Stock of a corporation may be paid for in property or services.—WOOLFOLK V. JANUARY, Mo., 83 S. W. Rep. 482.
- 34. CORPORATIONS—Subscriptions to Capital Stock.—Where the object of a corporation, as expressed in the certificate of incorporation, is not lilegal, the fact that such corporation afterwards entered upon lilegal projects cannot be urged as a defense in an action to recover unpaid subscriptions to the capital stock.—UNITED STATES VINEGAR CO. V. FOEHRENBACH, N. Y., 42 N. E. Rep. 403.
- 35. CORPORATIONS—Void Resolution—Ratification.—A resolution of a board of directors fixing the salary of the president, and which was spread upon the records, but was illegal because it required the president's vote to adopt it, could be ratified by a subsequent board, so as to justify the president for having drawn such salary.—Wickersham v. Crittenden, Cal., 42 Pac. Rep. 593.
- 36. CRIMINAL EVIDENCE—Assault.—In a prosecution for assault, where defendant offers evidence to prove that the assaulted person stated that she did not know who committed the assault, the State, to corroborate her testimony, may prove that she stated soon after the assault that defendant was one of the persons who committed the assault.—Duke v. State, Tex., 33 S. W. Rep. 349.
- 37. CRIMINAL EVIDENCE—Assault—Deadly Weapon.—On a prosecution for aggravated assault with a deadly weapon, where it appears that the weapon was a pistol used as bludgeon, the weight and size of the pistol must be shown to determine whether it is, as so used, a deadly weapon.—Branch v. State, Tex., 33 S. W. kep. 356.
- 88. CRIMINAL EVIDENCE Homicide. It appeared that an officer went to the place where deceased's body was being prepared for burial, and there saw the body and a Mexican, and that he asked for deceased's clothes, and the Mexican handed him a bloody shirt and pants, produced in evidence. There was no suggestion that the evidence of such facts was fabricated: Held, that it was not error to permit such officer to testify that a pair of pants handed to him by a Mexical such of the such sample.

- can were deceased's, and had in the pocket a knife, which was shut.—KIDWELL v. STATE, Tex., 33 S. W. Rep. 342.
- 59. CRIMINAL LAW—Appeal.—Where defendant is convicted under an indictment containing two counts, the judgment will not be reversed because of errors committed in instructions submitting the issues on the count on which he was not convicted.—TIGERINA V. STATE, Tex., 38 S. W. Rep. 353.
- 40. CRIMINAL LAW—Habeas Corpus.—One convicted of murder in the first degree under an indictment in the language of the New Jersey statute, dividing murder into two degrees, and defining them, and providing that the indictment need only charge that defendant did willfully, feloniously, and of his malice aforethought, kill and murder the deceased, the degree of murder charged not being specified, was not denied the equal protection of the laws nor convicted without due process of law.—KOHL v. LEFLBACK, U. S. S. C., 16 S. C. Rep. 304.
- 41. CRIMINAL LAW—Homicide.—Where it could be inferred from the testimony that deceased was killed by a certain person, in a sudden quarrel, and not in necessary self-defense, and that defendant participated in such killing, or that defendant interfered, without previous design, in the difficulty between deceased and said person, in which deceased was the aggressor, and defendant used more force than was necessary for the protection of said person, and thus slew deceased, a charge on manslaughter should have been given.—MAFFATT v. STATE, Tex., 38 S. W. Rep. 344.
- 42. CRIMINAL LAW—Homicide Continuance.—Nine days having elapsed from the time when the witnesses who resided in the county were summoned to the day of the trial, and the trial having continued for three or four days, and no attachment having been issued for said witnesses, defendant was not entitled to a continuance on the ground of their absence, it not appearing when the process was returned, or how far from the county seat the witnesses lived, and as the testimony of such witnesses could not have affected the result.—MITCHELL V. STATE, Tex., 33 S. W. Rep. 367.
- 48. CRIMINAL LAW—Homicide Impaneling of Jury.
 —Defendant, in a murder case, was not entitled to
 wait until the State should make its challenges and
 furnish him with its list of jurors, before striking from
 his list.—Vernon v. State, Tex., 38 S. W. Rep. 364.
- 44. CRIMINAL LAW-Homicide—Instructions.—Where the only issues are manslaughter and accidental homicide, on both of which proper instructions are given, an erroneous charge on self-defense is harmless.—James v. State, Tex., 83 S. W. Rep. 842.
- 45. URIMINAL LAW—Homicide—Self-defense.—Defendant sought deceased with the avowed and deliberate purpose of killing him if he questioned his conduct in a certain matter, and, on deceased questioning his conduct, he shot him: Held, that defendant could not defend a prosecution therefor on the ground of self-defense because deceased placed his hand on his pistol pocket.—Adams v. State, Tex., 33 S. W. Rep. 855.
- 46. CRIMINAL LAW Homicide Self-defense.—One who goes into the house of another, with a pistol in hand, and says to him, "I understand you intend to kill me," and then shoots him, cannot avail himself of the piea of self-defense, on the ground that deceased at the time attempted to procure a pistol for the purpose of killing defendant, and defendant so understood his conduct.—HOOVER v. STATE, Tex., 38 S. W. Rep. 887.
- 47. CRIMINAL LAW Malicious Exposure of Poison.—An indictment under the statute, direct and certain as to time, place, and the party charged, is ordinarily sufficient, if the offense is described substantially in statutory language, fully apprising the accused of the nature and particular circumstances of the charge against him.—STATE v. ISAACSON, S. Dak., 65 N. W. Rep. 480.

- 48. CRIMINAL LAW Perjury Res Judicata.—Under Code, § 4859, providing that the only pleas to an indictment shall be guilty or not guilty or a plea of former acquittal or conviction, where defendant was indicted for perjury on his trial for larceny, of which he was acquitted, it was proper to strike out a plea setting out what defendant claimed was in issue on the trial for larceny, and averring that the same matters were in issue under the indictment for perjury.—STATE V. CAYWOOD, Iowa, 65 N. W. Rep. 885.
- 49. CRIMINAL LAW Right to Copy of Indictment.— Where, after an indictment was presented against defendant, the prosecution procured a second bill, including another person in the charge, on which acapias issued under which defendant was arrested, defendant was entitled to a copy of the second bill.—STOKES v. STATE, Tex., 33 S. W. Rep. 350.
- 50. CRIMINAL PRACTICE—Bribery—Indictment.—Pen. Code, §§ 950, 952, provide that an indictment shall contain a statement of the acts constituting the offense, and must be direct as to the particular circumstances when necessary to constitute a complete offense. Section 7, subd. 6, defines the word "bribe" as anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion in any public or official capacity: Held, that an indictment which charged that defendant did "give a bribe" to a certain supervisor, with intent to corruptly influence him in a certain matter, was not sufficient.—PEOPLE v. WARD, Cal., 42 Pac. Rep. 894.
- 51. CRIMINAL PRACTICE—Embezzlement—Indictment.
 —Where an indictment charges, under Act March 3, 1875, the embezzlement of a certain sum of money. belonging to the United States, by defendant, a post-office employee, if the words charging defendant with being such an employee are material, it must be averred that the money embezzled came into his hands by virtue of such employment, since otherwise the allegation of employment is meaningless, and may be misleading.
 —Moore v. United States, U. S. S. C., 16 S. C. Rep.
- 52. CRIMINAL PRACTICE Indictment for Perjury .- A count for perjury gave the name of the special examiner of the pension office before whom the alleged false oath was taken, averred that he was competent to administer an oath, and set forth the very words of his statement alleged to have been willfully and corruptly used by the accused, which was, in effect, that defendant had never received any injury to the forefinger of his right hand since his discharge from the army. It further charged that such false statement was part of a deposition given and subscribed by the accused before that officer, and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions: Held, that the accused was sufficiently informed of the matter for which he was indicted, so as to meet the requirement of Rev. St. § 5396, that the substance of the charge should be set forth .- MARKHAM V. UNITED STATES, U. S. S. C., 16 S. C. Rep. 289.
- 53. CRIMINAL PRACTICE Rape Indictment.—Code Cr. Proc. § 4806, provides that no indictment is insufficient for want of an allegation of the time of any material fact, when the time has been once stated: Held, that where an indictment for rape is in two counts, the first charging that the crime was committed by force, and the second by carnally knowing a female child under 18 years of age, the same female being named in each count, and the date of the commission of the offense being the same in each, except that in the second the year is omitted, the date of the offense is sufficiently shown in the second count, though the State dismisses the first.—STATE v. GASTON, Iowa, 65 N. W. Rep. 415.
- 54. DEED Cancellation Marriage as a Consideration.—Where the consideration of a deed was that the

- grantee should marry the grantor, and live with him the rest of their joint lives, and they were married and lived as man and wife for a number of years, the husband is not entitled to a reconveyance because the wife refused to live longer with him, though, before the execution of the deed, the wife falsely represented to the husband that she was a woman of chaste character.—Barnes v. Barnes, Cal., 42 Pac. Rep. 904.
- 55. DESCENT Rights of Adopted Children.—A child duly adopted is a child capable of inheriting, within Rev. St. 1889, §§ 4518, 4520, providing that the widow, may take half her husband's real estate, if he die leaving no child capable of inheriting.—MURAN V. STEWART, Mo., 83 S. W. Rep. 443.
- 56. ELECTIONS—Ballot Marked by Poll Clerks.—Rev. St. 1894, § 6214, provides that any voter who declares that, through inability to read, he is unable to mark his ballot, may have it prepared by the poll clerks: Held, that where a voter who could not read stated that he could, but asked the poll clerks to prepare his ballot, and they did so, the ballot was properly re ceived.—Montgoment v. Oldham, Ind., 42 N. E. Rep. 474.
- 57. ELECTIONS AND VOTERS—Fusion Ticket—Legality.—Under Act 1891, p. 184, § 4, providing that names of candidates nominated by each party shall be grouped together on the proper ballot, and each group be headed by the name comprising the group were placed in nomination, a person named as a candidate by different political parties is entitled to have his name appear upon the ballot in the group headed by the name of each party.—WILLIAMS V. DALRIMPLE, Mo., 83 S. W. Rep. 447.
- 58. ESTOPPEL Married Woman.—Under Rev. St. 1894, 5 6962, providing that a married woman shall be bound the same as any other person by an estoppel in pais, a statement by a married woman that her note is all right, and that she has no defenses thereto, and that she will pay it, will estop her from claiming, as defenses to an action on it by one who purchased it relying on her statement, that it was given for the debt of a third person, and was without consideration.—STEPHENSON V. CLAYTON, Ind., 42 N. E. Rep. 491.
- 59. ESTOPPEL AGAINST MARRIED WOMEN.—Where a wife purchases a retail drug store with her separate property, and permits her husband to carry on the business in his own name, she is not estopped, there being no allegation of her insolvency, as against a person seiling goods to the husband on the faith of his ownership of the store, to deny the authority of the husband to subsequently mortgage the goods to secure the price, though, after the goods were bought, she may have stated to the sellers that they belonged to her husband.—Kieffer v. Klinsick, Ind., 42 N. E. Rep. 447.
- 60. EVIDENCE Custom and Usage.—Testimony of witnesses that, when they ordered a "car load" of meat from a certain town, they received 20,000 pounds, their order though, generally specifying the number of pounds to be shipped, is insufficient to disprove the existence of a custom in such city, directly testified to by several witnesses, that a car load consisted of 25,000 pounds.—Woldbert v. Arledge, Tex., 83 S. W. Rep. 372.
- 61. EVIDENCE—Letters in Possession of Non-resident.
 —Where a person without the State refuses to permit letters written to her by defendant to be attached to her deposition, secondary evidence of the contents of such letters is admissible.—BULLIS v. EASTON, IOWS. 65 N. W. Rep. 895.
- 62. EVIDENCE Relevancy Admissions.—In an action for false representations, by the owner of land, as to the amount of lumber thereon, whereby plaintiff was induced to enter into a contract for cutting the same, evidence of similar statements by defendant to third persons as to the quantity of lumber on the land, made both before and after plaintiff entered into the contract, is inadmissible against him.—Huganie v. Cotter, Wis., 65 N. W. Rep. 364.

- 63. EXECUTION SALE—Rights of Purchaser.—Under Rev. Stat. 1894, § 781 (Rev. St. 1881, § 789), providing that any person having an undivided interest in land sold under execution may redeem from the sale, and shall have a lien on the several shares of the other owners for their respective shares of the redemption money, where, after a sale of a husband's land under a judgment, it is sold under a prior mortgage given by the judgment debtor and his wife to secure his debt, and is redeemed by the wife on foreclosure, the interest in the land acquired by the purchaser at the judgment sale is chargeable with the full amount paid by the wife to redeem.—Union Nat. Bank v. McConaha, Ind., 42 N. E. Rep. 495.
- 64. FEDERAL COURT—Diverse Citizenship.—The privilege of a grantee or purchaser of property, who is a citizen of one State, to invoke the jurisdiction of a federal circuit court to protect his rights as against a citizen of another State, cannot be affected or impaired merely because of the motive that induced his grantor to convey, or his vendor to sell and deliver, the property, provided such conveyance, or such sale and delivery, was a real transaction by which the title passed without the grantor or vendor reserving, or having any right or power to compel or require, a reconveyance or return to him of the property in question.—LEHIGH MIN. & MFG. CO. v. KELLY, U. S. S. C., 16 S. C. Rep. 307.
- 66. FORECLOSURE Redemption Limitations.—The time within which a mortgagor may bring an action to redeem from the mortgagee in possession begins to run from the time the mortgagee goes into possession. The limitation upon suits to redeem, adopted by analogy, is the time within which an action to foreclose may be brought.—Bradley v. Norris, Minn., 65 N. W. Rep. 357.
- 66. FRAUDULENT CONVEYANCES—Action to Set Aside.—
 A purchaser of land at an execution sale may sue to set aside a prior deed of the land made in fraud of the judgment creditor's claim.—FULLER v. PINSON, Ky., 33 S. W. Rep. 339.
- 67. FRAUDULENT CONVEYANCES—Evidence.—Though defendants procured, by fraud, certain property which was afterwards transferred in trust for a certain creditor, the mere false statement by said creditor as to the financial standing of defendants, made to one who sold goods to defendants by reason thereof, had no tendency to show that the debt in favor of said creditor was not bona fde, or that the trust deed was the result of a conspiracy to defraud the general creditors of defendants. SIORES V. BURKS, Mo., 33 S. W. Rep. 460.
- 68. FRAUDULENT CONVEYANCES—Husband and Wife.—Indebtedness of a husband to his wife is not shown, as against his creditors, by the fact that at the time of their marriage, when the common law, in respect to property rights of husband and wife, was in force, she had certain live stock which went into his possession, and that at various times during the twenty-four succeeding years, according to their testimony, she claimed the proceeds of the property and its increase, and he promised to account therefor some time, he having dealt with it as his own and used the proceeds, and no account having been kept with respect to it.—COLUMBIA SAV. BANK V. WIÑN, Mo., 33 S. W. Rep. 457.
- 89. Garnishment—Extent of Garnishee's Liability.—Proceedings in garnishment do not change the legal relations and rights existing between the defendant and the garnishee, nor place the plaintiff in a more favorable position, for the enforcement of a claim against the garnishee, than would be the defendant in an action brought by him for the same cause; nor can one be held in such proceedings to the rayment of a liability which the defendant could not himself enforce because of existing equities and set-offs.—Kansas Lev. Co. v. Jones, Kan., 42 Pac. Rep. 985.
- W. GARWISHMENT Property Liable.—Garnishment proceedings bind only such property, money and credits, not exempt by law from execution, as belong

- to the defendant, and in the possession of the garnishee, or owed by him at the time of the service of process upon the garnishee.—BRADLEY V. BYERLEY, Kan., 42 Pac. Rep. 930.
- 71. Habbas Corpus—Jurisdiction—Adoption.—When, in a proper proceeding under the statute, it reasonably appears to the satisfaction of the judge of the county court that for a period of one year a mother has abandoned her illegitimate child, an order of adoption may be made without the consent and against the objection of such mother.—RICHARDS v. MATTESON, S. Dak., 65 N. W. Rep. 428.
- 72. HABEAS CORPUS—Person in Custody of State Officers.—Where a person is in custody under process from a State court of original jurisdiction for an alleged offense against the State laws, and it is claimed that he is restrained of his liberty in violation of the United States constitution, the circuit court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the State court; that discretion, however, to be subordinated to any special circumstances requiring immediate action.—Whitten v. Tomlinson, U. S. S. C., 16 S. C. Rep. 297.
- 78. HOMESTEAD-Increase in Value.-Rev. St. 1859, § 5436, provides that when an execution is levied on land of a housekeeper of which his homestead is a part, he may designate the part thereof which he claims as a homestead, and that the boundaries thereof shall be fixed by appraisers, and the balance levied on underthe execution. Section 5435 provides that a homestead shall be exempt from an execution for a debt accruing after it is set apart. Section 5442 provides that when a housekeeper acquires a new homestead from the proceeds of a former one, the new homestead shall be exempt from all the debts from which the former was exempt: Held, that where, after a homestead has been set apart to a housekeeper, a judgment is recovered against him, and he sells the homestead for a sum in excess of the amount fixed by statute as the value of a homestead, the judgment creditor cannot subject the excess of the land in the hands of the vendee to the payment of the judgment .- MACKE V. BYRD, Mo., 83 S. W. Rep. 448.
- 74. HOMESTEAD-Sale on Execution.—A purchaser of a homestead at execution sale acquires no title thereby.—RATLIFF v. GRAVES, Mo., 33 S. W. Rep. 450.
- 75. HUSBAND AND WIFE—Community Property—Administration.—On the death of husband and wife, a joint administration on their community estate, against which there are valid claims, may properly be granted.—STEPHENSON V. MARSALIS, Tex., 33 S. W. Rep. 383.
- 76. HUSBAND AND WIFE—Estate by Entirety.—A married woman, authorized to dispose of her property as a feme sole, may convey her interest in an estate by entirety, subject to the right of survivorship in the husband.—Branch v. Polk, Ark., 33 S. W. Rep. 424.
- 77. Injunction—Bond—Counsel Fees.—Counsel fees and costs incurred upon an order to show cause why a restraining order should not be continued, and upon a subsequent unsuccessful motion to dissolve the injunction, and for the preparation and defense of the main action, cannot be recovered in an action on a bond conditioned to pay such damages as might be sustained by reason of the injunction, though the action was eventually dismissed.—Curtiss v. Bachman, Cal., 42 Pac. Rep. 910.
- 78. INTOXICATING LIQUORS—Illegal Sale—Burden of Proof.—On a trial for selling spirituous liquors without a license the burden is on defendant, after it is proved that he sold such liquors, to show that he first obtained a license.—Lucia v. State, Tex., 33 S. W. Rep. 852
- 79. INTOXICATING LIQUORS—Unlawful Sales.—On a prosecution for selling intoxicating liquors without a State or county license, the paying of an internal revenue tax to the United States for selling liquor may be shown by a copy of entries from a book kept in the internal revenue office, which, under the internal revenue.

nue laws, is required to show the names of persons who have paid such tax.—Gersteman v. State, Tex., 38 S. W. Rep. 357.

- 80. JUDGMENT—Process—Non-residents.—Service on a non-resident out of the State will not support a personal judgment.—PORTER V. HILL COUNTY, Tex., 83 S. W. Rep. 388.
- 81. JUDICIAL SALE—Collateral Attack.—A judgment of a probate court confirming a sale of land by an executor cannot be attacked collaterally by evidence outside the record tending to show that the sale was not made at the place required by law.—CRAWFORD V. MCDONALD, Tex., 33 S. W. Rep. 326.
- 82. LANDLORD AND TENANT—Estoppel to Deny Landlord's Title.—In an action for possession defendant cannot show that the only title plaintiff had when he made the lease was under a tax deed, and that, after the expiration of the lease, defendant attorned to one claiming superior title to plaintiff, where the lease was not procured by fraud, and defendant never surrendered possession, and defendant's possession was never disturbed, and there had been no change in plaintiff's title since the lease was made.—PENCE V. WILLIAMS, Ind., 42 N. E. Rep. 494.
- 88. LIMITATION OF ACTIONS—Judgment.—On the creation of one township from a portion of another, limitations do not begin to run against the liability of the new township, prior to the division, until the liability of the old township, prior to the division, until the liability of the old township thereon has been established by judgment, the bonds being only valid in the hands of bona fide holders.—Township of Grant v. Township of Reno, Mich., 65 N. W. Rep. 376.
- 84. MARRIED WOMAN—Separate Property.—As under Civ. Code, § 162, realty acquired as a gift by a married woman remains her separate property, the filing of a declaration of homestead for the benefit of herself and husband, even if it transmuted the title into a joint tenancy, did not preclude the wife from maintaining in her own name an action to quiet title.—PREX V. STANLEY, Cal., 42 Pac. Rep. 908.
- 85. MASTER AND SERVANT—Assumption of Risk.—Deceased and three others having been set to work, in the presence of a foreman, in removing guard rails, which weighed about 400 pounds, from a railroad bridge, and one of the others having stumbled, whereby the whole weight of one end of the rail was thrown upon deceased, causing him to fall from the bridge, the questions of defendant's negligence in doing the work in the manner in which it was done, and of deceased's assumption of the risk, should have been submitted to the jury.—BONNETT v. GALVESTON, H. & S. A. RT. CO., Tex., 83 S. W. Rep. 384.
- 86. MASTER AND SERVANT Assumption of Risks.—While the rule is general that the servant takes upon himself the risks necessarily incident to his employment, still, if the employer has knowledge of some latent hazard which the servant does not know, and which, with proper diligence or reasonable observation, he would not know, he ought not to be held to have assumed such concealed hazard.—Carlson v. SIOUX FALLS WATER CO., S. Dak., 65 N. W. Rep. 419.
- 87. MASTER AND SERVANT—Assumption of Risk—Care Required of Minor.—A boy of 16 years must exercise only such care as boys of his age, intelligence, and experience usually use under similar circumstances.—
 KUCERA V. MERRILL LUMBER CO., Wis., 65 N. W. Rep. 874.
- 88. MASTER AND SERVANT—Contract of Employment.

 —A contract for services at a specified rate per year, not specifying any time of employment, is not a contract for a year, but one to pay for services actually rendered at the specified rate, determinable at the will of either party.—MARTIN V. NEW YORK LIFE INS. Co., N. Y., 42 N. E. Rep. 416.
- 89. MASTER AND SERVANT—Negligence—Fellow-servants.—Under Laws 1893, p. 120, providing that, in order to be fellow-servants, employees must be in the com-

- mon service, in the same department, of the same grade, working together at the same time and place, to a common purpose, an engineer of a road locomotive, who was under the control of the train master, is not a fellow-servant with employees in the yard, who were under the supervision of the yard master, unless in the performance of his duties he became temporarily subject to the yard master while operating in the yard, but he was not then a fellow-servant with the yard master himself.—Sin Antonio & A. P. By. Co. v. Harding, Tex., 33 S. W. Rep. 278.
- 90. MECHANIC'S LIEN—Assignment.—A mere right to assert a mechanic's lien is not assignable.—BAUER v. FAT, Cal., 42 Pac. Rep. 902.
- 91. MORTGAGE-Foreclosure-Priorities.-Where the vendor of real estate agreed with the vendee to take a mortgage on the premises sold to secure a deferred payment of the purchase money, subject to a mortgage for a definite sum, bearing interest at a stipulated rate, to be executed by the vendee in favor of a lean company for a loan of money, the terms of which agreement were known to the loan company, such vendor has a right to demand, upon a foreclosure of the mortgages taken pursuant to said agreement, and a sale of the mortgaged premises before the time specified for the maturity of the first mortgage, that the proceeds of the sale be not applied to the first mortgage debt to an amount greater than the agreed amount of the loan, with the stipulated rate of interest thereon up to the time when the proceeds of the sale shall be distributed. -NEW ENGLAND LOAN & TRUST CO. V. WOOD, Kan., 42 Pac. Rep. 940.
- 92. MORTGAGE FORECLO URE—Redemption by Junior Mortgagee.—Where a junior mortgagee, whose mortgage was recorded, was not made a party to an action to foreclose the senior mortgage, the fact that, after the foreclosure sale, and before the expiration of the statutory time to redeem therefrom, he bought the land at a sale under foreclosure of his own mortgage, for the full amount of his foreclosure judgment, does not preclude him from suing in equity to redeem from the sale under the senior mortgage.—MCCORMICK HARVESTING CO. V. LLEWELLIN, IOWA, 65 N. W. Rep. 412.
- 93. MUNICIPAL CORPORATIONS Alteration of Highways.—Since Rev. St. art. 875, gives to cities incorporated under general laws exclusive control of streets, private citizens cannot enjoin the alteration of a highway on the ground that it will injure their property and business, and inconvenience a portion of the public; the proposed change not depriving plaintiffs of ingress to and egress from their land, which does not abut on the street to be altered.—WOOTTERS v. CITT OF CROCKETT, Tex., 38 S. W. Rep. 391.
- 94. MUNICIPAL CORPORATIONS—Damages from Fire-Waterworks. The power conferred upon incorporated villages to establish and maintain systems of waterworks is of a public and governmental nature, though water rents are paid by the people, and hence such municipalities are not liable for loss of property by fire, owing to the defective condition of the waterworks.—Springfield Fire & Marine Ins. Co. v. VILLAGE OF KESSEVILLE, N. Y., 42 N. E. Rep. 405.
- 95. MUNICIPAL CORPORATIONS—Limitation of Power to Create Debt.—As Const. art. 11, declares that no debt shall be created by any city, unless at the same time provision be made for its payment, one claiming compensation under a contract with the city must show that the obligation was to be satisfied out of the current revenues, or out of some fund within the immediate control of the city, and was not, therefore, a debt within the constitution, or he must prove compliance with the constitutional provision as to the payment thereof.—MONEILL v. CITY OF WACO, Tex., 33 S. W. Rep. 322.
- 96. MUNICIPAL CORPORATIONS Negligence—Defective Sidewalks.—That a city permitted a depression 21.2 inches deep, 7 inches wide, and 2 feet 6 inches in length, to remain for years in the center of a flag sidewalk, 8

feet wide, it not appearing that any accident had theretofore happened to pedestrians therefrom, as a matter of law does not render the city liable for injuries to a pedestrian, who is thrown by stepping into the depression.—Beltz v. City of Yonkers, N. Y., 42 N. E. Rep. 401.

- 97. NEGLIGENCE Defective Highways Town.—A person who has notice of a defective, unsafe or dangerous condition of a bridge, culvert, or public highway is not necessarily negligent in using the same if he does so in a careful, prudent manner.—FALLS TP. OF CHASE COUNTY V. STEWART, Kan., 42 Pac. Rep. 926.
- 98. NEGOTIABLE INSTRUMENT—Action on Note—Defenses.—Want of authority in a national bank to purchase a negotiable note cannot be used by the maker of the note as a defense in an action upon it.—First NAT. BANK OF PIERRE V. SMITH, S. Dak., 65 N. W. Rep. 487.
- 99. NEGOTIABLE INSTRUMENT—Material Alteration of Note.—Where a note provided that the makers, indorsers, and guarantors waived presentment of payment, notice of non-payment, protest, notice of protest, and due diligence in bringing suit, it was not a material alteration thereof to write over the blank indorsement of the payee, "Payment guarantied."—IOWA VALLEY STATE BANK v. SIGSTAD, IOWA, 65 N. W. Rep. 467.
- 100. NEGOTIABLE INSTRUMENT Promissory Notes—Irregular Indorsers.—The obligation of "irregular indorsers" of a promissory note, who are liable as original promisors or makers, is joint and several, and not joint, with the obligation of the makers who sign their names at the foot of the note, although the instrument is in form in other respects joint.—SCHULTZ V. HOWARD, Minn., 65 N. W. Rep. 368.
- 101. NEGOTIABLE INSTRUMENT—Stipulation for Attorney's Fees.—Sec. 1, ch. 16, Laws, 1889, providing "that any provision contained in any note, bond, mortgage or other evidence of debt for the payment of an attorney fee in case of default in payment or of proceedings had to collect such note, bond or evidence of debt or to foreclose such mortgage is hereby declared to be against public policy and void," a stipulation for attorney's fee in an otherwise negotiable note cannot have the effect of destroying its negotiability.—CHANDLER V. KENNEDY, S. Dak., 65 N. W. Rep. 439.

lo2. Partmership—Books of Account—Evidence.—In an action against a partner individually on a partner-ship transaction, after the partnership has ceased to do business, the fact that the books of account were taken by another partner, and are in another State, will not render secondary evidence of their contents admissible, where the only evidence of diligence to procure the books shown is that inquiries made two procure the books shown is that inquiries made two years, and again a few days prior to the trial failed to show the whereabouts of such partner.—WAITE v. Hier, Iowa, 65 N. W. Rep. 397.

106. PARTNERSHIP — Settlement.—On the settlement of a partnership, one partner cannot object to a correction of a cierical mistake whereby another partner, who put in goods as stock of the firm, was not credited with the full value of the goods, due to the fact that two pages of the book in which the goods were involved were omitted in footing up their value.—WOLF v. Lavi, Ky., 33 S. W. Rep. 418.

184. PEDDLER'S LICENSE—Interstate Commerce.—On a trial for peddling without a license, in violation of an ordinance, it appeared that a firm doing business from New York, through the various States, had a general agent and distributing agents in the State, of whom defendant was one. The distributing agents sent their orders to the general agent, who forwarded them to New York, and received the goods from there. He repacked and sent them to the distributing agents, who delivered them to their customers: Held, that defendant was engaged in interstate commerce, and Was not subject to the ordinance.—City of Hunting-TORY. MARAN, Ind., 42 N. E. Red. 468.

105. PLEADING—Action against Firm.—When, in an action against the defendants as partners, the partnership, the names of the members composing the same, and the partnership name are fully set out in the body of the complaint, the omission in the title of such complaint of the statement that such defendants are partners, and constitute a firm, does not render the complaint subject to the objection that the same does not state facts sufficient to constitute a cause of action.—Van Brunt & Davis Co. v. Harrigan, S. Dak., 65 N. W. Rep. 421.

106. PRINCIPAL AND AGENT—Evidence.—An agency cannot be shown by declarations of the agent alone.—WHITAM V. DUBUQUE & S. O. R. Co., Iowa, 65 N. W. Rep. 403.

107. PRINCIPAL AND AGENT—Evidence.—On an issue as to whether defendant's wife purchased goods from plaintiff on her husband's account, or on the credit and for the use of a sanitarium company of which he was manager, plaintiff may show that, at about the same time, defendant and his wife bought goods from other persons, for the use of the sanitarium, in defendant's name and on his own credit.—MOORE v. SCHRADER, Ind., 42 N. E. Rep. 490.

108. PRINCIPAL AND SURETY — Note — Signature by Mark.—St. § 482, providing that a person who cannot write shall not be bound as surety by the act of an agent unless the agent's authority is in writing, signed by the principal's mark, in the presence of one credible witness, does not apply to a surety who signed a note by making his mark, his name being written by the witness to his signature.—Staples v. Bedford Loan & Deposit Bank, Ky., 33 S. W. Rep. 403.

109. RAILROAD COMPANIES—Accident—Negligence.—While a failure on the part of those in charge of a locomotive to give the statutory signals constitutes negligence per se on the part of the railway company, such failure does not render the company liable for injuries received at a common country crossing, if the traveler injured contributed thereto by omitting to look and listen.—Judson v. Great Northern Ry. Co., Minn., 65 N. W. Rep. 447.

110. RAILEOAD COMPANIES—Complaint Showing Contributory Negligence.—A complaint in an action for injuries caused by failure of defendant to stop its train at a station long enough for plaintiff to alight, which alleges that plaintiff was acquainted with the station, and knew that the platform was twenty-six inches below the car steps, and that trainmen always assisted women to alight; that she saw that the train was moving before she left the car; that on reaching the platform, seeing that the train was moving faster and no one to assist her, she was selzed with fear that she would be carried past her station, and proceeded down the steps, and was thrown off, is demurrable as showing contributory negligence.—Toledo, St. L. & K. C. B. Co. v. Wingate, Ind., 42 N. E. Rep. 477.

111. RAILROAD COMPANIES—Ejection of Passenger.—A judgment for \$750 for the wrongful ejectment of a passenger from a train on a rainy day, more than mile from any house, and three or four miles from a station, is excessive, in the absence of any ground for substantial damages other than physical and mental suffering, or any facts entitling him to exemplary damages.—GILLAN v. MINNEAPOLIS, ST. P. & S. S. M. RY. Co., Wis., 65 N. W. Rep. 373.

112. RAILROAD COMPANIES—Injuries to Passenger—Contributory Negligence.—Where a passenger, after the conductor calls out the name of his station, and says "ail out for" such station, gets off the train several hundred yards before it reaches the depot, and while running at a high rate of speed, he is guilty of such negligence as precludes a recovery for injuries received.—LOUISVILLE & N. R. CO. V. DEPP, Ky., 38 S. W. Rep. 417.

113. RAILEOAD COMPANIES—Injury to Stock—Averment of Jurisdictional Facts.—In an action against a railroad company for killing a horse, a complaint

which alleges that plaintiff's farm is situated in H county, where the action is brought, and that the animal entered upon a neighbor's land, and thence to defendant's unfenced track, where it was killed, is defective, since it does not show that the horse was killed in H county.—CHICAGO & S. E. RY. CO. Y. WHEELER, Ind., 42 N. E. Rep. 489.

114. RAILROAD COMPANIES—Negligence—Evidence.—Where a train is running through a populous neighborhood, just outside the city limits, where laborers have for years been accustomed to use the tracks in going to their work, and the employees on the tracks in going by the exercise of ordinary care may see, a person on the track in time to avoid a collision, but fall to use such care, the company will be liable, though the person injured is guilty of contributory negligence.—Chamberlain v. Missouri Pac. Ry. Co., Mo., 38 S. W. Rep. 487.

115. RAILEOAD COMPANIES—Street Bailway Accident—Negligence.—Where plaintiff was standing between street railway tracks, awaiting an approaching car, and without looking stepped backward upon the other track, within ten or fifteen feet of a car going in the opposite direction, she was guilty of contributory negligence, as a matter of law.—Bailer v. Market Street Cable Rt. Co., Cal., 42 Pac. Rep. 914.

116. RECEIVERS—Contracts—Approval by Court.—A person engaged by the receiver of a railroad as general solicitor, at a stipulated annual salary, who seeks, in a court other than that by which the receiver was appointed, to enforce against the corporate property a claim for compensation under such contract, must show that his claim was authorized or approved by the court which had control of the receivership, though he had received compensation under the contract from time to time from the receiver.—International & G. N. R. Co. v. Herndon, Tex., 33 S. W. Rep. 377.

117. REPLEVIN OF SECURITIES—Judgment.—A judgment in replevin by a vendor enforcing against the property sold the special interest reserved therein by him, as security for notes, to the full amount of the unpaid price, is not, till satisfied, a bar to an action on one of the notes.—HYLAND V. BOHN MFG. CO., Wis., 65 N. W. Rep. 369.

118. SALE—Undue Influence — Action for Damages.—An action for damages for procuring a sale by undue influence will not lie where plaintiff made no offer to rescind under Civ. Code, § 1566, when freed from the undue influence, and knew at the time of the sale the facts constituting the undue influence.—BANCROFT v. BANCROFT, Cal., 42 Pac. Rep. 896.

119. SLANDER OF FEMALE.—On a trial for slandering a female, proof of words of the same or similar import as those alleged in the indictment is insufficient, but the language charged must be proved.—BARNETT v. STATE, Tex., 38 S. W. Rep. 340.

120. SPECIFIC PERFORMANCE — Equitable Relief.—
Though defendant's wife did not join in a contract to
convey, it was proper, in a suit for specific performance, to protect plaintiffs against the inchoate rights
of defendant's wife in the land, under a general prayer
for equitable relief.—HESSION v. LINASTRUTH, IOWA, 65
N. W. Rep. 399.

121. SUBROGATION TO RIGHTS OF JUDGMENT CREDITORS.—A junior judgment creditor purchased, at an invalid sale on an execution issued on his judgment, land of the judgment debtor, which was also sold under an execution issued on a senior judgment. Pending an appeal by the execution debtor, in an action to set aside the deed issued to the junior judgment creditor, the latter redeemed from the sale under the senior judgment: Held that, on the sale under the junior judgment being declared invalid, the junior judgment creditor was subrogated to the rights of a redeeming creditor under the sale on the senior judgment.—MILBURN V. PHILLIPS, Ind., 42 N. E. Rep. 461.

122. TAXATION — Assessment — Validity.—Where assessments are relatively equal, but at much less than

the true value of the property, the board of review cannot increase the valuation of the property of one taxpayer without increasing in proportion the valuation of the property of the other taxpayers.—HIXON V. TOWN OF EAGLE RIVER, Wis., 65 N. W. Rep. 366.

123. TAXATION—Sales — Redemption.—Under Rev. St. 1894, § 8611, providing that an insane person may redeem from a tax sale within two years after the expiration of such disability, in an action by the guardian of an insane person during his life to recover possession of land illegally sold for taxes, the court cannot order a sale of the land to satisfy the purchaser's tax lien.—Wagner V. Stewart, Ind., 42 N. E. Rep. 469.

124. TAXATION OF BANK STOCK.—The shares of stock of an incorporated banking association being, as provided by chapter 14, Laws 1891, assessed against the individual owners thereof, and the tax extended thereon being against and payable by such individual shareholders, and not by the bank, such bank cannot, in its own name, and for itself, maintain an action to restrain the collection of such tax from the individual stock owners.—NORTHWESTERN LOAN & BANKING CO. V. MUGGLI, S. Dak., 65 N. W. Rep. 442.

125. Towns—Claims against.—Sections 790-796, Comp. Laws, constituting the town supervisors an auditing board, and prescribing how accounts payable by the town may be presented, audited, and allowed, do not make the presentation of claims against the town to such board, for audit, a condition precedent to the bringing of action thereon.—Short v. Civil Township Of White Lake, S. Dak., 65 N. W. Rep. 432.

126. TRIAL — Special Verdict—Conflict with General Verdict.—A general verdict, finding, in effect, that a freight brakeman was expressly authorized to eject trespassers from trains, was in irreconcilable conflict with a special verdict fluding that defendant had in force a rule providing that brakemen were under immediate orders of the conductor with whom they served, and, in general, were the servants and guardians of the train, to do all the work required during its trip, and to protect it from danger, as (the construction of that rule being for the court) it did not confer express authority to eject a trespasser, and there was no other finding to sustain such authority.—LAKE SHORE & M. S. RY. Co. v. PETERSON, Ind., 42 N. E. Rep. 480.

127. WATERS—Irrigation—Diversion of Water.—In an action to restrain the wrongful diversion of water, and for damages for past diversion, where the complaint alleges plaintiff's prior appropriation, defendant's diversion, and the amount of damages thereby occasioned, and the answer consists simply of denials and an allegation of appropriation by defendant, a finding that plaintiff's manner of using the water has been wasteful, and that all or a part of his damage has been occasioned ther.by, is within the issues.—ROEDER V. STEIN, Nev., 42 Pac. Rep. \$67.

128. WILLS—Construction.—Testator devised all his land to his wife for life, and later in the will, after devising certain land to other relatives to take effect on the wife's death, gave the remainder of the land to his wife, to dispose of as she might choose at her death: Held that, by the last clause, the wife took a fee in the remainder of the land.—BYRNE V. WELLER, Ark., 33 S. W. Rep. 421.

129. WILLS — Construction — Parol Evidence.—Parol evidence is admissible to identify "my life insurance policy, amounting to \$1,000," which testator ordered to be paid to his executor to carry out the provisions of the will.—Hartwiev. Schiffer, Ind., 42 N. E. Rep. 471.

180. WITNESS—Privileged Communications—Waiver.—Where a patient, who has been attended by two physicians at the same consultation in regard to injuries received by her in an accident, calls one of the physicians to testify in regard to the nature of the injuries, she waives thereby her right to demand that the other physicians shall not also testify.—MORRIS V. NEW YORK, O. & W. RY. CO., N. Y., 42 N. E. Rep. 410.

Central Law Journal.

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In the report of the meeting of the Illinois State Bar Association published in our issue of last week we omitted to mention the excellent addresses of Robert Mather on "The Commerce Clause of the Constitution" and L. L. Bond on "Copyright Law."

The decision of the Supreme Court of Minnesota in Morgan v. Kennedy, 64 N. W. Rep. 912, is probably good law, but it is a severe reflection upon the law makers of that State who evidently have not kept up with modern notions concerning the relationship between husband and wife. In that case it was held that the common law rule making the husband liable for damages for slanderous words uttered by the wife, even though he was neither present nor a participant is not abrogated by any statute and therefore is the law of that State. If a husband is civilly responsible for slanderous words spoken by his wife, by the same logic he is criminally responsible for her criminal acts. The legislature of that State would do well to take action on this subject.

Upon whom is the burden of proof as to sanity or insanity in homicide cases? This is a question which has long puzzled courts and brought about a somewhat irreconcilable conflict of opinion. The earlier English cases (Reg. v. Stokes, 3 Car. & K. 185; Mc-Naghten's Case, 10 Clark & F. 109), and some of the later American cases (Com. v. Rogers, 7 Metc. (Mass.) 500; Com. v. York, 9 Metc. (Mass.) 93; State v. Spencer, 21 N. J. Law 1896), hold that the defense of insanity interposed in behalf of one charged with murder must be shown by the defendant beyond a reasonable doubt; this upon the principle that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to the satisfaction of the jury. At the recent trial of the case of one Davis in the United State District Court for the Western District of Arkansas Judge Parkar instructed the jury to that effect and that the fact of the "existence of such insan-.Vol. 42—No. 8.

ity at the time of the commission of the offense charged must be established by the evidence to the reasonable satisfaction of a jury and the burden of proof of the insanity rests with the defendant."

The Supreme Court of the United States has however repudiated the doctrine and reversed the case holding that on a prosecution for murder, where the defense is insanity, and the fact of the killing with a deadly weapon is clearly established, defendant is entitled to an acquittal of the specific crime charged if, upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime. Davis v. United States, 16 S. C. Rep. 353. Mr. Justice Harlan who wrote the opinion of the court, enters into an exhaustive review of the cases on the subject. He cites the following cases as upholding the conclusion of the court: Com. v. Heath, 11 Gray, 308; Com. v. Pomeroy, 117 Mass. 143; People v. McCann, 16 N. Y. 58; Brotherton v. People, 75 N. Y. 159; O'Connell v. People, 87 N. Y. 377; Walker v. People, 88 N. Y. 81; Chase v. People, 40 Ill. 352; State v. Bartlett, 43 N. H. 224; Cunningham v. State, 56 Miss. 269; Dove v. State, 3 Heisk. 348; Plake v. State, 121 Ind. The doctrine laid down in these cases. as pointed out by Mr. Justice Harlan is grounded upon the humane principle existing at common law, that "to make a complete crime cognizable by human laws, there must be both a will and an act;" and "as a vicious will without a vicious act is no civil crime. so, on the other hand, an unwarrantable act without a vicious will is no crime at all. that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act, consequent upon such vicious will." 4 Bl. Comm. 21. All this is implied in the accepted definition of murder, for it is of the very essence of that heinous crime that it may be committed by a person of "sound memory and discretion," and with "malice aforethought," either express or implied. 4 Bl. Comm. 195. The crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts; and the burden of proving such mental capacity must rest upon those who affirm that he has committed the crime for which he is indicted.

NOTES OF RECENT DECISIONS.

NEGLIGENCE—ELECTRIC STREET RAILWAY— TROLLEY WIRE-DETACHED TELEPHONE WIRE. -That an electric street railway company is jointly liable with one who has negligently allowed his telephone wire to drop across the company's trolley wire, for injuries to a third person, accidentally coming in contact with it by the current of electricity conveyed through it from the trolley wire, is decided by the Supreme Court of Arkansas in City Electric St. Ry. Co. v. Conery, 33 S. W. Rep. 426. The court points out the general doctrine on the subject. The rule of law. which requires every one to so use his property as not to injure another applies, of course, to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross arms, and wires, and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property. If they negligently allow their wires to fall or sag, or poles or other apparatus to fall, to the injury of another, they are responsible in damages for the wrong done, if the party injured is guilty of no culpable negligence contributing to the injury. Uggla v. Railway Co., 160 Mass. 351, 35 N. E. Rep. 1126; Haynes v. Gas Co. (N. C.), 19 S. E. Rep. 344; Telegraph Co. v. Eyser, 91 U. S. 495; Light Co. v. Orr, 59 Ark. 215, 27 S. W. Rep. 66. The difference between some of those cases and the present one is that electricity was communicated to the party injured in the former by the electric company's own wire, and in the latter by the wire of another, but the principle upon which the liability is based is the same in both cases. All persons have the right to use the streets, in or over which the wires were suspended, as public highways. Subjecting the dangerous element of electricity to their control, and using it for their own purposes, by means of wires suspended over the streets. it is their duty to maintain it in such a manner as to protect such persons against injury by it, to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the prevention of the escape of the dangerous force in their service through

any wires brought in contact with their own. and of its transmission thereby to any one using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended. Railway Co. v. Shelton, 89 Tenn. 423, 14 S. W. Rep. 863; Block v. Railway Co. (Wis.), 61 N. W. Rep. 1101. Electric companies are bound to use "reasonable care in the construction and maintenance of their lines and apparatus, that is, such care as a reasonable man would use under the circumstances, and will be responsible for any conduct falling short of this standard."

CONTRACT — VOID FOR INDEFINITENESS.—
The Supreme Court of Montana holds, in Ahlstrom v. Fitzpatrick, that an agreement to extend the time of the payment of a debt till a bank which had suspended should resume payment is void for uncertainty. The court says in part: 1. Fax. 472

But, passing to the question suggested in the last paragraph, we are of opinion that the agreement to forbear and extend time, as set up in the answer, was void for uncertainty. The answer alleges that defendant is informed and believes that the bank will resume payments on January 1st, but this is only an allegation of defendant's information and belief at the time of filing the answer. It is not alleged to be a fact, nor is it alleged that defendant was informed or believed at the time of the alleged agreement to forbear that the bank would resume payments at any time. There is no showing whatever that there was any certainty, when the alleged forbearance agreement was made, that the bank would ever resume payments. We do not think that it can be presumed as a fact, without an allegation thereof, that a suspended bank will resume at a given time, or ever. Thus, the time of the alleged extension was not only wholly indefinite, but for all that appears the extension might last for all time. We quote as follows from 8 Rand. Com. Paper, §§ 1819, 1820: "To constitute a valid extension of time, there must be a binding agreement to that effect." Section 1819. "The time of an extension, however short, must be definitely fixed. An agreement for an indefinite time will not be sufficient. So the maker cannot set up a contemporaneous written aggrement not to sue at maturity, although he may have an independent action for damages for breach of such agreement. And this is true, in general, of an agreement on the holder's part not to sue until a given time after maturity. So the holder cannot set up a verbal agreement that the bill might be paid in installments other than as provided by its terms." Section 1820. It is said by Rapallo, J., in Bank v. Franklin, 55 N. Y. 288: "The only consideration claimed by the plaintiff to have been shown is the forbearance of a call loan previ-ously existing. But there was no valid agreement for such forbearance. No engagement was entered into by the plaintiff, upon the receipt of these notes, which would have precluded it from demanding pa

ment of the loan the moment after the receipt of the notes in question. Van Saun & Co., having been called upon by the plaintiff to pay the \$30,000 call loan said they did not want to pay it just then, but would give the plaintiff additional security if it would allow the loan to remain a little longer. They ithen brought the notes in suit to the bank, and the president took them and put them with the other collaterals. No definite extension was agreed upon. This was not a valid agreement for forbearince. Bank v. Ives, 17 Wend. 501. Mere indulgence, without a valid agreement for forbearance, does not constitute a valuable consideration. Stalker v. McDonald, 6 Hill, 93 114." We quote as follow from Ward v. Wick, 17 Ohio St. 159: "Now, if it be conceded that the accommodation character of this paper gave to the Porters, in equity, the position of principals, and to Ward & Co. that of sureties, yet is any valid contract shown to have been made for the extension of the time of payment by the principal, so as to discharge the surety? To have that effect, it must not only be founded on a good consideration, but it must also be definite in its terms; 'such a one as the principal debtor could enforce, and which would tie up the hands of the surety, prevent him from paying his principal's debt, stepping into the shoes of his creditor, and prosecuting the principal debtor himself.' Jenkins v. Clarkson, 7 Ohio, pt. 1, p. 72. The agreement here was to give time for payment beyond the day of maturity of the notes. Without such agreement no action could have been brought on them until after maturity. By its terms, how much longer was the creditor bound to wait? Such a stipulation is void for uncertainty. It amounts to nothing more than a general promise of indulgence, and can tie up the hands of no one." See, also, Boardman v. Larrabie, 51 Conn. 39; Benson's Adm'rs v. Harrison, 39 Mo. 308.

TRESPASS-REMOVAL OF BODY FROM CEME-TERY.—Exactly what the rights of one are to the burial place of his dead—in the absence of a fee to the soil, or his right to the possession thereof—as respects the maintenance of a civil action for its disturbance, is one of delicate and, as yet, not very satisfactory solution. People have so much respect for the final resting place of the dead, and there is so little to tempt one to disturb their repose, cases are of rare occurrence where such disturbances have become the subject of litigation and the adjudication of courts. Those that have arisen have generally grown out of the removal of the dead from one place to another, for purposes, as claimed, of health, convenience or the better care, preservation and ornamentation of these burial places. The Supreme Court of Alabama has lately had occasion to consider this question in Bessemer Land & Improvement Co. v. Jenkins. 18 South. Rep. 565, wherein the view of the court is best shown by the following from the opinion of Haralson, J.:

Cooley, in his work on Torts, says: "In respect to the burial of the dead, if anywhere, shall we find in

the common law, a recognition of the legal rights in the family as an aggregate of persons. Even in that case, however, the recognition is very faint and uncertain. An unlawful interference with the buried dead of a family might probably be restrained by injunction on their joint application, and the owner of the lot in which the body was deposited might maintain trespass quare clausum fregit for its disinterment, and recover substantial damages, in awarding which the injury to the feelings would be taken into consideration;" and he adds that the common law did not recognize the bodies of the dead as property belonging to the surviving relations, "though it did recognize a property in the shroud or other apparel of the dead as belonging to the person at the charge of the funeral." Cooley, Torts, 289, 240. Blackstone in his commentaries, referring to the subject, says: "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any suit or action against such as indecently, at least, if not injuriously, violate and disturb their remains when dead and buried. The person, indeed, who has the freehold of the soil may bring an action of trespass against such as dig and disturb it; and if any one, in taking up a dead body, steals the shroud or apparel, it will be felony, for the property thereof remains in the executor, or whoever was at the charge of the funeral." 1 Bl. Comm. 429. It seems to be very generally agreed that a dead body is not the subject of property right, and becomes, after burial, a part of the ground to which it has been committed, and that an action quare clausum fregit may be maintained by any person who has the fee to the soil, if entitled also to the possession, against one who digs and disturbs the grave. But to entitle one to this action, he must have the actual or constructive possession of the soil. Meagher v. Driscoll, 99 Mass. 284; Weld v. Walker, 130 Mass. 422; Guthrie v. Weaver, 1 Mo. App. 136; Page v. Symonds, 63 N. H. 17; Shipman v. Baxter, 21 Ala. 456; Leadbitter v. Blassingame, 31 Ala. 496; McInerny v. Irvin, 90 Ala. 276, 7 South. Rep. 841; 3 Am. & Eng. Ency. Law, 54; Bonham v. Loeb (Ala.), 18 South. Rep. 800. When one buries his dead, therefore, in soil to which he has the freehold right, or to the possession of which he is entitled, it would seem there is no difficulty in his protecting their graves from insult and injury, by an action of trespass against a wrongdoer. But bodies are most commonly interred in public cemeteries, where the parties whose duty it is to give them burial are not the owners of the soil by deed properly executed, and have no higher right than a mere easement or license. Of such it is held that they do so under a mere license, and their exclusive right to make such interments in a particular lot would be limited to the time during which the ground continued to be used for burial purposes; and upon its ceasing to be so used, all they could claim would be that they should have due notice and an opportunity to remove the bodies to some other place of their own selection, if they so desire, or on failure to do so, that the remains should be decently removed by others. 3 Am. & Eng. Ency. Law, 50, and authorities cited; 1 Washb. Real Prop. 33. In Partridge v. First Independent Church, 89 Md. 637, a case of one who buried in a church cemetery under license from the trustees, it was held that, while the license continued, the grantee could bring trespass or case for any invasion or disturbance of the grave, whether done by the grantors or strangers. But it was said "if, in the course of time, it should become necessary to vacate the ground as a burying ground, all that he could claim, in law or equity,



would be that he should have due notice and the opportunity afforded to him of removing the bodies and monuments to some other place of his own selection, or that on his failing to do so, such removal should be made by others." 1 Washb. Real Prop. 5 33; Kincaid's Appeal, 66 Pa. St. 411. In Page v. Symonds, 68 N. H. 17, it was said: "Such right of burial is not an absolute right of property, but a privilege or license, to be enjoyed so long as the place continues to be used as a burial ground, subject to municipal regulation and control, and legally revocable whenever the public necessity requires. It is a right of limited use for purposes of interment, which gives no title to the land," analogous to the grant of a pew in a meeting house, and resembling a pew tenancy. Craig v. First Presbyterian Church, 88 Pa. St. 42; Kincaid's Appeal, supra; Windt v. German Reformed Church, 4 Sandf. Ch. 471; Richards v. Dutch Church, 82 Barb. 42; Sohier v. Trinity Church, 109 Mass. 1, 21; Bryan v. Whistler, 8 Barn. & C. 288; Wood v. Leadbitter, 18 Mees. & W. 887. It would seem, therefore, to accord with right principle and authority, that where one is permitted to bury his dead in a public cemetery, by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the bodies are buried, as will entitle him to action against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it. This right of possession will continue as long as the cemetery continues to be used; but if, for proper and legal reasons, it should be discontinued and the license withdrawn, and the bodies of the dead are to be removed, it must be done decently, only after due notice to the party entitled, if known, and such notice can be given.

CRIMINAL LAW—HOMICIDE — CORPUS DE-LICTI—CIRCUMSTANTIAL EVIDENCE.—The Supreme Court of Illinois in the case of Campbell v. People, 42 N. E. Rep. 123, after an exhaustive review of the authorities, hold that the fact of death may be proved by circumstantial evidence when that is the best evidence obtainable. The following is from the opinion:

Counsel for plaintiff in error contends in the first place that, if it be taken as true that the accused did all that the prosecuting witness testified that he did do, the conviction must fail for lack of sufficient proof of the corpus delicti. It has been said that in murder the corpus delicti consists of two elements, viz.: the fact of death, and the criminal agency of another as the cause of the death. Ruloff v. People, 18 N. Y. 179, 4 Am. & Eng. Enc. Law, 309. Counsel concedes that the identity of the deceased and of the accused may be proved by circumstantial evidence, or that, when the fact of the death of the person alleged to have been murdered is properly established, the criminal agency of the accused may be shown by any competent evidence, whether direct or circumstantial; but it is insisted that the fact of death must be established by direct or positive evidence, and cannot be established by indirect or circumstantial evidence. It is contended that this was the rule at common law, and is therefore the rule in this State. It is conceded on behalf of the people that this was the general rule at common law, but it is insisted that the rule was subject to exceptions, and that the rule itself has been modified and changed by the later authorities, and

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that now, by the great weight of modern authority, it is established that the corpus delicti may be proved, like any other fact, by presumptive or circumstantial evidence. Lord Hale said: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead, for the sake of two cases,—one mentioned in my Lord Coke's Pleas of the Crown (page 232, ch. 104), a Warwickshire case; another that happened, in my remembrance, in Staffordshire, where A was long missing, and upon strong presumptions B was supposed to have murdered and to have consumed him to ashes in an oven, that he should not be found, whereupon B was indicted and convicted and executed, and within one year after A returned, being indeed sent beyond sea by B against his will; and so, though B justly deserved death, yet he was really not guilty of that of-fense for which he suffered." 2 Hale, P. C. 290. Lord Stowell, in Evans v. Evans, 1 Hagg. Consist. 105, said: "When a criminal fact is ascertained, presumptive proof may be taken to show who did it-to fix the criminal-having there an actual corpus delicti; but to take presumptions in order to swell an equivocal and ambiguous fact into a criminal fact would, I take it, be an entire misapprehension of the doctrine of presumptions." In Reg. v. Hopkins, 8 Car. & P. 591, a young woman was indicted for the murder of her bastard child, alleged in some of the counts by drowning, in others by suffocation. The child had been put to nurse after its birth, and at the age of 16 days she took it, as she said, to take to her father's, who lived on the bank of the river Wye. She was seen with the child as late as 6 o'clock in the evening of April 8th, but between 8 and 9 o'clock she arrived at her father's without the child. The body of a child was found in the river Wye, but did not correspond with the description of the child in question, and was found not to be the same. Lord Abinger, C. B., instructed the jury that the prisoner could not be called upon by law to account for the child, or to say where it was, unless there was evidence to show that it was actually dead.

Many other early cases are reported, sustaining the rule contended for by plaintiff in error. In Ruloff v. People, 18 N. Y. 179, decided by the New York Court of Appeals in 1858, the court reviewed the authorities on this subject, and came to the conclusion, with one judge dissenting, that there could be no conviction of murder unless there was direct proof either of the death, as by the finding and identification of the body, or of criminal violence adequate to produce death, and exerted in such a manner as to account for the disappearance of the body; that, when the death is proved by direct evidence, the criminal agency of the accused in producing the death may be estab-lished by circumstantial evidence. This, it was there held, was the rule at common law, and if it was adhered to in New York by the courts until at a later period a statute was enacted which prohibited a conviction "unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged are each established as independent facts, the former by direct proof, and the latter be-yond a reasonable doubt." And in People v. Palmer, 109 N. Y. 110, 16 N. E. Rep. 529, it was held that the statute was simply declaratory of the common law, and that it was not intended by the statute to so change the rule as it existed at common law as to require that the identity of the deceased should also be proved by direct evidence only. In the opinion of the court in that case, to show that it was not intended by the statute to limit the proof of the identity of the deceased to direct evidence, it was said in argument

that "a murderer may always escape if only he shall so mutilate the body of his victim as to make identification by direct evidence impossible, or shall so effectually conceal it that discovery is delayed until decomposition has taken away the possibility of personal recognition; and it will follow that the tenderness of the Penal Code has opened a door of escape to that brutal courage which can mangle and harm the lifeless body, and has put a premium upon, and offered a reward for, that species of atrocity." This argument would seem to be equally as forcible against the supposed rule that the fact of death can be proved only by direct evidence. We are satisfied that the strict rule contended for by plaintiff in error has been modified by many authorities, and that the weight of authority now is that all the elements of the corpus delicti may be proved by presumptive or circumstantial evidence. It was said by Jeremy Bentham that: "Were it not so, a murderer, to secure himself with impunity, would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the known chemical menstrua, or to sink it in an unfathomable part of the sea." 8 Smith, Jud. Ev. 234. In King v. Burdett, 4 Barn. & Ald. 95, 6 E. C. L. 404, Best, J., said, in speaking of circumstantial evidence: "Until it pleases Providence to give us means beyond those our present facilities afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be received as to the corpus delicti, that it ought to be strong and cogent." See, also, Wills, Circ. Ev. In a copious note to Rippey v. Miller, 62 Am. Dec. 177, Mr. Freeman says: "But, while it is established that the death of the person whom it is charged the prisoner has killed may be proved by circumstantial evidence, it is everywhere held to be necessary to prove this fact by the most convincing evidence that the nature of the case will admit of. In Smith v. Com., 21 Grat. 809, it was decided that the death of the person charged to have been murdered must be proved by the most cogent and irrefutable evidence." And he there further says that: "To require the discovery of the body in every case would seriously interfere with the administration of justice. It is therefore clearly settled that the fact of death may be inferred from such strong and unequivocal circumstantial evidence as renders it morally certain, and leaves no room for reasonable doubt." Id. 184, note. See, also, to the same effect, State v. Williams, 7 Jones (N. C.), 446, 78 Am. Dec. 248. In an elaborate note to this case, in which many cases are cifed, at page 253 it is said: "Direct and positive evidence is unnecessary to prove the corpus delicti. · · · It may be proved by circumstantial evidence, if it be strong and cogent and leave no room for reasonable doubt. This rule is now clearly established, and it would be unreasonable to always require direct and positive evdence. Crimes, especially those of the worst kind, are naturally committed at chosen times, in darkness and secrecy. Human tribunals must therefore act upon such indications as the circumstances of the case present or admit, or society must be broken up. The cases just cited show that the jury may find a verdict of guilty upon circumstantial evidence, and that the corpus delicti may be proved by such evidence, as well as any other part of the case, and that this rule applies in cases of manslaughter as well as in all other crimes." And at page 257 it is further said: "But of the various forms of criminal homicide, that of infanticide, by which is popularly understood the mur-

der of a recently born infant for the purpose of concealing its birth, perhaps presents the greatest difficulties in the establishment of the corpus delicti. No universal and invariable rule can be laid down with respect to it. Each case must depend upon its own peculiar circumstances, and, as in all other cases, the corpus delicti must be proved by the best evidence which is capable of being adduced, and such an amount and combination of relevant facts, whether direct or circumstantial, as establish the imputed guilt to a moral certainty, and to the exclusion of every other reasonable hypothesis."

To this general statement of the law we agree. So strict a rule as contended for by plaintiff in error would, as pointed out by many authorities, operate, and especially in cases of infanticide, to completely shield the criminal from punishment for the most atrocious crimes. The complete destruction of the body of a newly-born infant might not be difficult. To say that in such a case, while every one would admit that the body could be completely destroyed by animals, by fire, or other destructive agencies, the circumstantial evidence, though of the most cogent and convincing character, would not be admissible to show the fact of death, as well as the criminal agency of the accused in producing it, would be to say that there is a class of the most atrocious crimes, which, when committed in secret, as most crimes usually are, and by persons of sufficient capacity and skill to destroy the body, must go unpunished, because the law has closed all avenues but one leading to detection, and has permitted the criminal himself to close that one. We are not prepared to so hold. It is, however, familiar law, and frequently recognized by this court, that extrajudicial confessions of the commission of crime, where such confessions are relied upon to establish guilt, are not sufficient to authorize a judgment of conviction without other sufficient proof of the corpus delicti, but that the corpus delicti should first be otherwise established; not, however, by direct evidence only. Andrews v. People, 117 Ill. 195, 7 N. E. Rep. 265; Williams v. People, 101 Ill. 382; South v. People, 98 Ill. 261; May v. People, 92 Ill. 343; Bergen v. People, 17 Ill. 426; Gray v. Com., 101 Pa. St. 380; State v. German, 54 Mo. 526. It is undoubtedly true that, where there is no direct or positive evidence of the death of the person who is charged to have been murdered, great caution should be observed in acting upon presumptive or circumstantial evidence; but that the fact of death may be so proved, when it is the best evidence obtainable, we have no doubt. It would unnecessarily extend the length of this opinion to review the authorities at length. Many of them will be found cited in the notes to the following cases: State v. Williams, 78 Am. Dec. 248, and Rippey v. Miller, 62 Am. Dec. 177. See, also, 4 Am. & Eng. Enc. Law, 809, and notes; 9 Am. & Eng. Enc. Law, 728; Durrill, Circ. Ev. 680; Kerr, Hom. 539; Whart. Cr. Ev. § 825, et seq.; Wills, Circ. Ev. 179; U. S. v. Gilbert, 2 Sumn. 19, 27, Fed. Cas. No. 15,204; State v. Keeler, 28 Iowa, 551; Johnson v. Com., 81 Ky. 325; McCulloch v. State, 48 Ind. 109; Stocking v. State, 7 Ind. 826; Lancaster v. State, 91 Tenn. 267, 18 S. W. Rep. 777; Gray v. Com., supra.

RIGHT-OF-WAY OF RAILROAD COMPANY.

- 1. Definition; Nature of.
- 2. Use which may be Made of Land Acquired.
- 3. Right of Owner of Fee.
- 4. Duration of Essement.
- 5. Compensation for Use.
- 6. Right over Mortgaged Property.
- 7. Duty to Look out for Trespassers.
- 8. Claim under Statute of Limitations.
- 9. When may Sell and Convey Land.

The right-of-way of a railroad is an easement—an interest in the freehold—which can only exist in grant or by prescription.1 It is but a privilege to go on the lands of another for a specified purpose and has no element of exclusiveness in it.2 But lands claimed and condemned as a road-bed and right-of-way of a railroad, stand in a category different from that of ordinary easements; over them is acquired not the right of use to be enjoyed in common with the public, or with other persons. The right and use are exclusive, and no one else has any right-ofway thereon.3 A grant to a railroad of a right-of-way is the grant of a particular easement, and does not pass the fee, but it remains in the grantor.4

Use Which May be Made of Land Acquired.—The authorities support the conclusion that a railroad company may make any use of the land acquired by it, for use as a right-of-way for its railroad, which, directly or indirectly, contributes to the safe and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands.⁵ In short, the railroad company may use its right-of-way, not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the

easement, or exposes itself to any claim for additional damages to the original landowner.6 It has the right to occupy with buildings, or other structures the land acquired for its railroad, so long as the mode of occupation is necessary or proper for the convenient exercise of the privileges and the performance of the functions defined by its charter.7 It has also been held, that on the land granted for "railroad and depot purposes," the company can permit the erection and use by private parties, without payment of rent, of elevators, corn-cribs, lumber yards and lime houses, which facilitate the business of the company in the receipt, transportation and discharge of freight.8 So a railroad company may, for its own use in operating its road, construct a telegraph line over and along its right-of-way, and by such use of the property it does not subject itself to additional claim of the owner of the fee for compensation.9

Right of Owner of Fee to Buildings and Other Improvements.—The fee of the land and ownership of improvements thereon, and everything not incompatible with the use intended as a right-of-way, remains in the owner.10 But the railroad has the right to remove all buildings, or constructions, located upon its right-of-way, or which interfere with its use. 11 Any stone excavated in grading the track, not actually used in the construction of the track, belongs to the owner of the land, and cannot be removed without his permission.12 Railroads with their engines and trains, from their complicated character, and peculiar mode of operation, require more and larger uses of the land for running and managing trains safely than other public ways; but what they do require is within the limits of the grant, and where they are not especially prescribed or limited, must be determined by the nature of such exigency.

¹ East. Ala. Ry. Co. v. T. & C. R. Ry. Co., 78 Ala. **2**81.

² Tenn. & C. R. Ry. Co. v. E. Ala. Ry. Co., 75 Ala. 524; Washb. on Ease. (3d. Ed.), 3, 260, 270; Child v. Chappel, 9 N. Y. 246.

³ M. & O. Ry. Co. v. Williams, 58 Ala. 595; Tanner v. L. & N. Ry. Co., 60 Ala. 621; Cook v. Cent. Ry. Co., 67 Ala. 538; R. & G. Ry. Co. v. Davis, 2 Dev. & Bat. (Law) 451; Jackson v. R. & B. Ry. Co., 25 Vt. 150; T. & B. Ry. Co. v. Potter, 42 Vt. 265.

⁴ U. S. Digest (Vol. 4), 586, 21 N. E. Rep. 470. ⁵ Lewis' Em. Dom., Secs. 584-588, cases cited; Gudger v. Richmond & D. Ry. Co., 43 Am. & Eng. R. Cas. 606; Railroad v. Deal, 90 N. C. 110; Elyton L. Co. v. S. & N. Ry. Co., 95 Ala. 647.

6 W. U. Tel. Co. v. Rich, 19 Kan. 517; Elyton L. Co. v. S. & N. Ry. Co., 95 Ala. 647.

7 Props. of Locks & Canals v. Nashua & Lowel Ry. Co., 104 Mass. 1; Boston Gas Light Co. v. Old Colony & Newport Ry. Co., 14 Allen, 444; Brainard v. Clapp, 10 Cush. 6; Pierce v. Boston & Lowel Ry. Co., 141

8 Ill. Cent. Ry. Co. v. Wathen, 17 Bradw. (Ill. App.) 582.

9 W. U. Tel. Co. v. Rich, 19 Kan. 517.

Dec. 287.

10 Ala. & Fla. Ry. Co. v. Burkett, 42 Ala. 84; Lance App., 55 Pa. St. 16; 98 Am. Dec. 722, and note 729.

11 Odum v. Rutledge & Julian Ry. Co., 94 Ala. 494; Davis v. Memphis & Char. Ry. Co., 87 Ala. 633. 13 2 Lawson's R. R. & P. 997; 39 N. H. 564; 75 Am.

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And if trees are found to be dangerous in running cars by obstructing the view of engineers and conductors up and down the track, in approaching depots, crossing highways on the same grade, or otherwise, the company have the same right to cut them down, standing within their limits, as if they tended to obstruct the passage of trains, and thus en-And the right and danger their safety. power of the company to use the lands within their limits may not only be exercised originally when the road is first laid out but continues to exist afterwards.18 A railroad company or its officers are the judges of the extent to which it is necessary or convenient to make use of the land included in their location, and of the mode of use which will best answer the purposes of its appropriation.14

Duration of Easement.—The estate or interest in land acquired and taken for public use is to be determined by the nature and extent of the use; the intendment being that the estate or interest shall be commensurate with the purpose and duration of the use for which it is taken, when not otherwise provided. The acquisition of an estate in the land for a public use, by the exercise of the right of eminent domain, is in the nature of a transfer by the State to which the statute annexes the limitation or condition that the estate acquired shall continue during the existence of the corporation, and so long as the land may be used for the purpose it is taken. 15

Compensation for the Use.—It is evident that prepayment of just compensation to the owner of any lands sought to be condemned under any ad quod damnum proceeding is made a condition precedent, without which the title of the owner of the land, or any easement in it, is not divested or in any manner affected.16 But the owner, if sui juris, may, of course, waive his right to prepayment of damages by consenting expressly or by clear implication to extend a credit to the condemning corporation or party, allowing the damages to lie and remain as a mere debt. 17 Where, however, a plaintiff has knowledge of the fact that a company is proceeding to locate and construct their road upon his land and allows them to expend large sums of money in improvements for the purpose, without interfering or forbidding them to proceed, he would no doubt be estopped from undertaking to evict them by an action of eiectment.18 An unauthorized entry of a railroad company by its agents upon another's lands, without any proceedings of condemnation, as provided by the statute, unless perhaps in the case of preliminary occupation temporarily for a survey or other like steps of incipient acquisition, even when the statute furnishes a remedy to the landowner for the assessment of damages, he is not compelled to institute proceedings but may rely upon his constitutional protection, and may, if he has not waived prepayment, maintain ejectment against the company.19

Right Over Mortgaged Property.—The general rule in many of the States is, that when land is taken in the exercise of the right of eminent domain for the location of a railroad track, the mortgagee should be made a party to the proceedings for the taking of the land and the damages awarded should be paid to him; otherwise he may recover the same by action against the person or corporation entering upon the land.20 So if a railroad company without proceedings to acquire a right-of-way by condemnation, takes a conveyance from the owner of the equity of redemption, the mortgagee's interest is not thereby affected, but he or a purchaser at a foreclosure sale under the mortgage, may recover compensation for the land from the railroad company, though such purchaser cannot recover damages incident to the entry before he acquired title. But a mortgagee may, of course, waive his right to claim damages for a taking of any part of the mortgaged land.21 Damages awarded to a mortgagor for land taken for a right-of-way or other public improvement become a substitute for the premises taken and the mortgage is a specific lien upon the fund.22

13 Brainard v. Clapp, 10 Cush. 6, 57 Am. Dec. 77.

17 Cooley's Con. Lim., 181, 561-2.

18 Trenton, etc. Co. v. Chambers, 9 N. J. Eq. 471;

¹⁴ Curtis v. Eastern Ry. Co., 14 Allen, 58; Boston Gas Light Co. v. Old Colony & Newport Ry. Co., 103 Mass. 5, 57 Am. Dec. 79n.

¹⁶ Davis v. Mem. & Char. Ry. Co., 87 Ala. 687. Mills' Em. Dom. Sec. 130; Prevolt v. R. R. Co., 57 Mo. 258; Stacey v. Ver. Cent. Ry. Co., 27 Vt. 39.

McAuley v. West Ver. Ry. Co., 83 Vt. 311.

Daniels v. Chicago, etc. Ry. Cc., 85 Iowa, 129, 14 Am. Rep. 490; Smith v. Ry. Co., 87 Ill. 191; M. & C. Ry. Co. v. Payne, 87 Miss. 700; Mills' Em. Dom., Sec. 130.

²⁰ Jones on Mortg., Sec. 681a, and numerous cita tions.

²¹ Jones on Mort., 681a, and numerous citations.

²³ Jones on Mortgages, 708, and citations.

Duty to Look Out for Trespassers.—From a regard for human life the law imposes the duty of due precaution and feasonable effort to prevent unnecessary injury. It is a settled doctrine in Alabama, supported by the great weight of authority in England and America, that ordinarily the right-of-way of a railroad company is its exclusive property. Its free and unobstructed use is essential to the transaction of the business of the company in transporting freight and passengers, and to the safety of its trains. Mere acquiescence in the use of the right-of-way does not confer on the public a right to use it nor create any obligation to look out for persons using it, other than the general duty to look out for obstructions. In the absence of law making such acts punishable, railway companies are powerless to prevent such use of their tracks. Under the conditions in which they are situated, physical prevention is impracticable and acquiescence is morally compulsory. The nature and extent of the duty is that no injury shall be produced by wanton or reckless or intentional negligence.28

Claim Under Statute of Limitations.— Statutory proceedings for the condemnation of a right of way by a railroad company, even though invalid for irregularities of procedure, may constitute color of title under which adverse possession being held continuously for more than ten years, with suitable user, a title may be acquired sufficient to defeat an ejectment,24 but the principle has long been settled in Alabama, that the mere fact of acquiescence on the part of the owner, in the use and enjoyment of his land, as a public highway or road, will not create a presumption of dedication within any period short of twenty years, without some clear and unequivocal act on his part explicitly indicating such purpose of dedication.25 This may be effected without any grant or conveyance by deed or other writing on the part of the owner of the land.26 But where a railroad company enters land claiming an easement, it cannot at any time thereafter claim title by adverse possession. A more permissive enjoyment of land, or of an easement thereon, has been held not to confer any adverse right. The claim must be of the entire title, exclusive of the title of any other person.27 The title of a railroad corporation to possession of the soil covered by the road-bed and right-of-way will, after condemnation, dominate all adverse claim of possession, even by the owner of the fee.28 Although the right which a railroad company acquires to land taken under their charter, is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety require that the possession of the land so taken should be absolute and exclusive against the adjacent landowner, so far as to secure fully every purpose for which the railroad is made and used.29

When Railroad Corporation may Sell and Convey Land Acquired for Right of Way.—
Of course if the charter authorizes it, a railroad company may acquire title in fee. And when this is the case and when the land is no longer necessary for the purposes of the corporation, it has the right to sell and convey the same. Watkins M. Vaughan.

Smith v. Blertis, 9 John. 180; Kirk v. Smith, 9 Wheat. 241; Converse v. Plimpton, 44 Vt. 158; Medword v. Pratt, 4 Pick. 22.

28 75 Ala. 524.

²⁹ Conn. & Pass. River Ry. Co. v. Holton, 32 Vt. 48; Tenn. & Coosa River Ry. Co. v. E. Ala. Ry. Co., 75 Ala. 524.

30 Yates v. Van De Bogert, 50 N. Y. 526.

CRIMINAL LAW—TRIAL JURY—EXCLUSION OF JURY PENDING PRELIMINARY EXAMINATION AS TO THE ADMISSIBILITY OF A CONFESSION.

STATE V. KELLY.

Supreme Court of Oregon, November 11, 1895.

- 1. A juror testifying on voir dire examination that, from reading newspaper reports of the case, he had formed and expressed some opinion, but that his opinion was not fixed, and would not influence his verdict, is competent.
- 2. Whether the jury shall be excluded pending the preliminary examination as to the admissibility of a confession is within the discretion of the trial court.

BEAN, C. J.: The defendant, having been convicted of the crime of murder in the second degree, brings this appeal, assigning as error the decision of the court overruling his challenge to certain jurors for actual bias, and its refusal to exclude the jury from the court room during the preliminary hearing before the court to determine the

²³ Mem. & Char. Ry. Co. v. Womack, Admx., 84 Ala. 149; Carrington v. L. & N. Ry. Co., 88 Ala. 472.

Mobile & Girard Ry. Co. v. Cogsbill, 85 Ala. 456.
 Hoole v. Att'y Gen., 22 Ala. 190; N. O. & S. R. R.
 Co. v. Jones, 68 Ala. 55.

^{26 2} Smith, Lead. Cas. (5 Am. Ed.), 209.

admissibility of an alleged confession offered in evidence by the prosecution. Upon the examination of the jurors challenged on their voir dire. each of them testified that he had read what purported to be the facts of the case in the newspapers; that from such reading and what he heard he had formed and expressed some opinion upon the merits, but that it was not fixed and would not influence his verdict if taken as a juror. Under these circumstances there was no reversible error in overruling the challenge. This question has been so often and thoroughly examined by the court that it is unnecessary to do more at this time than refer to the opinions in the following cases: State v. Tom, 8 Oreg. 177; Kumli v. Southern Pac. Co., 21 Oreg. 505, 28 Pac. Rep. 637; State v. Ingram, 23 Oreg. 434, 31 Pac. Rep. 1049; State v. Brown (Oreg.), 41 Pac. Rep. 1042.

The next point made by the defendant is that the court erred in overruling his motion to exclude the jury from the court room during the preliminary hearing before the court as to the competency of a certain alleged confession which the court, after the hearing, refused to admit in evidence, because it was obtained by undue influence and improper inducements held out to the defendant by those in authority. This is a new question here, but we understand the practice in the trial courts has generally been to conduct such examination in the presence of the jury; and, in our opinion, the question as to whether it shall be so conducted or otherwise should be left to the sound discretion of such courts. The competency and admissibility of confessions, like other testimony, is for the court to determine; but when admitted their weight and credibility is for the jury alone, and hence it is necessary that the jury should be put in possession of all the circumstances surrounding the making of an alleged confession to enable them to intelligibly determine the weight and credibility to which it A confession, to be admitted, must have been freely and voluntarily made. When offered in evidence, the question whether it was so made is to be decided primarily by the presiding judge, but his decision is not conclusive upon the jury as to the weight or credibility to be given to such evidence. If, upon the whole testimony, they believe it was not the free and voluntary act of the defendant, they have a right to exclude it entirely in their consideration of the case. Therefore, if the preliminary examination is not held in the presence of the jury, and the court admits the confession in evidence, the whole testimony as to the circumstances under which it was made must be gone over again before the jury; and whether this course should be pursued, or the preliminary examination had in the presence of the jury, in the first instance, may be safely intrusted to the sound discretion of the trial court. Cases may arise, it is true, in which the ends of justice might be best subserved by conducting the examination without the hearing of the jury, but the necessity for such precaution must be left to the enlightened discretion of the presiding judge to determine.

The argument that, if the preliminary hearing is had in the presence of the jury, they will ordinarily learn the nature of the confession, and be influenced thereby in arriving at a verdict, although the court may refuse to admit it in evidence, is based upon an unwarranted assumption of the ignorance and incompetency of the jury. During such an examination they are but silent spectators, who necessarily understand that out of its results something may or may not come before them as evidence, and that, until the court. rules, the question is for its consideration, and not for theirs. In the judgment of the law, juries are deemed capable of that amount of discrimination. It would be impossible to conduct a jury trial on any other principle. In this, as in most other cases where evidence is offered and objected to, it is generally impossible for the court to determine its admissibility without the objection itself, the argument of counsel, or the offer to prove, disclosing to some extent at least its nature; and the law assumes that jurors are competent to disregard whatever is heard at such a time, and not admitted as evidence for their consideration. Experience has shown such to be the case, and upon this assumption the law proceeds. The defendant cites in support of his position Hall v. State, 65 Ga. 36; Ellis v. State, 65 Miss. 44, 3 South. Rep. 188, and Carter v. State, 37 Tex. 362. In the Georgia case what is said upon this question is mere dictum, and the writer of the opinion failed to note a previous decision of the same court (Holsenbake v. State, 45 Ga. 43) where the point was directly made and ruled to the contrary. And in the subsequent cases of Woolfolk v. State, 81 Ga. 551, 8 S. E. Rep. 724, and Fletcher v. State, 90 Ga. 468, 17 S. E. Rep. 100, the court took occasion to so explain the Hall case, and to announce what we conceive to be the true rulethat it is within the discretion of the trial court to say whether the jury shall remain or retire while such preliminary testimony is being taken. In Fletcher v. State, 90 Ga. 468, 17 S. E. Rep. 100, Mr. Chief Justice Bleckley said: "Touching the practice of retiring the jury, the strict letter of Hall v. State, supra, is not good law. Though approved arguendo in McDonald v. State, 72 Ga. 55, it has since been toned down in Woolfolk's Case, 81 Ga. 564, 565, 8 S. E. Rep. 724, and the true rule announced to be that the question whether the jury shall be retired or not is one resting in the sound discretion of the court." In the Mississippi and Texas cases the judgments were reversed upon other points, and the question as to the proper practice in conducting the preliminary examination to determine the admissibility of confessions seems not to have been necessary to a decision in either instance. We have been unable to find that the question has arisen in any of the other States except Ohio, Alabama and Nebraska, and in these the courts have held that the propriety of conducting the

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examination in or out of the presence of the jury must be left to the sound discretion of the trial court. Lefevre v. State (Ohio), 35 N. E. Rep. 52; Mose (a slave) v. State, 36 Ala. 211; Shepherd v. State (Neb.), 47 N. W. Rep. 1118. In this State the rule prevails that such inquiry as to the admissibility of dying declarations may be conducted in the hearing or presence of the jury, or otherwise, as the discretion of the judge may dictate (State v. Shaffer, 23 Oreg. 555, 32 Pac. Rep. 545); and no good reason can be suggested why a different practice should prevail as to confessions.

There being no error in the record, the judgment is affirmed.

NOTE.—In recognition of the difficulty of obtaining jurymen in criminal cases who do not read newspapers, and do not receive impressions from what they read, the legislatures of many of the States have passed laws providing that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state, on oath, that he believes he can render an impartial verdict, according to the law and the evidence. These laws have generally been held constitutional when passed upon by the courts. Spies v. Illinois, 123 U. S. 131; Woolfolk v. State, 85 Ga. 69. The statute of Tennessee, regulating this subject, was held, in Eason v. The State, 6 Baxter, 466, to be unconstitutional. By that statute an opinion formed or expressed touching the guilt or innocence of the accused upon information derived exclusively from a published account of the facts of the offense charged, should not render the juror incompetent, unless the writer of the statement professed to have been a witness of the occurrence, provided the juror would state that he believed he could give the accused a fair and impartial trial upon the law and the evi-There is no provision, as there is in the statutes in other States, requiring the court to be satisfied of the truth of the juror's statement, that notwithstanding his opinion he could give the accused a fair and impartial trial.

The doctrine of the principal case is undoubtedly supplied by the weight of authority. The mere fact that a juror has expressed an opinion as to the gulit or innocence of the accused, when such opinion is based only on rumor or newspaper statements, does not necessarily disqualify him. Smith v. Eames, 3 Scam. (Ill.) 76; Gardner v. The People, 3 Scam. (Ill.) 83; Baxter v. The People, 3 Gilm. 376; Thomas v. The People, 67 N. Y. 220; Reynolds v. The United States, 98 U. S. 145; People v. McGonegal, 126 N. Y. 62; Spies v. Illinois, 123 U. S. 131.

In Reynolds v. The United States, 98 U. S. 145, the court said: "Upon the trial of the issue of fact raised by a challenge to a juror in a criminal case, on the ground that he had formed and expressed an opinion on the issues to be tried, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he ould not, in law, be deemed impartial. The case

must be one in which it is manifest the law left nothing to the conscience or discretion of the court. If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this case, the ground relied on for the reversal by this court of the judgment of the highest court of the State, is that the error complained of is so gross as to amount in law to a denial by the State of trial by an impartial jury to one who is accused of crime. We are unhesitatingly of opinion that no such case is disclosed by this record."

In Gradle v. Hoffman, 105 Ill. 147, the juror challenged stated on his voir dire that he had read an account of the case in the newspapers, but remembered no part of what he had read; that the account made no impression on his mind; that he had no impression and that no evidence would be required to remove one. He further said that if the evidence was equally balanced it would be difficult to decide. This juror was held to be impartial and qualified. So where a juror had heard a part of the evidence in a suit by the same plaintiff against another insurance company, which had just been tried and in which the questions involved were similar to those at issue in the case which the juror was called to try, and it did not appear that he had formed any fixed or decided opinion, it was held that he was qualified. Lycoming Fire Ins. Co. v. Ward, 90 III. 545.

The Illinois Supreme Court, in Coughlin v. The People, 144 Ill. 140, seems to have held contrary to the opinion of the court in the principal case. Where a juror, after expressing a fixed opinion as to the person's guilt based on newspaper accounts, is held by the trial court to be qualified, because the court is satisfied, as the statute requires, that he can render a fair and impartial verdict, such holding was held subject to review. In this case the court said: "In the review of the authorities we have already made, it has sufficiently appeared that, where the opinion of the juror is only slight or transient, or is hypothetical, very considerable reliance is placed upon his statement under oath, that his opinion is not of such character as will interfere with his action as a juror. Indeed, when the opinion is shown to be of that character, such statement is usually one of the most satisfactory tests of the juror's impartiality. But the holding of this and other courts is substantially uniform, that where it is once clearly shown that there exists in the mind of the juror, at the time he is called to the jury box, a fixed and positive opinion as to the merits of the case, or as to the guilt or innocence of the defendant he is called to try, his statement that notwithstanding such opinion he can render a fair and impartial verdict, according to the law and the evidence, has little, if any, tendency to establish his impartiality. This is so because a juror who is shown to have in his mind a fixed and positive opinion as to the guilt or innocence of the accused, is not impartial, as a matter of fact, to say nothing of those legal conclusions which formerly prevail, and which would still prevail, if the statute were not in existence. His statement that he can render a fair and impartial verdict does not tend to show that he is not partial, since it does not tend to show the non-existence of the fixed and decided opin ion to which he has already confessed. It merely tends to show that the juror, while admitting that he has prejudiced the prisoner's case, believes in his ability to act as though he had not done so, or that, while admitting his actual partiality, he believes in his ability to act as though he were impartial. It being constantly kept in mind that the fact to be proved by the juror's answer is that he is impartial, in the constitutional sense of the word, it is difficult to see how, after a juror has avowed a fixed and settled opinion as to the prisoner's guilt, a court can be legally satisfied of the truth of his answer that he can render a fair and impartial verdict, or find therefrom that he has the qualification of impartiality, as required by the constitution."

D. M. MICKEY.

Chicago, Ill.

JETSAM AND FLOTSAM.

WHEN WILL DECRIT LIE ON A BROKEN PROMISE. In a recent Missouri case, Traber v. Hicks, 32 S. W. Rep. 1145, the defendant had contracted with the plaintiff to do a certain thing, without disclosing that a previous contract with a third party prevented performance. The plaintiff brought an action of deceit. The argument that the defendant's wrong was a mere breach of contract was dismissed by the court, and the plaintiff was allowed to recover, on the ground that there was concealment of a material fact, namely, the outstanding agreement with the third party, which it was the defendant's duty to disclose. As the other elements of deceit were present, the case was without doubt rightly decided. It suggests the query as to whether the court would have been willing to go one step further, and hold the defendant liable for deceit if he had not put it out of his power to perform, but had merely intended not to perform, at the time he made the promise.

This question has not often arisen, as generally the simpler remedy is to be obtained in an action of contract. But it becomes material in cases where, for one reason or another, it is either inexpedient or impossible to obtain redress in the latter form of action. What little authority there is on the point is in conflict. The latest treatise on torts contains an assertion to the effect that an action of deceit does not lie for failure to perform a promise, though the promisor never intended to perform, and the promisee has altered his position and suffered damage. 1 Jaggard on Torts, 598. And the view that such an act is not fraudulent has been taken by a few courts. Fenwick v. Grimes, 5 Cranch, C. C. 439; Banque Franco-Egyptienne v. Brown, 34 Fed. Rep. 162, 192. On the other hand, it is generally held that preconceived design in a buyer not to pay for the goods is such fraud as will vitiate the sale. See the exhaustive opinion of Doe, J., in Stewart v. Emerson, 52 N. H. 301. And in other cases a promise made without intent to perform, merely to induce some act on the part of the promisee, has been held fraudulent. Dowd v. Tucker, 41 Conn. 197; Goodwin v. Horne, 60 N. H. 485.

The simple question, apparently, is whether there is any misrepresentation of a present fact. As a promise relates to the future, courts have jumped at the conclusion that there is none. But a promise to do an act in the future certainly carries with it a representation of present intention to perform, just as certainly as the promise in Traber v. Hicks included a representation that the promisor had not put it out of his power to perform. And that a representation of of present intention is a statement of fact has rarely been disputed since Bowen, L. J., declared, in Edgington v. Fitzmaurice, L. R. 29 Ch. Div. 459, that "the state of a man's mind is as much a fact as the state of his digestion." If, then, this misrepresentation of a present fact is accompanied by the other ele-

and the same

ments of deceit, it seems clear on principle that the action should be allowed. See 1 Bigelow on Fraud, 484. Whether or not it would be expedient in practice is quite another question.—Harvard Law Review.

BOOK REVIEWS.

RECOLLECTIONS OF LORD COLERIDGE.

We have found great pleasure in the reading of this brochure written by Hon. William P. Fishback. It is the outgrowth of a visit to England made by that gentleman in 1891. Bearing with him a letter of introduction from Mr. Justice Harlan to Lord Coleridge he was enabled to see and take part in much of the official and private life of that remarkable man. He was admitted into his family circle, sat with him on the bench, and traveled with him on the circuit. He tells of those experiences in a conversational manner, and in a style that is delightful. The professional reader will find much to interest him in what is told of the official life and doings of Lord Coleridge, and all classes of readers will take pleasure in the charming pictures of his home life. The book is printed on handsome uncut hand-made paper, and is bound in ornamental cloth with the Coleridge crest on the cover. Published by Bowen-Merrill Company, Indianapolis and Kansas City.

AMERICAN STATE REPORTS, Vol. 45.

This, the latest volume of a well-known and popular series of selected reports, contains many cases of special value and a number of exhaustive and well prepared annotations. We call attention particularly to the cases of In re Philbrook (Cal.), which, together with a long annotation, discusses the important subject of grounds of disbarment of attorneys; Orvis v. Park Commissioners (Iowa), on subject of Municipal Indebtedness; Barnes v. Hekla Fire Ins. Co. (Minn.), wherein the authorities on subject of contract of reinsurance are collected; Shim's Estate (Penn.), on the Power and Duty of Administrator or Executor as to Property Outside of State; Conover v. Hull (Wash.), on the vexatious and unsettled subject of preference by Insolvent Corporations. The American State Reports are invaluable to the practitioner. Published by Bancroft-Whitney Co. San Francisco.

GENERAL DIGEST, VOL. 10.

This is a digest of all the decisions of the principal courts in the United States, England and Canada, rendered during the year ending September, 1895. It refers to all current reports, State and national, a feature which makes it of especial value. It is the Annual Vol. X. We have taken occasion heretofore to speak of this digest as being admirable in style and arrangement and accurate in statements and citations. There is nothing to criticise in its arrangement of subjects and subheads. It is a volume of nearly three thousand pages, contains a table of cases digested, also a table of cases criticised, and is well printed and bound. Published by the Lawyers' Co operative Publishing Co. Rochester, N. Y.

JAGGARD ON TORTS.

The author of this work modestly calls his production a "Handbook of the Law of Torts." Even a cursory examination of the contents of the two large volumes will reveal that it partakes more of the nature of an exhaustive treatise than a handbook. The plan adopted is, as the author admits, that of Sir Frederick Pollock, the key-note to whose splendid word on

torts, was expressed by him in the following lauguage: "The purpose of this book is to show that there is really a law of torts,—not merely a number of rules about various kinds of torts, that there is a true living branch of the common law, and not a collection of heterogeneous instances." He accordingly divided his discussion into two parts: 1st, the general part containing principles common to all or most torts, and 2d, specific wrongs. Mr. Jaggard, following in this line has, as he says, extended it "by making the discussion of specific wrongs more an illustration and development of the principles stated in the general text than a mere isolated exposition of rulings as to specific wrongs. To this end the various wrongs are compared and contrasted one with another. The thread of relationship of contract and tort for example, considered in the general part, is traced throughout. It is discussed under the title of negligence in a general way, and is then amplified in detail in the discussion of the liability of the master to his servant, and under the title of Common Carriers. It is endeavored to bring out, without slavish devotion to the phrase, the idea that, while a contract is based on consent, a tort inheres in relation. Under this general plan the author first treats of the general nature of torts, then of variations in the normal right to sue, then of liability for torts committed by or with others, then of discharge and limitation of liability for torts, finally of remedies. He then enters the discussion of specific wrongs, and lays down the rules of law governing wrongs affecting the safety and freedom of person, of injuries in family relations, of wrongs affecting reputation, of malicious wrongs, of wrongs to possession and property, nuisance, negligence, master and servant, and common carriers. 'A careful examination and study of this work has profoundly impressed us with its logical construction, its admirable style, its accurate presentation of the doctrines of law, as disclosed by the authorities and the diligence of the author in the compilation of cases cited. In our judgment it will take a prominent place in the law literature of this country. Its author is a professor of torts in the Minnesota Law School and well qualified for the task undertaken by him. It is in the shape of two handsome volumes and is published by West Publishing Co., St. Paul, Minn.

CORRESPONDENCE.

EJECTMENT-DIVORCE.

In answer to J. C. M. in correspondence in Cent. L. J. of Vol. 42, p. 78, I will say that the wife now has whatever interest in and right to the property occupied by her that she had prior to her husband's obtaining a divorce in Nebraska; just what that interest and right may be and how far the same may be available as a defense in an action of ejectment will depend upon the statutory provisions of the State of Missouri with which I am not at all familiar. The ides here intended to be conveyed is this: That the divorce granted the husband in Nebraska does not alter the status of the wife in Missouri for the reason that she was never in the jurisdiction of the Nebraska court, and the action of that court was therefore a nullity in so far as she is concerned. See case of The People v. Baker, 76 N. Y. page 78, and cases there cited. It then follows as a necessary consequence that any interest she may have had in the property in Missouri has been in no way affected by the action of Missouri has been in no way amount in the Nebraska court in the divorce proceeding.
H. C. S.

BOOKS RECEIVED.

Handbook on the Construction and Interpretation of the Laws, With a Chapter on the Interpretation of Judicial Decisions and the Doctrine of Precedents. By Henry Campbell Black, M. A. Author of "Black's Law Dictionary" and of Treatises on Judgments, Tax Titles, Constitutional Law, etc. St. Paul, Minn.: West Publishing Co. 1896.

The American State Reports, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Free-man and the Associate Editors of the "American Decisions." Vol. XLVI. San Francisco: Ban-croft-Whitney Company, Law Publishers and Law Booksellers. 1895.

The General Principles of the American Law of the Sale of Goods, in the Form of Rules with Comments and Illustrations, Containing also the English "Sale of Goods Act." By Reuben M. Benjamin, Author of "Principles of Contract," Professor in the Bloomington Law School. Indianapolis and Kansas City: The Bowen-Merrill Company. 1896.

HUMORS OF THE LAW.

What crime involves the least risk? A safe burglary.

Why are oysters poor lawyers? Because they lose all their cases as soon as they come to the bar.

A prisoner was in the dock on the serious charge of stealing, and the case having been presented to the court by the prosecuting solicitor, he was ordered to stand up.

"Have you a lawyer," asked the court?

"No, sir." "Are you able to employ one?"

"No. sir."

"Do you want a lawyer to defend the case?"

"Not partickler, sir."

"Well, what do you propose to do about the case? "We-ll-ll, with a yawn, as if weary of the thing, "I'm willin' to drop the case, far's I'm concerned."

An old Chicago lawyer tells of a case he once had which he didn't keep. An old Irish woman sent for him in great haste one day. She wanted him to meet her in the criminal court. He hastened to the court house all out of breath. The woman's son was about to be placed on trial for burglary. When the lawyer entered the court-room the old woman rushed up to him and in an excited voice said:

"Mr. B---, Oi want ye to git a continyuance for me b'y, Jimmie.''

"Very well, madam," replied the lawyer. "I will do so if I can, but it will be necessary to present to the court some grounds for a continuance. What shall I say?"

"Shure, ye can jist tell the court Oi want a continyuance till Oi can git a better lawyer to try the case."

The lawyer nearly fainted when he heard this, and after telling the old woman that she would have to get another lawyer to get the continuance, he hurried back to his office a very angry man.

WEEKLY DIGEST

of ALL the Current Opinions of ALL the State and Tecritorial Courts of Last Resert, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Fail or Commented upon in our Notes of Econol Decisions.

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- 1. ACCOUNTING—Stipulation.—Where complainant in a sulf for an accounting stipulates that, in consideration of his release from all liabilities, he will receipt to defendant for a certain sum, and he, being so released, gives such receipt, he cannot compel defendant to account for any part of the amount so receipted for merely because defendant obtained the release of the liabilities at less than their face value.—PETRIE v. TORRENT, Mich., 63 N. W. Rep. 557.
- 2. ADMINISTRATION—Claim's against Decedent's Estate.—When the claim against the estate of a deceased person is filed with the probate court, and is one over which such court has jurisdiction, the admissions of the administratrix of the estate that she would pay such claim, and that she did in fact make part payment thereof, are inadmissible to show the existence or validity of such claim.—IN RE HOFF'S ESTATE, Minn., 65 N. W. Rep. 464.
- 2. ADMINISTRATION Executors Settlement of Account.—Under Gode Civ. Proc. § 1618, providing for allowance to executors of commissions on the amount of the estate "accounted for," an executor should not be allowed commissions for the care of land in the possession of decedent at his death, but for the recovery of which a judgment has been rendered in favor of a third person, though at the time of the settlement of the executor's account an appeal is pending from such judgment.—In RE DELANEY'S ESTATE, Cal., 42 Pac. Rep.
- 4. APPEAL—Objections by Appellee.—Plaintiff alone having appealed from a decree reforming an instrument, defendant cannot complain of failure to allege or prove a mutual mistake on which to found the decree.—Thornton v. Krimbbel, Oreg., 42 Pac. Rep. 995.
- 5. Assignment Consideration.—An assignee of a chose in action, to recover thereon, need not show that there was any consideration for the assignment, though he alleges that it was "sold" and assigned to him.—Grecoire v. Rourke, Oreg., 42 Pac. Rep. 996.
- 6. ASSIGNMENT FOR OREDITORS.—An agreement between an insolvent and some of his creditors and a third person, in consideration of extension of time to pey the claims, that, till termination of the agreement, such person shall be the financial agent, representing the parties, to collect and receive the proceeds

- of all sales of the product of debtor's factory, debtor otherwise to have the sole management of the factory, the proceeds, after payment of certain claims and future wages, including a certain amount to the debtor, to be applied by the agent pro rata on the claims of the contracting creditors, the agent, in case the debtor failed to carry out the contract, being authorized to take possession of all the material, manufactured or unmanufactured, and dispose of and apply it in accordance with the agreement, it to continue in force six months, subject to be renewed by the agent and debtor, provided that the debtor may at any time pay up the indebtedness, and be released from the agreement, the agent also being authorized to terminate it if the earnings of the factory do not pay expenses—is an assignment for creditors, which, not being made in accordance with the statutes, is void.—JAMESON V. MAXCY, Wis., 65 N. W. Rep. 492.
- 7. Assumpsit Common Count Amendments.—A declaration containing merely common counts cannot, after the expiration of the statute of limitations, be amended so as to authorize recovery for breach of a special contract which could not have been proven under the common counts.—FLINT & P. M. R. Co. v. Donovan, Mich., 65 N. W. Rep. 583.
- 8. ATTACHMENT Contract Indebtedness. Under Gen. 8t. 1888, § 2000, declaring that if a creditor make affidavit that defendant is indebted to him "on a contract, express or implied, stating the amount of such indebtedness, as near as may be," and allege that defendant is a non-resident, attachment shall issue, one having cause of action for breach of contract to sell and deliver merchandise is entitled to an attachment. —HIMANY. NEWELL, Colo., 42 Pac. Rep. 1016.
- 9. ATTACHMENT—Levy.—How. Ann. St. § 6840, et seq., provide, in regard to attachments, that the officer levying the attachment shall serve a copy of the inventory of the property seized on defendant, if he can be found within the county, and, if not that a copy of the inventory shall be left at the place of residence of defendant, if there be such place within the county. Held, that the officer levying the attachment must also serve the copy of the inventory on defendant. Service of such copy, by any other officer does not give the court jurisdiction.—CARY v. EVERETT, Mich., 65 N. W. Rep. 566.
- 10. ATTACHMENT Priority Contract by Agent.—Where a party claiming to act as the authorized agent of an Ohio firm undertakes in Louisiana to enter into, and does enter into, an absolute, present contract of sale for a certain number of goods of a particular kind and description for a fixed price on credit, and there being no goods of the firm of that kind in Louisiana at that time, the party acting for the firm notifies it of the sale, and instructs it to ship and deliver the goods to the purchaser under the contract, and the same has been done accordingly, the firm is entitled to a vendor's privilege to secure the payment of the unpaid price as resulting from a Louisiana contract.—Erman v. Lehman, La., 18 South. Rep. 680.
- 11. BAILMENT OR SALE.—Evidence considered, and held to justify the findings of fact that certain transactions constituted sales, and not bailments, and that an other transaction constituted a bailment, and not a sale; also, that the facts found justified the conclusions of law except in one particular, as to which the conclusion of law and order for judgment is modified.—WEILAND V. SUNWALL, Minn., 65 N. W. Rep. 628.
- 12. Bank—Collection of Check—Conversion.—Where the payee of a check deposited the same with a bank for collection, and said bank sent it for collection to defendant, and defendant received from the bank upon which the check was drawn a draft in payment thereof, defendant is not liable to the payee for the conversion of said draft, in the absence of a demand therefor, and neither a telegram sent to defendant by the drawer of the check, instructing defendant to hold the draft, nor an inquiry by the bank upon which the check was drawn as to whether defendant could hold the draft, is

a sufficient demand on behalf of said payee.—Castle v. Corn Exch. Bank, N. Y., 42 N. E. Rep. 518.

18. Bankruptcy—Unproved Debt.—A creditor who has not proved his debt in bankruptcy has still, after discharge of the debtor, a subsisting demand, as creditor, against him to the extent of his debt, which he is entitled to have paid out of the proceeds of a policy of insurance on the life of the debtor, assigned to him by the debtor and the beneficiary therein, to secure his "demands subsisting," "as creditor," against such debtor.—Champion v. Buckingham, Mass., 42 N. E. Rep. 498.

14. Carriers — Ejection of Passenger.—Damages.— In an action for wrongful ejection from a railroad train, personal "inconvenience" and "loss of time" are proper elements of damages.—Borem v. Dulluth, S. S. & A. RY. Co., Wis., 65 N. W. Rep. 506.

15. Carriers—Embezzlement by Agent.—Where the agent of an express company induces, by fraud, a bank to ship money to a fictitious firm, which is embezzled by the agent, the company is liable to the bank therefor as for money had and received.—SOUTHERN EXP. CO. V. BANK OF TUPELO, Miss., 13 South. Rep. 664.

16. CARRIERS — Express Companies.—Where an express company establishes limits in a city, beyond which it will not call for or deliver packages, it is not liable for refusing to call for or deliver packages at the store of one who, knowing of the limits, moved his store outside thereof, though the limits established in another direction were further from the company's office than such store.—BULLARD v. AMERICAN EXP. Co., Mich., 65 N. W. Rep. 551.

17. CARRIERS—Liability to Passengers or Shippers.—The liabilities of a carrier of passengers or freight, who has entered into contract relations with passengers or shippers, depend not only on his contract, but also, in part, on the obligations imposed by law, as a matter of public policy, and an action may be brought against the carrier, either upon the contract, or for negligent omission of a duty imposed by law, independently of the contract, or for an injury done to person or property as the case may be.—CENTRAL TRUST CO. V. EAST TENNESSEE V. & G. RY. CO., U. S. D. C. (Tenn.), 70 Fed. Rep. 764.

18. Carriers — Live Stock Shipments — Waiver.—In the absence of knowledge brought home to the defendant, or of anything tending to show that contracts under which certain witnesses had, in isolated cases, shipped live stock over portions of defendant's raliway, provided that "it is agreed and understood that such owner and shipper shall feed, water, and take care of such stock at his own expense and risk," and "persons in charge of live stock, who are passed on trains with it, are so passed to take care of the stock, and must ride in the caboose attached to the train," the mere fact that they had ridden in the car with their stock is no evidence of a waiver of such stipulation, when freely entered into and acted upon by the shipper.—Hedurphreus v. Fremont, E. & M. V. R. Co., S. Dak., 65 N. W. Rep. 466.

19. Carriers Of Goods — Connecting Carriers. — The defendant the last of several connecting common carriers, delivered the goods, at their destination, to a person other than the consignee, by reason of wrong directions given him by one of the prior connecting carriers, without the authority of either the consignor or consignee, and without the surrender of the bill of lading issued by the initial carrier: Held, such prior carrier did not have apparent authority so to order the goods delivered to such third person, and the defendant is liable for conversion of the goods.— Foy F. Chicago, M. & St. P. Ry. Co., Minn., 65 N. W. Rep. 637.

20. Carriers of Goods — Negligence — Burden of Proof.—If the acceptance of goods for transportation by a common carrier be special, the burden of proof in case of loss is upon him to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence

or want of due care.—Shea v. Minneapolis, St. P. & S. S. M. Ry. Co., Minn., 65 N. W. Rep. 459.

21. CHATTEL MORTGAGES — Priorities.—In an action between two parties claiming property under chattel mortgages from different persons, the court properly refused to direct a verdict for defendant on the ground that plaintiff's mortgage was not on file when defendant extended credit to its mortgagor; it appearing that plaintiff's mortgagor was the owner of the property when plaintiff's mortgage was given, and the evidence not being conclusive that defendant's mortgagor ever succeeded to the rights in the property of plaintiff's mortgagor.—First NAT. BARE OF MANISTEE V. MARSHALL & ILSLEY BANK OF MILWAUKEE, Mich., 60 N. W. Rep. 604.

22. Constable—Liability for Proceeds of Property Sold.—Where a constable sells property under execution, issues his certificate of purchase, and fails to collect a portion of the price, he and his surties are liable for the entire amount for which the property was sold.—MEHERIN V. SAUNDERS, Cal., 42 Pac. Rep. 966.

23. CONSTITUTIONAL LAW—Arrest of Debt.—2 How. 8tch. 804, authorizing the imprisonment of a debtor who has assigned, or disposed of, or is about to dispose of, his property with intent to defraud his creditors, is not in conflict with Const. art. 6, § 33, providing that no person shall be imprisoned for debt founded on contract, except in cases of fraud.—DUMMER v. NUMGESEER, Mich., 65 N. W. Rep. 565.

24. CONTRACTS — Consideration.—Where an assignment of a judgment belonging to a bank is made by one of its officers, in its name, to an individual, who, in consideration thereof, transfers property to the bank officer, such transfer constitutes a valid consideration moving to the bank, since a trust results in its favor as to the property transferred to its officer.—Cox v. Robinson, U. S. C. C. (Wash.), 70 Fed. Rep. 760.

25. Contract — Construction.—Plaintiff had piled a quantity of lumber for the classes known as "C select and better," and "shop and flat," and defendant's agent, after inspecting the lumber, wanted to buy some on grades, but plaintiff declined to sell except on "pile run." After two cars then ordered had been received, defendant made a contract for a quantity describing it as "piled for C select and better," and "piled for shop and flat," "it being understood that worthless cull lumber is not to be accepted:" Held, that the contract called for the lumber as piled in plaintiff's yard, and not according to the grades stated.—T. B SCOTT LUMBER CO. V. HAFNER-LOTHMAN MANUF'G CO., Wis., 65 N. W. Rep. 518.

26. CONTRACT — Ejection of Passenger.—A passenger who has had mileage taken from his book by the conductor for his entire trip, but who, at an intermediate station, changes his seat, cannot recover for being ejected on his refusal to pay when fare was afterwards demanded; he having simply said he had paid his fare, and, on being asked where to, tôld the conductor that he ought to know; that it was his business to know,—language which on, a former occasion the conductor had used to him,—and having, when the conductor, for the first time recognizing him, asked him to get on again, refused to do so, with the statement that he would fix him.—White v. Grand Bayids & I. R. Co., Mich., 65 N. W. Rep. 521.

27. CORPORATIONS — Dissolution.—A judgment rendered in Illinois against a New York corporation, after it had been dissolved, is void, and neither the principle of comity nor the constitution of the United States, requiring full faith and credit to be given to judgments of other States, requires the courts of New York to give effect to such judgment, though by the laws of Illinois the judgment is valid therein.—RODOERS V. ADRIATIC FIRE IMS. CO., N. Y., 42 N. E. Rep. 515.

28. CORPORATIONS—Liability against Stockholders.—Act No. 141, Laws 1877,—a general law applicable to all corporations, prescribing procedure for enforcing liability of stockholders,—is not repealed or in any way



abrogated by Act No. 252, Laws 1885, declaring that stockholders of corporations "organized under this act shall be individually liable for all labor performed for such corporations, which said liability may be enforced against any stockholder by action founded on this statute;" the repealing clause referring merely to two other acts, and "all acts amendatory or supplemental" to them.—MUSSELMAN v. WRIGHT, Mich., 65 N. W. Rep. 569.

29. CORPORATION—Liability of Stockholders—Kansas Statute.—A statute of Kansas, enacted pursuant to a requirement of the constitution of the State, provides that, if any execution against the property of a corporation shall be returned unsatisfied, execution may be issued against the property of any stockholder for an amount equal to the stock held by him, upon an order of the court in which the suit was brought, made after notice to the stockholder, or that the creditor may proceed by action to charge the stockholder: Held, that the liability created by such statute of Kansas is enforceable by action in a federal court sitting in another State.—MCVICKAR V. JONES, U. S. C. C. (N. H.), 70 Fed. Red. 754.

30. CORPORATIONS — Reorganization — Contracts.—
Where a corporation transfers all its property, rights, and franchises to a new company incorporated with the same stockholders and directors as the old, and the new corporation adopts the contracts and assumes the liabilities of the old, the merger of the old into the new corporation creates a novation of the debts of the old company, though the creditors have not assented to the change.—FRIEDENWALD CO. v. ASHEVILLE TOBACCO WORKS & CIGARETTE CO., N. Car., 23 S. E. Rep. 450.

31. CORPORATION — Stock — Contract.— Defendants, the organizers of a corporation, issued to themselves the stock as fully paid, and guarantied to subsequent holders that the stock should be "non-assessable." At the time stockholders were, by statute, liable for the debts of the corporation, in addition to their stock, to an amount equal to their stock, the liability to be enforced by a creditor of the corporation in behalf of all creditors, in an action against all the stockholders, in which the amount payable by each stockholder should be determined: Held, that defendants were liable to a subsequent owner of the stock for the sum he was required to pay to creditors of the corporation not only on account of his stock not having been paid up, but also due to the extra statutory liability.—Omo v. Bernart, Mich., 65 N. W. Rep. 622.

33. CORPORATIONS — Stockholder's Liability.—How. Ann. St. § 4161, ch. 8, making stockholders of manufacturing corporations "individually liable for all labor performed for such corporations," which liability may be enforced against any stockholder at any time after execution against the corporation is returned unsatisfied, does not make a stockholder liable for labor performed before he became a stockholder.—KAMP V. WINTERMUTE, Mich., 65 N. W. Rep. 570.

23. CORPORATION — Subscriptions to Stock — Limitations.—How. Ann. St. ch. 282, relating to the voluntary dissolution of corporations and the appointment of receivers therefor, in section 12 provides that, if there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver shall immediately proceed to recover the same: Held, that the statute of limitations begins to run against the sum remaining due immediately upon the appaintment of the receiver, and not upon demand therefor.—Webber v. Hovey, Mich., 65 N. W. Rep.

M. CORPORATION — Unpaid Subscriptions—Defenses.—Is an action by an assignee for the benefit of crediters—ander the insolvency laws of this State—of a corporation duly organized under the laws of the State, to resover from a stockholder and former director of the ecrporation, the amount of his unpaid stock subscription, if it is not a defense that the real purpose of the organization of the corporation was to foster

gambling and the selling of pools on horse racing, and that the stock subscription was secured to further such purpose.—AUGIR V. RYAN, Minn., 65 N. W. Rep. 640.

35. Costs-Who Liable.-In its answer herein, defendant admitted the plaintiff's cause of action as alleged in the complaint, and offered in broad and explicit terms, that judgment might be entered against it for the relief plaintiff was entitled to under the allegations in said complaint, with all costs and disbursements. The answer then contained allegations of wholly irrelevant new matter and asked for affirmative relief. The reply put the new matter in issue, and the question involved was voluntarily litigated by plaintiff on a trial before the court without a jury. As to the new matter, the defendant was in all respects the prevailing party, and was granted the affirmative relief demanded in the answer: Held, that it was error for the trial court to order judgment to be entered against the defendant for plaintiff's costs and disbursements .- HARBO V. BOARD OF COM'RS OF BLUE EARTH COUNTY, Minn., 65 N. W. Rep. 457.

86. COUNTY TREASURERS — Purchase of Tax Certificates.—Where a new county was formed out of part of an old one holding tax certificates, and under the act creating the new county the tax certificates were assigned to it, the treasurer of the old county was not, by Sanb. & B. Ann. St. § 1145, prohibited from purchasing the certificates from the new county.—Gilbert v. Dutreut, Wis., 65 N. W. Rep. 511.

87. CRIMINAL LAW — Abortion.—To constitute abor-

87. CRIMINAL LAW — Abortion.—To constitute abortion, it is not necessary that the fostus should have had vitality, so that in the course of nature it could mature into a living child.—COMMONWEALTH V. SURLES, Mass., 42 N. E. Rep. 502.

89. CRIMINAL LAW — Burglary—Indictment.—An indictment for burglary may be laid as at common law, without referring to the special facts so as to bring it within one of the different degrees of punishment provided by statute for burglary.—PEOPLE V. SHAVER, Mich., 65 N. W. Rep. 588.

89. CRIMINAL LAW — Homicide — Instructions.—Act Feb. 11, 1893 (Acts 1898, p. 76, §§ 1, 2, 8, divide murder into murder in the first degree and murder in the second degree, prescribe the acts constituting murder in the first degree, and provide that all other murder is murder in the second degree; "but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree:" Held, that it is error to instruct the jury that if they believe the evidence the defendant is guilty of murder in the first degree, though defendant offers no evidence, and all the evidence for the State tends to show only murder in the first degree.—STATE v. GADBERRY, N. Car., 28 S. E. Rep. 477.

40. CRIMINAL LAW-Murder-Self-defense.—It was error to charge that defendant was guilty if he armed himself for the purpose of killing deceased, and hunted up deceased for that purpose, without referring to his testimony, which was corroborated, and not contradicted, that he had the gun with which he killed deceased with him merely for hunting deer, and that his stop at the house at which the killing occurred was accidental.—ALLISON v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 252.

41. ORIMINAL LAW—Rape—Effect of Consent.—Uffder St. 1993, ch. 466, one who has carnal knowledge of a girl under 16 years of age is guilty of rape, even if she gives her full consent.—Commonwealth v. Murphy, Mass., 42 N. E. Rep. 504.

42. CRIMINAL LAW — Receiving Stolen Goods.—On a trial for receiving goods consisting of eigars and to-bacco, evidence that stolen dry goods were also found in defendant's possession is admissible, where there are admissions by defendant that all the goods were received from the same persons, at the same time, though defendant testified that he received them from different persons, at different times.—Prople v. Mc Clure, N.Y., 42 N. E. Rep. 528.

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- 43. CRIMINAL LAW Venue Presumption.—Code, § 1194, provides that it shall be presumed that the offense was committed within the county in which the indictment charges it to have been committed: Held, that where the indictment charged an offense in a certain county, but there was no evidence of venue, the presumption is that it was committed in the State.—STATE V. LYTLE, N. Car., 23 S. E. Rep. 476.
- 44. DESCENT-Next of Kin.—Civ. Code, § 1886, subd. 6, provides that, if decedent leave neither issue, wife, father, mother, brother, or sister, the estate shall go to the next of kin in equal degrees. Section 1394 provides that kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by devise of one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance: Held that, where decedent inherited his estate from his father, the sisters and brothers of his deceased mother shared equally with those of his father.—IN RE PEARSONS' ESTATE, Cal., 42 Pac. Rep. 960.
- 45. DIVORCE—Custody of Children.—Where a divorce was granted to a wife on the ground of extreme cruelty, it was proper to award her the custody of the children under 14 years of age, and to allow the others to elect which parent they would live with.—Horning v. Horning, Mich., 65 N. W. Rep. 555.
- 46. DIVORCE Liability for Support of Children.— Where the Supreme Court granting a divorce was authorized by Pub. St. ch. 167, § 23, to modify on application, its orders concerning the custody and support of the minor children, a woman who has been granted a divorce and the custody of the children, without any provision for their maintenance, cannot, on the death of the husband, recover from his estate for the board of the children.—Brown v. Smith, R. I., 33 Atl. Rep. 466.
- 47. DIVORCE—Validity of Marriage.—A marriage consummated between the plaintiff in a divorce suit and a third person 16 days after the decree of divorce was entered, but after the said decree became final, will not be pronounced void simply upon the ground that the statute declares that it shall be unlawful for either party to such suit to marry until the expiration of six months from the entry of the decree of divorce.—Conn v. Conn, Kan., 42 Pac. Rep. 1006.
- 48. EJECTMENT Title to Support—Public Lands.—Under Rev. St. U. S. § 2269, providing for the issuance of the patent to the heirs of a pre-emptor dying without having consummated his claim, the grantee of such a pre-emptor cannot, in ejectment, recover from the heirs to whom the patent is issued.—TENNESSEE COAL, IRON & RAILROAD CO. v. TUTWILER, Aia., 18 South. Rep. 668.
- 49. ELECTION OF REMEDIES.—On the insolvency of the buyer, the fact that the seller sues out a writ to replevin the goods sold, where he discontinues the proceeding without trial, and pays the trustee of the insolvent the value of the goods replevied, does not estop the seller from claiming from the insolvent's estate payment for such goods.—Bolton Mines Co. v. Stoker, Md., 38 Atl. Esp. 491.
- 50. EMINENT DOMAIN Damages. In an action against a railroad company for the unauthorized appropriation of land, the measure of damages is the market value of the land taken at the time it was entered, and the damage to the remainder of the tract from the appropriation.—GREELEY, S. L. & P. RY. Co. V. YOUNT, Colo., 42 Pac. Rep. 1023.
- 51. EMNNENT DOMAIN Legislative Authority.—Express legislative power is necessary to authorize the condemnation of private property for public use, and statutes claimed to confer such power must be strictly construed.—UNITED STATES V. RAUERS, U. S. D. C. (Ga.), 70 Fed. Rep. 748.
- 52. EQUITY—Suit between Non-residents.—A bill by a resident of New Hampshire to have a simple contract

- claim against a resident of Pennsylvania satisfied out of his interest in a partnership, the assets of which, with few exceptions, are in Pennsylvania, where its principal business is carried on, and where one of the other two partners lives, should be dismissed, it appearing that complete justice cannot be done in Massachusetts, that the amount involved is small, that the defendants will be subjected to great and unnecessary expense and inconvenience, and that many and great difficulties surrounding the investigation will be avoided, without especial hardship to plaintiff, if suit be brought where the debtor defendant lives and where personal service can be had on him.—NATIONAL TELEPHONE MANUE'S CO. v. DUBOIS, Mass., 42 N. E. Rep. 510.
- 58. ESTOPPEL Acquiescence.—Where the seller of property, sold to a dealer therein on condition that the title shall not pass unless notes given for the purchase price are paid, stands by and permits the buyer to sell the property to an innocent purchaser, without disclosing his lien for the purchase price, he is estopped to afterwards assert his lien.—MILLER v. Ross, Mich., 65 N. W. Rep. 562.
- 54. ESTOPPEL—In Pais.—The fact that a married woman, a sole trader, does business under the name "Smith & Co.," and that, in ordering goods, she and her son, who managed the business for her, used the expression "we," and that she, when asked by the salesman selling her the goods who her partners were, auswered that "my creditors are my partners," and, when asked why she did business in that name, answered "That is my business," as a matter of law, does not estop her to deny that she was doing business as a partnership, so as to enable her to claim personal exemptions in the property used in the business.—SMITH V. BROWS, Ariz., 42 Pac. Rep. 949.
- 55. EVIDENCE—Declarations of Wife.—On a trial of right of property between a wife and an execution creditor of her husband, declarations of the wife, claiming title by sale from the husband made prior to the execution levy, wherever made, are admissible as part of the res gestæ.—LARKIN V. BATY, Ala., 18 South. Red. 666.
- 56. EXECUTION—Return.—Though a sheriff's return is dated Sunday, it may be shown by the cierk's entry and the indorsement on the writ that the return was made the Saturday preceding.—McCOMBER V. WRIGHT, Mich., 65 N. W. Rep. 510.
- 57. FEDERAL COURTS—Jurisdiction—Enjoining Criminal Proceedings.—A federal court has no jurisdiction in equity to enjoin State, police and judicial officials from commencing or prosecuting criminal proceedings in the courts of the State, under the laws thereof, though such laws are alleged to be in violation of the constitution of the United States.—RHODES & JACOBS MFG. CO. Y. STATE OF NEW HAMPSHIRE, U. S. C. C. (N. H.), 79 Fed. Rep. 721.
- 58. FRAUDULENT CONVEYANCE.—The conveyance by a debter of all his real and personal estate to a trustee, to be held in trust, with directions to pay a claim which the trustee himself held against the grantor, and also the claims of certain other creditors, out of the rents and profits and out of the proceeds of the sale thereof by the trustee, but which sale cannot be made without the consent in writing of the grantor, will be set aside as fraudulent at the instance of judgment oreditors, who have not been provided for in such conveyance, because it hinders and delays them in the collection of their just demands; but such conveyance will be sustained so far as it provides a security for trust moneys in the hands of the grantor, which may be enforced by cross-bill.—RICHEY V. CARPENTEE, N. J., 33 Atl. Rep. 472.
- 59. GARNISHMENT—Payment as Defense.—In garnishment, plaintiff having alleged a sale by defendant to garnishee shortly before commencement of the proceedings, garnishee, who relies on payment as a defense, has the burden of proof.—WILLIS v. HOLMES, Oreg., 42 Pac. Rep. 989.

- 60. HIGHWAY—Establishment.—Members of a township board, who heard a proceeding to establish a highway on the merits, and decided the necessity for the highway, and swarded damages, were disqualified to sit on the hearing of a subsequent proceeding to establish the same highway, after the quashing of the former proceeding.—LOCKE V. HIGHWAY COMMISSIONER OF WIOMING TP., Mich., 65 N. W. Rep. 558.
- 61. HOMESTEAD—Allotment to Widow and Children.—Where a homestead is assigned to the widow and minor children of decedent, the provision for the widow will be deemed surplusage.—FORMEYDUVAL V. BOCKWELL, N. Car., 28 S. E. Rep. 488.
- 62. INJUNCTION—Preliminary Injunction.—A preliminary injunction will not issue where complainant's right thereto rests upon an unsettled question of law.—NEWARK & H. R. CO. V. NEW JERSEY TRACTION CO., N. J., 33 Atl. Rep. 475.
- 63. INSURANCE—Notice of Loss—Authority of Agent.—The local agents of the insurance company who issued the policy had authority to accept applications for insurance, to fix the rate of insurance, fill up, countersign and issue the policies (which they received from the company, signed by its general officers,, and collect the premiums. There was no evidence that they were clothed with any apparent authority other or greater than their actual authority: Held, that it was not within the scope of their authority to accept or waive notice of loss.—Ermbergaut v. Girard Fire & Marine Ims. Co. of Philadelphia, Minn., 65 N. W. Rep. 685.
- 64. INTOXIGATING LIQUORS Liquor License Payment.—Though Rev. St. § 1549, providing that a liquor license shall not be issued till the license fee is paid, does not require that the fee shall accompany the application, one who, on applying for a license, pays a portion of the fee, and opens his saloon, cannot, on a license being denied and his saloon closed because of his failure to pay the balance, recover the amount paid.—HAGUE v. OITY OF ASHLAND Wis., 65 N. W. Bep. 568.
- 65. ISTOXICATING LIQUORS—Maintenance by Wife of Liquor Nuisance.—Where a wife kept in her husband's house liquors for sale in violation of law, the husband is liable for maintaining a liquor nuisance, if he had knowledge of the fact of her intent, unless he used reasonable means to prevent her from carrying out such intent.—COMMONWEALTH v. WALSH, Mass., 42 N. E. Rep. 500.
- 66. JUDGMENT BY DEFAULT.—Where three persons are seed as partners, and judgment is asked "against said defendants," and two of them suffer default, and the other answers denying that he was a member of the firm, judgment may be entered against those in default, though it is rendered in favor of the other, under Code Civ. Proc. § 578, providing that judgment may be given for or against one or more of several defendants.—Balley Loan Co. v. Hall, Cal., 42 Pac. Rep. 962.
- 67. LANDLORD AND TENANT—Assignment of Lessee's Covenant.—A covenant by two lessees not to assign the lesse, or permit an assignment thereof to be made, by bankruptcy or otherwise, for breach of which the lessor retained the right of re-entry, was not broken by an assignment of the undivided half interest of ones of said lessees to his assignee in insolvency.—RANDOL 7. Scott, Cal., 42 Pac. Rep. 976.
- 68. Libel—Evidence.—In a prosecution for libel on a candidate for public office, the evidence upon which the publication was made is admissible to rebut malice.

 —Prople v. Glassman, Utah, 42 Pac. Rep. 956.
- 69. Libble—Privileged Communications—Public Office. —A publication by a newspaper of the fact that certain persons had refused to sign the official bond of a preceding county treasurer, if plaintiff, who was at the time a nominee for the office, was appointed his deputy, with the comment that such persons did not wish to be held in any way responsible for the public funds if plaintiff had any share in the handling of them, as a

- matter of law, is not libelous.—DUNNEBACKE v. TRIB-UNE PRINTING Co., Mich., 65 N. W. Rep. 583.
- 70. LIFE INSURANCE—Conditions—Evidence.—In an action on a life insurance policy conditioned on insured being in good health at the time of the delivery of the policy, it appeared the policy was delivered on Tuesday; that on the preceding Saturday night insured was not feeling well, and took medicine; on Monday she had some disturbance of the bowels; on Tuesday and Wednesday she was about the house doing her bousehold work, resting occasionally; on Friday inflammation of the bowels set in; on Saturday she was seriously ill, and died the following Tuesday: Held, that it was a question for the jury whether insured was in good health when the policy was delivered.—Plumb v. Penn Mut. Life Ins. Co., Mich., 65 N. W. Bep. 611.
- 71. LIFE INSURANCE—Scaling Agreement—Assignment.—An agreement between an insurance company and the insured and the beneficiary in a life policy for a scaling down of the amount named in the policy is binding on an assignee of the policy.—LEGNARD V. CHARTER OAK LIFE INS. Co., Conn., 88 Atl. Rep. 511.
- 72. MANDAMUS TO MAYOR—Claim to Municipal Office. —Mandamus will lie to compel a mayor who, by statute, is made the presiding officer of the common council, to recognize the claim of one who has been appointed by the council to fill a vacancy therein, and to allow him to discharge the duties of councilman, there being no adverse claimant to the office.—Swindell v. State, Ind., 42 N. E. Rep. 528.
- 78. MARRIED WOMEN—Exemptions.—Gen. St. p. 695, \$6, authorizes a married woman to carry on business on her own account, as if she was sole. Section 1986 provides that working horses used in business by one not a head of a family shall be exempt from execution: Held, that where a married woman carries on business on her own account, a horse used by her therein is exempt, though her husband is entitled to exemptions as the head of the family.—SCOTT v. MILLS, Colo., 42 Pac. Rep. 1021.
- 74. MARRIED WOMEN—Personal Injuries—Damages.—Where the statute enables a married woman to use her time for the purpose of earning money on her separate account, the impairment of her capacity to labor may be considered as an element of damages in an action by her for personal injuries.—HARMON V. OLD COLONY R. Co., Mass., 42 N. E. Rep. 505.
- 75. MASTER AND SERVANT—Defective Machinery.—In an action by a brakeman for injuries received in coupling cars, alleged to have been due to the defective condition of the draught irons on the car, the mere evidence that the draught irons were out of order after the accident is not sufficient to show that they were so out of order when the cars were inspected, where there is evidence that at the time of the coupling the cars came together with sufficient force to have caused the defect.—PERRY v. MICHIGAN CENT. R. Co., Mich., 65 N. W. Red. 668.
- 76. MASTER AND SERVANT—Defective Machinery—Unskilled Employee.—A mill owner is not liable for injury to an employee in operating a saw, because of the absence of a guard in front thereof to prevent boards from flying forward, the machine, which was one of the best make, and in good condition, not being constructed with a view to having such guard.—ARIZONA LUMBER & TIMBER CO. v. MOONEY, Ariz., 42 Pac. Rep. 952.
- 77. MASTER AND SERVANT—Injury—Contributory Negligence.—Where an employee has worked for 12 years in sawmills, and is injured by reaching through a hole to get the end of a chain lying within three inches of a revolving saw, where the danger is obvious, he is guilty of contributory negligence, and cannot recover for injuries received.—Sch LTZ V. C. O. THOMPSON LUMBER CO., Wis., 65 N. W. Rep. 498.
- 78. MASTER AND SERVANT-Injury Defective Machinery.—Where a railroad company makes no provision for inspection of locomotives except by en-

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gineers, and an accident occurs to a brakeman from a defective pushbar on an engine known to the engineer before starting on the trip, it is a question for the jury whether the engineer does not occupy such relation to the company that notice to him is notice to the company.—McDonald v. Michigan Cent. R. Co., Mich., 65 N. W. Rep. 597.

- 79. MASTER AND SERVANT Negligence—Assumption of Risk.—Where there was evidence that defendant's superintendent knew of a loose stone over the place where he set plaintiff at work, and that he made an unsuccessful attempt to dislodge it, and that he told plaintiff of that fact, and that the place was safe, but the stone fell upon plaintiff, the question of defendant's negligence and plaintiff's want of due care were for the jury.—BURGESS v. DAVIS SULPHUR ORE CO., Mass., 42 N. E. Rep. 501.
- .80. MASTER AND SERVANT Railroad Companies—Safety of Track.—In an action against a railroad company for the death of a brakeman, it was error to charge that if defendant did not provide a reasonably safe track, and keep the same in repair, and that if the want of repair was the cause of the accident, plaintiff should recover, as, if the track, as originally built, was safe, the only duty defendant owed deceased was to exercise reasonable care to see that it continued safe.—Anderson v. Michigan Cent. R. Co., Mich., 65 N. W. Rep. 585.
- 81. MECHANICS' LIENS—For What Obtained.—A contract to "furnish and deliver" certain articles of woodwork for a house, "all prepared," though it necessitates special manufacture, is not an "agreement for labor and materials," nor does it create a debt "for labor" (Pub. St. ch. 191, §§ 1, 2), so as to entitle the party furnishing the woodwork to a mechanic's lien therefor.—Tracy v. Wetherell, Mass., 42 N. E. Rep. 497
- 82. MECHANIC'S LIEN-Mortgage-Priority.—Rev. St. § 3314, provides that every person who, as principal contractor, furnished any materials for a building, or any machinery so constructed as to become a part of the freehold, shall have a lien thereon, and on the interest of the owner of such building and machinery in the land; and that such lien shall be prior to any other lien which originates subsequent to the commencement of the construction of such building and machinery: Held, that the lien for the machinery for a mill is prior to the lien of a mortgage given after the erection of the building was commenced, the machinery being contracted for before the mortgage was made, but furnished afterwards.—VILAS v. McDonough Marup'g Co., Wis., 65 N. W. Rep. 488.
- 83. MORTGAGE Presumption.—A lapse of 20 years after a mortgage has become due, within which there has not been either payment or demand of the principal or interest, or part thereof, or entry by the mortgagee into possession of the mortgaged premises, will raise a presumption that the mortgage has been satisfied, though in fact it be not paid.—STIMIS v. STIMIS, N. J., 33 Atl. Rep. 468.
- 84. MORTGAGE—Retaining Possession of Chattels.—A mortgage embracing real estate and a stock of merchandise, with permission to the mortgagor to retain and sell the goods in the usual course of trade, without accounting to the mortgages for the proceeds, is void as to creditors of the mortgagor to the extent of the merchandise.—Rogers v. Munnerlyn, Fla., 18 South. Rep. 669.
- 85. MORTGAGE FORECLOSURE—Limitation of Actions.—When, after a default in a mortgage, the mortgage in apparent good faith makes a void foreclosure, and, after the year to redeem, the purchaser at the foreclosure sale takes possession under color of the foreclosure proceedings, he is a mortgagee in possession, and entitled to all the rights of such a mortgagee, whether he took possession with or without the censent, either express or implied, of the mortgagor.—BACKUS V. BURKE, Minn., 65 N. W. Rep. 461.

- 86. MUNICIPAL CORPORATIONS—Building Committee.

 —The majority of a town building committee acting individually cannot set aside the action of the committee as a whole, reserving the right to reject all bids for the construction of the building.—MURDOUGH V. TOWN OF REVERE, Mass., 42 N. E. Rep. 502.
- 87. MUNICIPAL CORPORATIONS—Powers.—A municipal corporation can exercise only such powers as are granted to it in express terms, or those necessarily or fairly implied in or incident to the powers expressly granted, or those that are ersential and indispensable, not simply convenient, to the declared objects and purposes of the corporation. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation.—JACK-SONVILLE ELECTRIC LIGHT CO. V. CITY OF JACKSONVILLE, Fia., 18 South. Rep. 677.
- 88. MUTUAL BENEFIT INSURANCE Non-payment of Assessments.—A forfeiture will not be enforced unless it is clearly demanded by the established rules governing the construction of written agreements, and a violation of the precise condition of the contract. Courts will construe a contract of insurance liberally, so as to give it effect, rather than make it void; and conditions which create forfeitures will in case of doubt be construed most strongly against the insurer, and only a stern legal necessity will induce such a construction as will unliffy the policy.—ELLIOTT v. Grand LODGE A. O. U. W. OF KANSAS, Kan., 42 Pac. Rep. 1008.
- 89. NEGLIGENCE—Risk Contributory Negligence.—Where water froze upon the tracks, causing the derailment of a car, and killing an employee, the question of defendant's negligence, in not foreseeing the danger and providing a drain, is, on conflicting evidence, for the jury.—Balhoff v. Michigan Cert. R. Co., Mich., 65 N. W. Rep. 598.
- 90. NEGLIGENCE Damages Proximate Cause.— Damages to goods in a storehouse, caused by rain coming in through a defectively constructed window, are not too remote to be recouped in an action for the price of the window.—KREBS MANUF'G CO. V. BROWN, Ala., 18 South. Rep. 659.
- 91. NEGLIGENCE Natural Gas Injury to Shade Trees.—Where there was evidence to show that the death of plaintiff's shade trees near defendant's natural gas mains was coincident with the leakage of a large amount of gas, and that after the mains were recalked there was a renewed growth of vegetation, a verdict for plaintiffs will not be disturbed on appeal, though there was other evidence to show that the injury to the trees was not caused in the manner alleged.—Evans v. Keystone Gas Co., N. Y., 42 N. E. Rep. 513.
- 92. NEGLIGENCE Obstructing Street Injury.—Where the piling of lumber by defendant in a street is alleged to have been the cause of plaintiff's injury, it is not error to charge that failure to comply with an ordinance is negligence, and that if defendant was obstructing the street in the manner alleged, in violation of an ordinance, it was negligence.—McKune v. Santa Clara Valley Mill & Lumber Co., Cal., 42 Pac. Rep. 980.
- 98. NEGOTIABLE INSTRUMENT Accommodation Indorser—Discharge.—An accommodation indorser on a note secured by mortgage of the maker is discharged by application of the security without his knowledge to other purposes, he being a surety.—PRICE COUNTY BANK V. MCKENZIE, Wis., 65 N. W. Bep. 507.
- 94. NEGOTIABLE INSTRUMENT Indorsement Note.—An indorsement in the following words, upon a promissory note payable to the order of a named payee: "For value received, hereby assign and convey the within bond, together with all interest in and all rights under the deed securing the same, to without recourse,"—though signed by the payee, does not pass out of him the title of the note, nor deprive him of the right of bringing an action thereon in his own name.—Daniel V. ROYCE, Ga., 28 S. E. Rep. 498.

95. NEGOTIABLE INSTRUMENTS — Negotiability.—A note is not rendered non-negotiable because of an indersement thereon of a statement by the maker of the value of the property owned by him.—HUDSON V. EMMORS, Mich., 65 N. W. Rep. 542.

98. OFFICERS—Recovery of Salary Paid in Excess.—Where illegal payments of salary are made to a State officer on account of the act under which the payments were made being unconstitutional, money so paid, though paid under a mistake of law, may be recovered, as, the act of the officer in making the payment being beyond the scope of his duty, the State is not bound thereby.—ELLIS V. BOARD OF STATE AUDITORS, Mich., 65 N. W. Rep. 577.

97. PARENT AND CHILD—Services of Child—Compensation.—Where the services of a child to a father and mother, who are infirm, are rendered and accepted with the understanding that they are to be paid for by the father, a claim for the services is enforceable against his cetate.—Sammon v. Wood, Mich., 65 N. W. Rep. 529.

96. Partition—Chancery Court.—Under Code 1896, § 3852, giving the chancery court concurrent jurisdiction with the probate court of suits for the sale and partition of property held by tenants in common, the chancery court has no jurisdiction of a suit for sale of land for partition, when defendants are in possession under a deed from a grantor, who is claimed to have perfected title by adverse possession as against the complainants.—Davis v. Bingham, Ala., 18 South. Rep.

39. PARTMERSHIP—Dissolution by Insolvency.—In the absence of fraud, a solvent partner could, on the dissolution of the partnership by the assignment of his insolvent copartners, mortgage the entire property of the partnership to a creditor of the firm, without rendering himself liable to the other partners for the difference between the actual value of the firm property and the amount for which it was sold under the mortgage.—Thompson v. Noble, Mich., 65 N. W. Rep. 563.

106. PARTMERSHIP—Settlement and Accounting.—On an issue as to whether there was such a settlement between partners as would sustain an action at law by one against the other for a share of firm money collected by the latter, it was error to charge that "where one makes out an itemized statement of his accounts with another, and mails or hands him a copy, and such person retains the same, making no objection thereto, then, in law, it constitutes a settlement of the accounts between them."—ROSE v. BRADLEY, Wis., 65 N. W. Rep. 509.

101. PARTHERSHIP CONTEACT.—A contract between V and G, trading as the S M Co., of the first part, and B, of the second part, recited that whereas the first parties were desirous of securing additional capital, and the second party was willing to contribute the amount desired on the terms that V shall be the general manager at \$15 per week, "and then, after the payment of all expenses in conducting the business of the company, the parties of the first part agree to pay to the party of the second part, for the use of the said \$2,000, an amount equal to one-third of the net profits arising out of the business:" Held, that such contract did not make B, a partner.—THILLMAN v. BENTON, Md., 38 Atl. Rep. 485.

162. PAYMENT IN SPECIFIC PROPERTY — Money Demand. Where a party agrees to pay for services rendered in some specific articles of property, and upon demand refuses to deliver the property, his obligation is thereby converted into one for the payment of money. —NEW YORK NEWS PUB. CO. V. NATIONAL STRAMSHIP CO., N. Y., 42 N. E. Rep. 514.

160. PLEDGE OF CORPORATE STOCK—Right to Dividends.—Where stock of an incorporated company is pledged by the owner as collateral security for the payment of a debt, the pledgee is, as a general rule, multiple to collect and receive the dividends thereon, unless this right is reserved by the pledger at the time

the pledge is made.—GUARANTEE CO. OF NORTH AMBRICA V. EAST ROME TOWN CO., Ga., 28 S. E. Rep. 508.

104. PROCESS—Abuse of—Pleading.—In an action for abuse of process in having plaintiff arrested in order to compel him to pay defendant's claim from property exempt from execution, an allegation in the complaint that defendant's affidavit for the warrant alleged that the plaintiff was about to "remove" himself from the State sufficiently shows that plaintiff was a resident of the State at the time defendant sued out the warrant for his arrest.—LOCKHART V. BEAR, N. Car., 28 S. E. Rep. 484.

105. PROCESS—Service by Publication—Decree in Divorce—Validity.—In divorce proceedings, where constructive notice is attempted, if there is a failure to pursue the essential requirements of the statute, the decree rendered upon such illegal constructive service is void as to parties who have not appeared or pleaded in the case.—Shradber v. Shradber, Fla., 18 South. Rep. 672.

106. RAILEOADS—Injuries to Employees—Assumption of Risk.—A brakeman cannot recover for injuries to his hand in coupling cars while holding up the drawbar, through defects in the coupling, where he had been in the employ of the defendant for some time, and had daily adjusted such drawbars, which were in common use on defendant's road.—SECORD v. CHICAGO & M. L. S. R. CO., Mich., 65 N. W. Rep. 550.

107. RAILROADS—Occupation of Private Land—Damages.—A tenant in common, to whom his cotenants have assigned all their interest in demands against a railroad company for the occupation of land for railroad purposes without purchase or condemnation, may recover of the railroad the entire demand for damages.—Tucker v. Chicago, Sr. P. M. & O. By. Co., Wis., 65 N. W. Rep. 515.

108. RAILEOAD COMPANIES — Street Railway—Fran chise.—The franchise of a street-railway company to operate its road and use the streets of a city is derived from the legislature, through its charter, and not from the municipal corporation, though the consent of the latter be required to the exercise of its authority. Such franchise, upon acceptance by the company, becomes a contract, inviolable and irrevocable; and the consent of the municipality, when once given, cannot, in the absence of a statute authorising its withdrawal, be withdrawn, either as to streets actually occupied or as to streets included within the general plan of the company's routes, which it intends in good faith to complete.—Aprica v. Board of Mayor and Aldermen of City of Knoxville, U. S. C. C. (Tenn.), 70 Fed. Rep. 739.

109. RAILEOAD COMPANIES — Trespasser on Train.—A party who, on the invitation of the brakemen of a railway freight train, who have no authority to receive passengers or collect their fares, takes passage in an exclusively freight car, loaded with freight, paying to the brakemen less than the regular fare, is not a passenger, and the railway company owes him no duty as such.—Janney v. Great Northern Ry. Co., Minn., 65 N. W. Rep. 450.

110. RAILROAD FORECLOSURE - Receivers-Payment of Unsecured Debts.—There is no fixed and inflexible rule in respect to the allowance, out of the earnings of a railroad in the hands of a receiver, of unsecured claims for current debts, but each case is largely governed by its own circumstances. Such allowance does not depend on any fixed rule as to the time when the debts were contracted, nor upon the order appointing receivers. Where there has been a diversion of current income from the payment of current debts to the payment of interest on a mortgage, or the making of permanent improvements, there should be a restoration, to the extent of such diversion; and independently, of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern, or which grow out of indispensable business relations. - WOOD V. NEW YORK & N. E. R. Co., U. S. C. C. (Mass.), 70 Fed. Rep. 741.

111. REFERENCE — Appointment of Referees.—Where the appointment of two referees is agreed upon by the parties, instead of one or three, as required by statute, and the parties appear before them, and submit all their matters, an objection cannot be raised, when a confirmation of their report is asked, that the appointment of two referees was improper.—SHEPHEED V. SHEPHEED'S ESTATE, Mich., 68 N. W. Rep. 580.

112. REFERENCE — Report of Referee.—Under Code Civ. Proc. § 998, providing that, upon the trial of an issue of fact by a referee, a refusal to make any finding whatever upon a question of fact, where a request to find is made, or a finding without any evidence tending to sustain it, is a ruling upon a question of law, it is not necessary that a party request a finding of fact, in order to have the finding as made, reviewed, as to the sufficiency of evidence to sustain it.—RAABE v. SQUIER, N. Y., 42 N. E. Rep. 516.

118. REPLEVIN — Affidavit.—In replevin the fact that in the copy of plaintiff's affidavit, left in service, his signature at the end was omitted, the jurat stating that the affidavit was subscribed and sworn to by plaintiff, is not ground for abatement.—MATTHAI v. CAPEN, Conn., 38 Atl. Rep. 495.

114. RBS JUDICATA — Divorce — Alimony—Parent and Child.—A father is not liable for necessary medical attendance furnished his infant child while in the custody of its mother, who had left the father's house without cause.—HYDE V. LEISEMRING, Mich., 65 N. W. Ren. 536.

115. SALE — Delivery.—Under an agreement whereby the vendor of certain staves was to deliver the same at a railroad depot, where they were to be inspected and culled by the vendee, there was no delivery under the contract until the staves were culled and accepted at the place designated.—COLE v. BRYANT, Miss., 18 South. Rep. 655.

116. SALE—Implied Warranty of Title.—One who, on recovering judgment in an action in which he has attached a judgment held by the defendant against a third person, agrees with another to bid in, at his risk, the judgment at execution sale for the full amount of his own judgment, and transfer the title so obtained to such other for the amount of his judgment and costs of execution sale, impliedly warrants a valid title to the judgment so bid in.—FLANDROW v. HAMMOND, N. Y., 42 N. E. Rep. 511.

117. SALE — Rescission by Vendor.—The fact that the vendee was insolvent when he purchased the goods, and that shortly thereafter he failed in business, did not entitle the vendor to rescind the contract and recover the goods, where the vendee purchased in good faith, with intent to pay the price.—ILLINOIS LEATHER CO. V. FLYNE, Mich., 65 N. W. Rep. 519.

118. TAXATION — Excuse for Non-payment.—Where the landowner applies in good faith to the treasurer to pay his taxes, and receives a statement, and pays accordingly, and afterwards the land is returned and sold for taxes in arrear when such statements was furnished, the sale is invalid.—BRAX & CHOATE LAND CO. V. NEWMAN, Wis., 65 N. W. Rep. 494.

119. Taxation—Municipal Corporations—Public Improvements.—Where the city charter requires assessments for public improvements to be made in proportion to the benefits secured thereby, an assessment of the cost of street grading in proportion to the frontage of the property on the improvement made, without an actual view of the property, is invalid.—HAYES v. DOUGLAS COURTY, Wis., 65 N. W. Rep. 482.

120. TAXES—Irregularities in Assessment.—One cannot complain that the assessment of a text was made in the name of the wrong person, or of any other irregularity which the board of review might have corrected, had application been made to it at the proper time.—HIMDS V. TOWNSBIP OF BELVIDERE, Mich., 65 N. W. Rep. 544.

121. TRESPASS—By Whom Maintainable.—A vendee in a land contract, having neither the actual nor con-

structive possession of the land, cannot sue for a trespass to the land.—GATES V. COMSTOCK, Mich., 65 N. W. Rep. 544.

122. TROVER BY PURCHASER—Superior Title in Third Person.—In trover by a purchaser at execution saie, where it appeared that, as against defendant, plaintiff acquired title and right to possession by the sale, but had not obtained actual possession, which was in defendant, defendant may defeat recovery by showing that the execution debtor had an outstanding title to the property superior to plaintiff's, because of an irregularity in the sale.—MOREY V. HOYT, Conn., 85 Atl. Rep. 496.

123. VENDOR AND PURCHASER-Legal Title.—The conveyance by a vendor in a contract for the purchase and sale of land of the legal title to a third party, subject to the contract, did not of itself operate as an assignment of the contract, so as to permit a recovery thereon by the grantee.—O'BRIEN v. Evans, Mich., 65 N. W. Rep. 571.

124. VENDOR AND VENDER-Agreement to Convey Land.—Defendant's intestate agreed that if plaintiff would pay a certain sum toward the building of a house on a lot belonging to the former, and superintend the erection of the house, she would convey to him a half interest in the house and lot. The intestate thereafter incumbered the property by a deed of trust to another person: Held, that plaintiff, having paid the agreed sum and superintended the erection of the house, could treat the property as subject to a Nen in his favor, and by bill in equity have it sold to satisfy his claim for half its original value.—Townsend v. Vanderwerker, U. S. S. C., 16 S. C. Rep. 258.

125. VENDOE AND VENDEE—Sale of Land—Commissions.—Where three joint owners of land agree that two of them may procure a sale thereof, but that meither of them shall charge any commission, and one of them employs attorneys who are his general legal advisors, and they bring about a sale, which the other owners ratify by joining in a conveyance, the other joint owner, authorized to sell, will not be liable for the attorneys' commissions for the sale, though he knew when he joined in the conveyance that they had procured it, where he did not know that in procuring it they were acting otherwise than as the attorneys of the other, or that they intended to make any charge.—Brown v. Scott, Wis., 65 N. W. Rep. 499.

126. VENDOR'S LIEN—Burden of Proof.—The burden is on the grantee to show that a vendor's lien was not reserved as security for the unpaid purchase price.—McLean v. Smith, Ala., 18 South. Rep. 662.

127. WILLS.—Testatrix devised to her two daughters and their heirs a portion of her estate; directing the executors to retain therefrom a fund, from the income of which certain annuities should be paid, the balance of the income to go to the daughters equally, and that the executors should hold the same until the death of the last annuitant, or if either daughter should die before the last annuitant, then her proportionate share of said income should be paid according to her last will, or in case of intestacy, to her heirs: Held, that both daughters and annuitants being dead, the fund, with its accumulations, should be paid to the estates of the daughters, in equal proportions.—Johnson v. Webber, Conn., 33 Atl. Rep. 506.

128. WITNESS—Transactions With Decedent—Officers of Corporation.—The testimony of officers or directors of a corporation, called as witnesses in its behaff in an action in which it is a party, is not testimony given by the corporation, and consequently is not rendered incompetent by the provise of the supplement to the act concerning evidence, approved February 25, 1880, which declares that a party to an action, in cases where his adversary sues or is sued in a representative capacity, shall not be permitted to give testimony as to any transaction with or statement by any testator or intestate represented in said action.—New Jersey Teust 2 Safe Deposit Co. v. Camben Safe Deposit 2 Trust Co., N. J., 33 Atl. Rep. 475.

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The Supreme Court of the United States has not for a long time considered so important a question, at least so far as its results are concerned, as is involved in the case of Bradley v. Fallbrook Irrigation District, argument of which, before that court, has recently been had. This was a suit in equity, originally brought in the United States Circuit Court for California, to enjoin the execution of a deed of certain land of the complainant, given by the collector of the defendant irrigation district, under a sale to satisfy a delinquent assessment against the said property, levied under the provisions of the so-called Wright law of California, providing for the organization and existence of irrigation districts, and to obtain a decree adjudging the proceedings under that legislation void and of no effect. The regularity of the proceedings under the act was not questioned, but the ground of the suit was the alleged unconstitutionality of the act itself, it being contended that it conflicted with certain provisions of the constitution of the State of California, and also with that provision of the constitution of the United States which declares that no person shall be deprived of his property without due process of law, and moreover that the act provided for the taking of private property for private use. The defendant demurred on the ground that similar objections had been raised to this legislation in other cases, and that the validity of the Wright Act had been determined by the Supreme Court of California. Irri. Dist. v. Williams, 76 Cal. 360; Irri. Dist. v. DeLappe, 79 Cal. 352; In re Madera Irri. Dist., 92 Cal. 296. The lower court, however, held the act unconstitutional and overruled the demurrer, Judge Ross, who decided the case, saying that while the decisions of the Supreme Court of California in those cases are justly entitled to great respect, he was not at liberty to decline to exercise his own independent judgment in determining whether any State legislation violates a provision of the United States. The solution of these questions, he contended, must be sought, Vol. 42-No. 9.

not in the decisions of a single State tribunal, but in the general principles common to our courts. Olcott v. Supervisors, 16 Wall. 678. Nor does a legislative declaration that a use is a public use necessarily make it so. Cooley, Const. Lim. (5th ed.), p. 666, and cases The character of a use is not to be tested by the number of persons who enjoy it, and no man's property can be taken from him without his consent and given to individuals for their own use, no matter how numerous they may be, nor can it be taken on the mere ground that the public good would be thereby advanced. A public use implies a possession, occupation, and enjoyment of the land by the public at large, and the same objection is valid in this case as in Cummings v. Peters, 56 Cal. 593, "that the use of the water is limited to specific individuals" (i. e., those holding land in the irrigation district), "and the interest of the public is nothing more than that indirect and collateral benefit that it derives for every improvement of a useful character that is made in the State."

A fatal objection to the maintenance of the legislation under the right of eminent domain, he asserted, is that if it is to be regarded as undertaken by the public primarily as a matter of public concern, the assessment upon the landowners must be limited to the benefits imparted, which is not the case with this statute. Wurtzv. Hoagland, 114 U.S. 613; Tide-water Co. v. Coster, 18 N. J. Eq. 527. If the act is to be maintained at all it must be under the power of assessment for local improvements, but there is no reason why this power more than any other can be exercised without "due process of law." And as the whole scheme of irrigation as to that district was experimental, he thought it arbitrary and unjust to take a man's property "without affording him any opportunity to show the insufficiency of that very thing which forms the basis of the proceedings under which the taking is to occur."

The decision of Judge Ross has met with considerable adverse criticism, which seems to be well founded. The American Law Review in a recent issue (29 Amer. Law Review, p. 915) contains a vigorous denunciation of the opinion, though it is fair to say that much of it bears on the question of expediency rather than of law. It is shown, however, that the decision is opposed by many respectable

cases, and that it is directly in the teeth of some adjudications of the United States Supreme Court, so far as federal questions are involved in it. Wurtz v. Hoagland, 114 U. S. 606; Hager v. Reclamation District, 111 U. S. 701; Barbier v. Connelly, 113 U. S. 31. The Harvard Law Review for December also attacks the decision upon the ground that the turning of large tracts from deserts into gardens, which was the object of the act, was not purely a private enterprise, and was a suitable field for legislative consideration, citing by way of illustration Paxton Irrigation Co. v. Farmers Irrigation Co. (Neb.), 64 N. W. Rep. 343. A review of the decisions on the subject will certainly justify the assertion, applicable to cases of this character, that what constitutes a public use is a legislative question, with the decision of which the judiciary will not interfere, unless an abuse of legislative discretion be very obvious. is quite probable that the United States Supreme Court will reverse the case and uphold the statute, a result which, considering the great importance of the measure to the people of some of the western States, is very desirable.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW-RIGHTS OF MEMBERS of the Legislature to Hold Office.-A constitutional question of more than ordinary interest arose in State v. Sutton, 65 N. W. Rep. 262, decided by the Supreme Court of Article 4, § 9, of the constitu-Minnesota. tion of that State, provides as follows: "No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster." It was held that, under this constitutional provision, the disability of a member of the legislature to hold office does not cease until the expiration of the full period of time for which he was elected.

CRIMINAL LAW — BURGLARY — CONSTRUCTION OF STATUTES.—The doctrine of ejusdem generis in the construction of statutes was applied by the Supreme Court of Missouri in the case of State v. Schuchmann, 33 S. W. Rep. 35, to the phrase "other building," as

used in Rev. St. 1889, § 3526, making it burglary for any person to break and enter any "shop, store, booth, tent, warehouse or other building," etc. The court held that this means a building of like kind with those enumerated, and does not, therefore, embrace a "chicken house building." The court cited Rex v. Inhabitants, 7 Bam. & C. B. 596; Ex parte Hill, 3 Car. & P. 225; City of St. Louis v. Laughlin, 49 Mo. 559; City of St. Louis v. Bowler, 94 Mo. 633; Chegaray v. Mayor, 13 N. Y. 220; In re Swigert, 119 Ill. 83; Bocher v. Com., 103 Pa. St. 528; Brooks v. Cook, 44 Mich. 617; People v. Richards, 108 N. Y. 137; State v. Staller, 38 Iowa, 324; State v. McCrum, 38 Minn. 154. The case of State v. Hecox, 83 Mo. 532, was in terms repudiated. Gantt, P. J., dissented from the conclusion of the court in a vigorous opinion.

CONSTITUTIONAL LAW - TAXATION - FOR-EIGN BUILDING AND LOAN ASSOCIATION .- A late legislature of Kentucky passed an act imposing a tax upon foreign building and loan associations. It required such companies doing business in the State to pay to the State two per cent. of their gross receipts. The act was assailed upon the ground that it was in contravention of the constitution, but the Supreme Court of Kentucky has recently declared the act constitutional. Southern Building & Loan Association v. Norman, 32 S. W. Rep. 952. They hold that such tax is in the nature of a tax on the franchise of doing business in the State, and, therefore, does not violate Const. § 174, providing that all property shall be taxed in proportion to its value, but authorizing the imposition of taxes on franchises. Nor, they say, is such act unconstitutional as impairing the obligation of previous subscription contracts between the corporation and its stockholders, and it is not unconstitutional as an interference with interstate commerce. The burdens imposed on foreign associations being substantially the same as those imposed on domestic associations, they also hold the act is not unconstitutional as denying to the association the equal protection of the laws.

PRINCIPAL AND AGENT — AUTHORITY OF AGENT—NOTICE.—The Supreme Court of Nebraska decides, in Johnson v. Milwaukee and W. Inv. Co., 64 N. W. Rep. 1100, that

one dealing with the agent of a business corporation in a matter relating to its business operations, and not involving its corporate functions, is not charged with notice its by-laws. Therefore the apparent authority of such agent cannot be extended or restricted by such by-laws, in the absence of actual. notice thereof; that where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third persons, from denying the agent's Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business, and that evidence of such apparent authority is not restricted to proof of general custom, or to proof that the agent had previously performed similar acts to the knowledge of the principal. The nature of the business, usage not amounting to a general custom, and the fact, if it exists, that the principal is at a great distance, and the agent apparently entirely in charge of the business, may, in proper cases, be, among other things, elements for consideration.

NEGLIGENCE — PRESUMPTION.—In Sheridan v. Foley it is held by the Supreme Court of New Jersey that where one engaged in laying a sewer in a building is injured by a falling brick, in the absence of explanation by the contractor doing the brickwork, it will be presumed that it occurred from want of reasonable care on his part, and he is liable for the injuries received. The court says:

While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern,—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim, "Res ipsa loguitur," is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care. A leading use on this subject is Kearney v. Railway Co., L. R. 50, R. 411; Id. (on appeal) L. R. 6 Q. B. 759. The hat were that the plaintiff was passing along a highway bridge when a brick fell from the plaintiff was passing along a highway bridge when a brick fell from

rested, and injured him. A train had passed over the bridge shortly before the accident, but the evidence failed to disclose whether it was a train of the defendant company, or of another railway company which also used the bridge. The bridge had been built and in use for three years. The court of queen's bench held that the maxim, "Res ipsa loquitur," applied; that, as the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was prima facie evidence from which the jury might infer negligence in the defendants; and the principle was unanimously affirmed by the court of exchequer chamber on the argument of the appeal. Another case, quite similar in its facts to the one now before us, where this principle was applied, is that of Byrne v. Boadle, 2 Hurl. & C. 722. In that case the plaintiff was injured by the falling of a barrel from the window of the defendant's shop. There was no evidence to show what caused the barrel to fall, nor was there any direct evidence to connect the defendant or his servants with the occurrence. Pollock, C. B., in discussing the question of the question of the way be said, 'res ipsa loquitur,' and this seems one of them. . . . is true that there are many accidents from which no presumption of negligence can arise, but this is not so in all cases. Suppose, in this case, the barrel had rolled out of the warehouse and fallen on the plaintiff. How could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff, who is injured by it, must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facte evidence of negligence." In our own State, in the case of Bahr v. Lombard, 58 N. J. Law, 288, 21 Atl. Rep. 190, and 23 Atl. Rep. 167, this maxim was fully commented upon and applied. The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger other persons, who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence it is for the defendant to prove them.

NEGOTIABLE INSTRUMENT — BONA FIDE HOLDER—SECURITY FOR PRE-EXISTING DEBT.
—In the dissenting opinion of Conaway, J., to the conclusion of a majority of the Supreme Court of Wyoming in the case of Rock Springs Nat. Bank v. Luman, 42 Pac. Rep. 881, the following valuable summary of the holdings of the different courts, on the subject of whether one who takes negotiable paper, as collateral security for a pre-existing debt is a bona fide holder for value, appears:

In the following States a holder of negotiable paper taken as collateral security for a pre-existing debt is not a holder for value, under the rule cutting off undisclosed equities: Alabama: Fenouille v. Hamilton, 35 Ala. 319; Connerly v. Insurance Co., 66 Ala. 432; Reid v. Bank, 70 Ala. 200. Arkansas: Bertrand v. Barkman, 18 Ark. 150. Iowa: Ruddick v. Lloyd, 15 Iowa, 441; Davis v. Strohm, 17 Iowa, 427. Kentucky: Alexander v. Bank, 2 Metc. (Ky.) 534; May v. Quimby, 3 Bush, 96; Breckinridge v. Moore, 8 B. Mon. 629. Maine: Nutter v. Stover, 48 Me. 163; Bramball v. Beckett, 31 Me. 205. Minnesota: Becker v. Bank, 1 Minn. 311 (Gil. 243). Mississippi: Brooks v. Whitsen. 7 Smedes & M. 513. New Hampshire: Williams v. Little, 11 N. H. 66; Jenness v. Bean, 10 N. H. 266; Fletcher v. Chase, 16 N. H. 38; Rice v. Raitt, 17 N. H. 116. New York: Moore v. Ryder, 65 N. Y. 438; Comstock v. Hier, 73 N. Y. 269. Obio: Roxborough v. Messick, 6 Ohio St. 448; Pitts v. Foglesong, 37 Ohio St. 676. Pennsylvania: Ashton's Appeal, 73 Pa. St. 153; Royer v. Bank, 83 Pa. St. 248; Pratt's Appeal, 77 Pa. St. 378; Maynard v. Bank, 98 Pa. St. 250. Tennessee: King v. Doolittle, 1 Head, 77. Wisconsin: Bowman v. Van Kuren, 29 Wis. 209; Body v. Jewsen, 33 Wis. 402. The following States hold directly to the contrary: California: Frey v. Clifford, 44 Cal. 835; Davis v. Russell, 52 Cal. 611. Connecticut: Roberts v. Hall, 37 Conn. 205. Georgia: Gibson v. Conner, 8 Ga. 47; Bond v. Bank, 2 Ga. 92; Meadow v. Bird, 22 Ga. 246. Illinois: Bank v. Cheeney, 87 Ill. 602; Mix v. Bank, 91 Ill. 20. Indiana: Straughan v. Fairchild, 80 Ind. 200. Louisiana: Giovanovich v. Bank, 26 La. Ann. 15; Bank v. Gaiennie, 21 La. Ann. 555. Maryland: Maitland v. Bank, 40 Md. 540. Massachusetts: Le Breton v. Peirce, 2 Allen, 8; Paine v. Furnas, 117 Mass. 290; Fisher v. Fisher, 98 Mass. 803; Stoddard v. Kimball, 6 Cush. 469. Mississippi: Fellows v. Harris, 12 Smedes & M. 462. Missouri: In this State courts hold positively both ways. The holder of negotiable paper as collateral security for an antecedent indebtedness is a holder for value according to Grant v. Kidwell, 80 Mo. 455; Institution v. Holland, 38 Mo. 49, and Paulette v. Brown, 40 Mo. 52. He is not a holder for value according to Goodman v. Simonds, 19 Mo. 106, and Brainard v. Reavis, 2 Mo. App. 490. New Jersey: In this State the holder of collateral is a holder for value under the rule: Allaire v. Hartshorne, 21 N. J. Law, 665; Armour v. McMichael, 36 N. J. Law, 92. And in Rhode Island: Bank v. Carrington, 5 R. I. 515; Cobb v. Doyle, 7 R. 1 550. And in South Carolina: Bank v. Chambers, 11 Rich. Law, 657. And in Texas: Greneaux v. Wheeler, 6 Tex. 515. And in Vermont: Atkinson v. Brooks. 26 Vt. 569.

This has always been the doctrine of the federal courts of the United States and of the courts of England. See Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14. In the forcible language of Justice Clifford: "Not only every court, but every judge of every court, in that country, concurs in the proposition that the holder of such a negotiable security, before maturity, as collateral to a pre-existing debt, without notice of any prior equities, is a bona fide holder, for value, in the usual course of business, and that his title to the instrument is good, and wholly unaffected by any such prior equities between the antecedent parties." It is to be remembered in this connection that by a stronger reason is the holder unaffected by any undisclosed equities of unknown parties, because the parties are unknown, and there is no clue to them or their equities, as there is in the case of prior parties to a bill or note.

In addition to the States mentioned where the holder of negotiable paper as collateral security to a pre existing indebtedness is a holder for value against undisclosed equities, the following States hold that a transfer in payment of a pre-existing indebtedness is a transfer for value under the rule: Alabama: Maybury v. Morris, 62 Ala. 116; Reid v. Bank, 70 Ala. 200. Arkansas: In this State the payment must be absolute and unconditional. Bertrand v. Barkman, 13 Ark. 150. Iowa: In this State payment is sufficient. Pond v. Agricultural Works, 50 Iowa, 596. Kentucky: In this State payment is considered as suspending the right of action on the original demand. and as a sufficient consideration under the rule. Alexander v. Bank, 2 Metc. (Ky.) 584; May v. Quimby. 3 Bush, 96; Breckinridge v. Moore, 3 B. Mon. 629. Minnesota: In this State payment is sufficient. Stevenson v. Hyland, 11 Minn. 201 (Gil. 128). And in Mississippi: Love v. Taylor, 26 Miss. 574; Emanuel v. White, 34 Miss. 63. And in Pennsylvania: Bardsley v. Delp, 88 Pa. St. 420. And in North Carolina: Reddick v. Jones, 6 Ired. 107. And in Wisconsin: Stevens v. Campbell, 13 Wis. 375. And in Maine: Bramball v. Beckett, 31 Me. 205. And in Ohio: Roxborough v. Messick, 6 Ohio St. 448. And in New York: In this State, Chancellor Walworth, during the long time he was on the bench, held to the doctrine that payment of a pre-existing debt was not a valuable or sufficient consideration for the transfer of negotiable paper, as against undisclosed equities of third parties. Stalker v. McDonald, 6 Hill, 98; Dickerson v. Tillinghast, 4 Paige, 215. He thus applied his powerful shoulder to the judicial car, and shunted it off the track, and no judge or court in that State has seemed disposed to attempt to replace it. But, by a slow and laborious process, the courts of the State of New York have laid a new track between the old track and the line upon which Chancellor Walworth left the car, and have placed the car upon the new track. They do not hold that a transfer of negotiable paper as collateral security for a pre-existing debt is for value under the rule barring undisclosed equities, but that a transfer in payment is, whether the payment be absolute or conditional. Bank v. Babcock, 21 Wend. 499; Bank v. Scoville, 24 Wend. 115; Brown v. Leavitt, 31 N. Y. 113; Stettheimer v. Meyer, 88 Barb. 215; Bank v. Gilliland, 23 Wend. 311; Bank v. Franklin, 55 N. Y. 238; Insurance Co. v. Church, 81 N. Y. 225; Mayer v. Heidelbach, 123 N. Y. 843, 25 N. E. Rep. 416. In Tennessee alone it is held that payment is not a sufficient consideration under the rule (Wormley v. Lowry, 1 Humph, 470); but this rule does not apply to an accommodation indorsement, made generally, and without restriction (Kimbro v. Lytle, 10 Yerg. 417); nor where the pre-existing debt is in the form of a note, with an indorser, which note is surrendered. Nichol v. Bate, Id. 429. These cases must involve the re markable result that, if two parties sign a note as principals, its surrender is not a valuable consideration, under the rule; but if one sign as principal, and the other as indorser, the surrender of the note is a valuable consideration, under the rule barring undisclosed equities.

The federal courts and the courts of England hold in accordance with our State courts, excepting Tennessee. The reason of the rule is stated by an English court in the following language: "The title to a bill on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the court of common pleas in Belshaw v. Bush, il C. B. 191, as the foundation of the judgment

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in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized.

RIGHT OF MEMBERS OF BENEFIT SOCIETIES TO SICK AND DISTRESS BENEFITS.

1. Nature of the Society and Contract.— Organizations which confer upon their members "in good standing" pecuniary aid in event of sickness or other disability are not regarded by the law as charitable associations, in the sense of conferring benefits without consideration. The payment of such benefits is not voluntary and to be considered in the nature of a gift, but in the fulfillment of an obligation legally created. In other words, it is simply carrying out the provisions of an express contract by and between the member and the society.1 Such organizations are viewed in the nature of societies for the mutual insurance of their members against sickness, accident, misfortune and the like.2 The members bind themselves to pay dues, assessments, contributions, etc., into the common, or society, fund; and the society, on its part, contracts to contribute pecuniary assistance to its members in case of need, in accordance with its constitution, by-laws, rules and regulations. Such laws, together with the certificate of membership of the member, create the obligation, or contract, by which the right to receive and the duty to give are controlled. These principles apply whether the society is incorporated under general or special laws, or merely a voluntary unincorporated association. The membership constitutes a very important property right, entitled to full protection under the law. In an unincorporated, or voluntary, association or society, the articles of association, or constitution, correspond to the charter of a corporation—both alike constituting the fundamental contract which the members and the society must faithfully observe.3 It seems proper to remark that the rules, etc., respecting sick and distress benefits, must not

be contrary to the society's charter, if incorporated,4 or articles of association, if unin-Likewise they must not be corporated.5 contrary to the federal or State constitution. or laws, or against public policy,6 or against the general municipal law, and in accordance with the doctrine of the best considered cases. such regulations must be reasonable and not oppressive or detrimental to the best interests of the society.8 However, many respectable authorities hold that the latter limitation does not obtain with respect to voluntary unincorporated societies; but on the other hand, such organizations are at liberty to impose all unreasonable regulations which may suit the fancy of the controlling element, and which are binding upon all the members, if they do not violate public policy or positive law.9 When the question as to the power of a particular society to confer sick and distress benefits arises, the whole scope and purpose of the association is to be considered. If the society is incorporated the power must exist in the charter, and if unincorporated, in the articles of association. In some societies such benefaction is discretionary only,10 as where the rules merely provide that members becoming sick or disabled may be entitled to relief.11

2. Character of Sickness or Disability.—
The character of the sickness or disability entitling the member to receive benefits depends upon the interpretation of the regulations of the particular society, as applied to the facts of the case. In one case it was held that partial paralysis resulting from an accidental pistol shot, which disabled the

4 Ins. Co. v. Harvey, 45 N. H. 292, 299; Masonic Ins. Co. v. Miller, 13 Bush (Ky.), 489; Equitable Life Assur. Co. v. McLenan (Tenn.), 6 Ins. L. J. 124; Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

⁵ Powell v. Abbott, 9 Weekly N. of C. (Pa.) 231. ⁶ People v. St. Franciscus Benev. Soc., 24 How. Pr. (N. Y.) 216; Price v. K. of H., 68 Tex. 361; Am. L. of H. v. Perry, 140 Mass. 580; Harrison v. Hoyle, 24 Ohio St. 254.

7 State v. Williams, 75 N. C. 184.

8 Alnutt v. Subsidiary High Court, 62 Mich. 110; Fire Engine Co. v. Com., 98 Pa. St. 264; Cartan v. Father M. Soc., 9 Daly (N. Y.), 20; Fritz v. Much, 66 How. Pr. 74.

⁹ People v. Board of Trade, 80 Ill. 184, 187; Fuller y. Plawfield Academy, 6 Conn. 532, 544; Kehlenbeck v. Logeman, 10 Daly (N. Y.), 447; State v. Georgia Medical Soc., 38 Ga. 608, 626; Grosvenor v. United Soc., 118 Mass. 78.

¹⁰ Ancient Order of U. W. v. Moore (Ky.), 6 Ins. L. J. 539.

¹¹ Eaton v. Sup. Lodge K. of H., U. S. C. C., S. D. of Ohio, 22 Cent. L. J. 560.



¹ Bolton v. Bolton, 73 Me. 299.

² Dolan v. Court Good Samaritan, 128 Mass. 487; Bauer v. Samsoh, etc. Lodge, 102 Ind. 262; Gorman v. Russell, 14 Cal. 582.

Bray v. Farwell, 81 N. Y. 600; Rosenberger v. Ins.
 Ce., 67 Pa. St. 207, 217; Bergman v. St. Paul Mut.
 Bldg. Ass'n, 29 Minn. 275.

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member from work, required the society to pay benefits.12 Where the constitution provides that relief may be furnished on account of sickness or "other physical disability," the society may give relief to members who shall have attained the age of seventy-five years, for the reason that such age may be considered a "physical disability." In one case benefits were conferred upon one "permanently disabled from following his or her usual or other occupation." The rules of the society defined such disability to be one which "permanently prevented the member from following any occupation whereby he or she can obtain a livelihood." A member becoming disabled from following his own profession, but capable of working at another, wholly dissimilar, is not entitled to benefits.14 "Total disability" is usually a question of fact. That which would be total disability in one case might not be in another.15 Thus, the loss of a hand by a lawyer might interfere but slightly in the transaction of his business, or in the performance of his work, while to a man who had learned a particular trade by which he had always earned his living, and was entirely ignorant of all other trades or business it might prove to be a much more serious disability. Ordinarily the loss of the fingers of the hand does not constitute total disability from the performance of "any kind of labor or business."16 But the loss of the fingers of one hand by a switchman on a railroad entitles such switchman to benefits where no question is raised as to his ability to earn a livelihood by any other kind of business, under the constitution of a society which provides that a "member who by reason of a disability * * * comes unable to direct or perform the kind of business or labor which he has always followed, and by which alone he can thereafter earn a livelihood, shall be deemed entitled to disability benefits." The language "totally and permanently disabled from following his

12 Smith v. Society, 12 Phila. (Pa.) 880.

or her usual occupation" has been construed to mean such disability as will prevent the member from earning a livelihood, and in determining such question the mental and physical capabilities of the person should be considered. And, in such case assistance to pursue an occupation by wearing an appliance, such as a truss, will not lessen the character of the disability as a total one, when the use of the appliance would endanger life, or would result in intolerable discomfort. 18 Generally, "total disability" from pursuing one's usual employment means inability to prosecute it in the usual manner.19 Yet "total disability" from transacting business of any kind cannot be construed to mean "partial disability," but the total disability must be shown.21 Thus where relief is given for the period of continuous total disability only, an instruction to the jury that total disability meant inability to do substantially all kinds of his accustomed labor, to some extent, is erroneous.22 It has been held that the words "sickness" and "illness" apply solely to diseased conditions of the organs of the human system. a by-law giving relief "in case of sickness," where the member is not able to attend to his daily labor, does not extend to the case of a permanent bodily injury—as fracture of the thigh—which does not affect the general health of the injured.23 Insanity is held to be a disease, included within the term "sickness." And the Supreme Court of Pennsylvania has held that insanity is a "disability," within the constitution and bylaws of a society providing benefits to a menber "who through sickness or other disability is unable to follow his usual business or some other occupation, whereby he may earn a livelihood for himself and family." The use of the words "or other disability" clearly in-

18 McMahon v. Supreme Council, etc., 54 Mo. App. 468.

20 Lyon v. Ry. Pass. Assur. Co., 46 Iowa, 631.

²³ Kelly v. Ancient Order of Hibernians, 9 Daly (N. Y.), 289.

¹³ Supreme Council v. Fairman, 62 How. Pr. (N. Y.) 386.

¹⁴ Albert v. Order of Chosen Friends, 34 Fed. Rep. 721.

¹⁵ Hutchinson v. Supreme Tent K. M. of the World, 22 N. Y. Supp. 801.

¹⁶ Knapp v. Assn., 53 Hun (N. Y.), 84; Saveland v. F. & C. Co., 67 Wis. 174; Lyon v. Assurance Co., 46 Iowa, 631; Young v. Ins. Co., 80 Me. 244.

¹⁷ Hutchinson v. Sup. Tent K. M. of W., 22 N. Y. Supp. 801.

 ¹⁹ Lawyer v. U. S. Casualty Co., 8 Am. Law Reg.
 (U. S.) 233; 1 Big. Life & Acc. Ins., 289; Hooper v.
 Acc. D. Ins. Co., 5 H. of N. 545; 6 H. & N. 839; May on Ins., §§ 522, 523.

Rhodes v. Ry. Pass. Ins. Co., 6 Lans. (N. Y.) 77.
 Saveland v. F. & C. Co., 67 Wis. 174, 30 N. W. Rep. 237.

²⁴ Burton v. Eyden, L. R. 8 Q. B. 292; Pellazzino v. German Catholic St. Joseph Society, 16 Weekly Law Bull. (Ohio) 27.

dicates that the purpose is to assist those who are incapacitated from earning their living by reason of sickness "or other disability." "If insanity is not sickness, it is certainly disability."

3. Benefits may be Lost, how?—Members may by their own acts deprive themselves of benefits, as violating a rule, which denies relief where the disease or disability is superinduced by debauchery, drunkenness, fighting, dueling or other disgraceful practices. Such regulations are held valid, for the organization possesses the power to provide that its members shall not indulge in those vices and crimes which multiply disease among them and thus deplete the society's funds. will be difficult to construct an argument against its reasonableness. The law commends and fosters all institutions which lead to the practice of virtue. The motive it presents to good conduct is worthy of notice. What more powerful incentive than a knowledge on the part of the member that by a course of debauchery and crime he cuts himself off from all relief."26 Ordinarily. delinquency in dues and assessments deprives a member of benefits, as, generally, benefits are only conferred upon those "in good standing," which term usually means that the member must be "square on the books of the order." However, a rule providing that any member who shall be in arrears in dues and contributions for a period of three months or more shall be denied sick and distress benefits for a period of three months after liquidating his account, has been held to be unreasonable. The judgment proceeds upon the ground that such rule subjects the member to a quasi penalty after the performance of his obligation to the society for a prospective period. The rule bases this deprivation upon the omission of an obligation when such obligation has been wholly performed.27 Members sometimes cut themselves out of relief by resuming work during the period specified in the rules, etc., but the Supreme Judicial Court of Massachusetts has held that working two days during a period of sickness will not deprive one of benefits given to those incapacitated from working.28

** McCullough v. Expressmans' Assur., 133 Pa. St. 148, 19 Atl. Rep. 355.

** St. Mary's Benef. Soc. v. Buford, 70 Pa. St. 321, 4 Am. Corp. Cas. 125.

Cartan v. Father Mathews Soc., 3 Daly (N. Y.), 20.
 Genest v. L'Union St. Joseph, 141 Mass. 417.

4. Reduction and Suspension of Benefits .-Benefits may be reduced in amount where the exigencies of the society require it. A financial embarrassment may be thus relieved; and such action may be taken in event of extreme sickness among members. Likewise. benefits may be suspended altogether in proper cases.29 Yet it must be remembered that such suspension and reduction are subject to limitations. They must not affect rights to benefits already vested. They must not discriminate; they must operate upon all the members equally, and they must be made by virtue of some reserved right in the membership contract, as well as in the manner pointed out in the rules of the society. In conformity with the above doctrine, sick benefits of five dollars per week may be suspended until there shall be at least eight hundred dollars in the treasury, and will operate upon all members whose rights to benefits accrue after such suspension.30 But sick benefits cannot be suspended or reduced after the right of a member to them has become vested, although such action is taken by virtue of a rule in force at the time the particular member joined the society. illustrate: In one case, at the date of the member's admission, and also at the time of his becoming disabled (here insane), three dollars weekly benefit was provided. Subsequently the society limited its sick benefits to thirteen weeks per year. It was held that such reduction did not operate upon the insane member, and the court reasoned: "A right to amend was reserved. But it was a right to amend the by-laws, not to repudiate a debt. A by-law provides what the rights of members shall be in certain events, if they continue to pay their dues until such event happens; this, of course, by virtue of the reserved right, may be amended or repealed. But when the event happens, what was a contract depending upon a contingency, becomes in law a debt. The right to modify a contract does not include the right to repudiate a debt, any more than the reserved right of the legislature to repeal the charter of a corporation giving it the right to confiscate property."31 And in another case, we find

²⁹ McCabe v. Father Mathew's Soc., 24 Hun (N. Y.), 149.

30 St. Patrick's Male Ben. Soc. v. McVey, 92 Pa. St. 510, 513.

31 Pellazzino v. German Cath. St. J. Soc., 16 Week y Bull. (Ohio) 27, criticising Figure v. Soc., 46 Vt. 362.



an additional illustration of this principle. The articles of association were amended, reducing the widow's benefit from four to one dollar per month, after the death of the member, and it was ruled that such amendment, not being retroactive, the member's widow was entitled to receive the monthly allowance named in the original articles.32 But courts have not always adhered to these sound principles. Certain modifications have been attempted which do not seem to harmonize with the doctrine of the decisions just cited. In a case before the Supreme Court of New York, at General Terms, the facts were: Sick benefits of four dollars per week were given to members of the "scarlet" degree. The particular sick member was of this degree, and becoming sick, drew benefits at the above rate for nearly three years, when the sick benefit regulation was modified to the effect that where a member has been sick and drawing benefits for twelve months, the society shall reduce the same to one dollar per week. The four dollar weekly benefit was paid during the following year, when it was immediately reduced. Such reduction was sustained on the ground that it operated upon all members alike and placed them on the same footing. That the society not only had the right, but was bound, to regulate its benefits for the advantage of all its members, making a reduction to prevent a depletion of its funds in case of general sickness among its members.33 The opinion of Westbrook, J., on the trial of the case, whose decision is reversed, appears more logical. "By the happening of the contingency provided for-the sickness-the plaintiff's right to the sum-four dollars per week-during his sickness or disability, became a vested one of which he could not be deprived. The contract is to be interpreted like any other contract for insurance, in which, as a rule, is incorporated a clause giving either the insured or insurer the right to end the risk. It would certainly be a somewhat novel construction of the clause conferring such power of termination to hold that after a loss had occurred to the insured, against which the agreement was to protect, the payment of the

sum stipulated for could be reduced or repudiated by the insurer. Yet this, as it seems to me, is the precise position assumed by the defendant. Upon his becoming sick, as has been before stated, the plaintiff's right to four dollars per week during the continuance of his illness became a vested one, and it would be most unreasonable and unconscionable so to construe the by-laws giving the power of amendment as to confer upon the members of the lodge the authority to deprive him of that to which he had thus become clearly entitled." A peculiar decision is reported in the Vermont reports. facts were: By the rules of the society the widow of each member was to receive twentyfive cents per day as long as she remained a virtuous widow. A member died, leaving a Afterwards the rules were amended to the effect that such widow should receive twenty-five cents per day until she had received two hundred dollars, when her benefits should cease. This action on the part of the society was sustained, the court holding that the limitation was applicable to all alike, and that the society possessed power to reduce its benefits to meet the exigencies of its funds. Evidently the court did not think that the widow's right to receive twenty-five cents per week during her virtuous widowhood became vested immediately upon the death of her husband.34

EUGENE McQUILLIN.

St. Louis, Mo.

34 Figure v. Mutual Society of St. Joseph, 46 Vt. 362.

SEIZURE OF PRIVATE PROPERTY—CUSTODY OF POLICE—CRIMINAL EVIDENCE.

NEWBERRY V. CARPENTER.

Supreme Court of Michigan, December 24, 1895.

Where a steam boiler exploded on the premises of relator, alleged to have been caused by the criminal negligence of the engineer, the court had no right, 10 days after the accident, to order the boiler and engine into the custody of the police, but not to be removed from the premises, to be used as evidence on the trial of the engineer for manslaughter.

GRANT, J.: The facts in this case are as follows: The relator was the owner of a large building in the city of Detroit, occupied by a printing establishment and other business enterprises. A large number of persons were employed in it. A steam engine and boilers were used in heating the building and situated in the basement. On

³² Gundlack v. German Mech. Assn., 4 Hun (N. Y.), 339.

³³ Poultney v. Bachman, 31 Hun (N. Y.), 49, overruling same case in 62 How. Pr. 466, and 10 Abb. N. C. 252.

November 6, 1895, one or both of the boilers exploded, completely wrecking the building, causing the death of 37 persons, and injury to others. It was claimed by the prosecutor of the county that one Thompson, the engineer, caused the explosion by his criminal negligence in the management of the engine and boilers, and is therefore guilty of manslaughter. An indictment was promptly returned by the grand jury against him, charging him with that crime. Immediately after the explosion the police department of the city of Detroit took possession of the building, and removed the debris and the bodies of those killed. On November 16th, the prosecuting attorney appeared before one of the circuit judges of the county of Wayne, and upon his verbal statement, without any sworn petition or affidavit, the following order was made: "On motion of O. F. Hunt, assistant prosecuting attorney, and after hearing argument of H. E. Boynton and Otto Kirchner, friends of the court therein, it is ordered that the steam engine, boiler or boilers, and materials surrounding the same, and now upon the premises known as '45 and 47 Larned street, West,' be and the same are ordered into the custody of the police department of the city of Detroit, as exhibits in said cause; the same, however, not to be removed from said premises. This order to remain in force only until the decision of a motion for injunction now pending before Judge Lillibridge, and subject to the terms of an order this day made by him." The relator moved to vacate this order, which the court refused, and the object to this proceeding is to set aside that order. Upon the hearing of this motion the prosecutor filed an affidavit from which it appears that, after the police department took possession of the debris, an arrangement was made between him and Mr. Thompson, through his attorney, and the relator, that certain persons (expert engineers) should, on behalf of the respective parties, have free access to the engines, boilers, machines, and the premises, for the purposes of examination. The learned prosecutor further states in his affidavit that this property is essential to be used as exhibits upon the trial of Mr. Thompson, as well as for the further investigation into the causes of the disaster by the grand jury, and claims the right of the prosecution to hold them until all criminal trials connected with the disaster are tried. It thus appears that the prosecution had the entire control and charge of this property for a period of 10 days prior to the making of this order, and have had ample opportunity for an examination thereof by the officers and experts to determine the cause of the disaster, so far as it can be determined from these articles.

The importance of this case to the relator is apparent from the statement of her counsel in their brief that she is threatened with civil suits for damages upon the ground that she was guilty of negligence. Not only, therefore, is she by this order deprived of her private property, which

she may desire to use in her business, but may be deprived of the evidence which may establish her innocence of any fault. She is charged with no crime. The broad claim of the learned prosecutor is that the courts possess the power, upon his motion, to enter upon the premises of private persons, and seize any property which may, in his judgment, have any bearing upon a crime with which another is charged. If the order in this case be sustained, it results in holding that a citizen's team, with which he earns a livelihood, may be seized by the police authorities because he believes that such team was used by an alleged criminal in the commission of a crime. If A be arrested, charged with arson in the burning of B's house, and there be some evidence in the house believed to connect A with the crime, the police authorities may seize and hold possession of the house for months, and until the trial, and prevent the owner from rebuilding. So, under like circumstances, a manufacturer might be deprived of the possession of his property necessary for the successful carrying on of his busi-Other illustrations will readily suggest themselves. The power is certainly an extraordinary one, and those who assert it ought to be able to find some common or statute law authorizing it. The exercise of power no more arbitrary than this has caused revolutions. learned prosecutor cites the following authorities in support of his contention: Whart. Cr. Pl. & Prac. § 60; Bishop New Cr. Proc. §§ 210, 211; Ex parte Hurn, 92 Ala. 102, 9 South. Rep. 515; Woolfolk v. State, 81 Ga. 551, 8 S. E. Rep. 724; Spalding v. Preston, 21 Vt. 9; O'Connor v. Bucklin, 59 N. H. 589. These authorities do not even hint at such an arbitrary and broad power. The citation in Wharton says only that "those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged." The citation from Bishop goes no further. In Ex parte Hurn, money was taken from the possession of the prisoner, and delivered to the sheriff, who was afterwards served with a writ of garnishment at the suit of an attaching creditor of the prisoner. The sheriff paid the money into court, and asked instructions as to what he should do with it, while the prisoner asked an order for its restoration to himself. It was held that the case could not be reviewed upon mandamus. Many cases are cited and reviewed in that decision, none of which sustain the present case. That court quotes with approval the case of Boyd v. U. S., hereinafter referred to. The conclusion of the court in that case is that "it is the duty of an officer, having no other authority than the light to make the arrest, to search the party arrested, and seize and remove from him the dangerous weapons found upon his person." That authority is confined by the decision to the seizure of articles found upon his person, and connected with the offense. In Woolfolk v. State, the respondent was charged

and the state of the

with murder. During the progress of the inquest he was required to remove his clothing, and while so doing he made statements which were introduced upon the trial. It was objected that the circumstances surrounding the defendant amounted to force and compulsion, but the testimony was held proper. In deciding that case the court discusses the right of seizure, and speaks only of seizure from the person. In Spalding v. Preston, a large number of pieces of German silver, of the precise size and thickness of Mexican dollars, and made in that form for the purpose of being stamped and milled into counterfeit coin of that description, were taken by a sheriff from the person who was carrying them at the time to a place of manufacture, for the purpose of having them finished, so that he could put them in circulation as genuine coin, and were detained by the sheriff to be used as evidence against the person from whom they were taken, and also for the purpose of preventing their cir-These were material to be used in counterfeiting. It was held that "the owner of them, in the absence of evidence that they were put in that form without his knowledge, or against his consent, could not sustain trover against the sheriff therefor." O'Connor v. Bucklin is another case of taking property found upon the person of the party accused.

In my judgment, no case cited in the opinion of my brother, the chief justice, sustains the power here asserted. In Closson v. Morrison, 47 N. H. 482, the property was taken from the person of the respondent, and was levied upon by attaching creditors while in the hands of the sheriff. The decision quotes the statute of that State authorizing search and seizure, and maintains the right of the officer to take weapons from the prisoner, and also money or other articles of value found upon him, by means of which, if left in his possession, he might procure his escape. Bank v. McLeod, 65 Iowa, 665, 19 N. W. Rep. 329, and 22 N. W. Rep. 919, is a similar case, where the property of the prisoner, taken from his person upon arrest, was attached in the hands of the officer. In Langdon v. People, 133 Ill. 382, 24 N. E. Rep. 874, the property seized was a ferged official certificate. It was held not to be private property, and was seized upon a search warrant made upon due complaint. In the case of Boyd v. U. S., 116 U. S. 615, 6 Sup. Ct. Rep. 524, Mr. Justice Bradley, in delivering the opinion of the court, quotes with approval the language of Lord Camden in Entick v. Carrington, 19 Howell, St. Tr. 1029: "No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass, and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law. or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment." The right of search and seizure is very fully and ably discussed in the Boyd Case, at page 622 et seq., 116 U. S., and page 524, 6 Sup. Ct. Rep. In Hibbard v. People, 4 Mich. 125, an act to authorize the issue of warrant to seize liquor, and to retain it to abide the order of the court, and to be used in evidence upon a trial, was held to be unconstitutional. This decision was approved in Robison v. Miner, 68 Mich. 557, 37 N. W. Rep. 21.

The people of this State, through their legislature, have made ample provisions for the seizure of property in criminal cases, and they are summarized as follows: (1) Personal property stolen, embezzied, or obtained by false pretenses; (2) counterfeit or spurious coin, forged bank notes, or other forged instruments, or any tools, machines, or other materials provided or prepared for making them; (3) obscene matter; (4) lottery tickets (5) gaming apparatus. Section 9619, How. Ann. St., provides what shall be done with the articles so seized. These statutes are declaratory of the legislative will upon the subject of search and seizure, and cannot be extended by the courts to include the right to enter the inclosures of private citizens, and seize their lawful property, to be held as evidence against alleged criminals. No intimation is found in any statute of this State, or in any decision of this court, that a prosecutor may cause to be seized the property of third parties, the possession, ownership, and use of which are not prohibited by law, and which are useful and required in the legitimate prosecution of their businesses, and their private inclosures to be entered for that purpose. Such seizures are unwarranted, unreasonable and prohibited by the constitution of the United States and of this State. Important as is the proper administration of the criminal law, the power to administer must be exercised with due regard to the constitutional rights of the citizen. among which is the right to the possession and control of his lawful property. Justice Cooley says: "The only lawful mode of making search upon one's premises is under command of search warrants, and these are allowed to discover stolen or smuggled goods, or implements of gaming, and in a few other cases, for which provision must be found in the statutes. The authority to issue them is liable to great abuses, and the law is justly strict regarding their requirements." Cooley, Torts, 295. See, also, Cooley, Const. Lim. 364-370; 2 Hare, Const. Law, 830; Potter v. Beal, 49 Fed. Rep. 793.

The order of the circuit judge was without authority of law, and must be set aside. The writ will issue.

NOTE.—The facts that in the decision of the principal case the appellate court reversed the trial court, and that one of the judges of the former dissented from the conclusion of the majority, is sufficient to show that the point decided is not by any means clear or free from doubt. As appears from the dissenting opinion, the right to impound exhibits, even in a civil case, has been generally exercised by the courts, and the right to hold articles found in possession of a person charged with crime is not limited to such as are supposed to be stolen, but extends to evidentiary articles. It is not the fact that there is a contest over the ownership of stolen goods that gives the people the right to retain them, but rather that they are of the res gestæ and evidential. The prisoner's consent does not give them the right of possession as against the people. The right to the possession and enjoyment of property must be subordinated to the law of overruling necessity. It is subject to the necessary burdens and restrictions imposed by the general police power of the State, in order to secure the general comfort, health, security and protection of the citizen. The limitations upon the police power and its execution do not embrace such reasonable judicial orders as may be found necessary in the course of the administration of the criminal law for the detention of witnesses and the preservation of evidence. Thus, it is not only the right but the duty of an officer making an arrest to take from the prisoner, not only stolen goods, but any articles which may be of use as proof in the trial of the offense with which the prisoner is charged. Wharton, Cr. Pl. & Prac. (9th ed.) §§ 60, 61. He may take from the prisoner any articles of property which it is presumable may furnish evidence against him. Rex v. O'Donnell, 7 Car. & P. 138. This right of sequestration is plain, notwithstanding the property may be claimed by a third party, and stolen goods may be held as against the owner if necessary for use as evidence, however clear the title of the claimant may be. Exparte Hun, 92 Ala. 102, 9 South. Rep. 515; Closson v. Morrison, 47 N. H. 483; Bank v. McLeod, 65 Iowa, 665, 19 N. W. Rep. 329, and 22 N. W. Rep. 919; Woolfolk v. State, 81 Ga. 551, 8 S. E. Rep.

The cases of Entick v. Carrington, 2 Wils. 275, Boyd v. U. S., 116 U. S. 616, and Pattin v. Beal, 49 Fed. Rep. 793, cited in the principal case, are, as claimed by the dissenting judge, cases of paper searches and seizures, and involves the right of the government to invade private premises and search among private papers for evidence of crime, and the right to compel the production of one's own private papers in a criminal prosecution as evidence against himself. These cases do not hold that all searches and seizures are unreasonable. They do hold that the invasion of the privacy of one's home, and the seizure of private papers and documents are an unreasonable search and seizure, and are within, not only the article of the constitution prohibiting unreasonable searches and seizures, but also the article that no person shall be compelled to give evidence against himself. The principal case is not one where it is sought to compel relator to produce evidence against herself for she is not the person charged. "It frequently happens," mys the dissenting judge, "that animals affected with infectious disease are killed by the public authorities to prevent the spread of the disease, and if the poor man's team had been stolen and taken from the thief the necessity for its use would not necessarily determine the owner's right to its possession. If in a partially burned building was found a package of combustible material saturated with kerosene,

there be any question of the right of the authorities to take and preserve the package for use as evidence? Illustrations of what might readily be held to be unreasonable seizures could be multiplied without effort, but they would. be without force. The prohibition is against unreasonable seizures, and all seizures are not regarded as. unreasonable. The question here is whether this is an unreasonable seizure. Relator's contention is that any impounding of any of her property for the purpose named is unwarranted. Because a man may not be put out of his own house, it does not follow that a. revolver or a steel drill or a knife may not be sequestered for use as evidence in a criminal proceeding. Because a man's team with which he earns a livelihood, which has been used by another to convey away stolen goods, may not be impounded, it does not follow that the status quo of an exploded boiler, the negligent use of which, resulting in the death of 37 persons, is charged as manslaughter, and concerning which no claim is made of a desire for its use, nor does it appear but what it is useless except for scrap iron, may not be preserved for use as evidence upon the itrial (of ithe offense charged, especially as it is claimed by the record here that the police authorities have, since the explosion, been endeavoring to exercise a certain surveillance over it, and in that endeavor a conflict between police officers, counsel forthe accused, and the owner had arisen, and certain of the connections of the boiler had been spirited away.

It is urged that some common or statute law authorizing such a seizure should be pointed out. Thecases referred to sustain the right to hold evidentiary articles, irrespective of the question of ownership, and as against the owner; and no case can be found. which disputes this right, or intimates that such articles cannot be seized and impounded, where the rules referred to in the Entick and Boyd Cases are not infringed. Those cases do not intimate that a search warrant may not issue in a proper case for the discovery and seizures of evidences of crime. The officers of the law, to whom is committed the prevention and detection of crime and the collection of criminating evidence, are daily committing acts for which there is. no express authority in the statutes or elsewhere in. the books."

In the recent notorious Holmes Case, tried in the city of Philadelphia and reported in 52 Legal Intelligence, 739, the officers of the law in their efforts to secure criminating evidence entered upon [private property and excavated under cellar floors and elsewhere, and no one raised any question as to the right so to do. It cannot be said that the trial court, in the principal case, would not have the power had it been found necessary to compel witnesses to give sureties for their appearance or to commit them on refusal so to do. If this be true can it be seriously contended. that this exploded boiler cannot be impounded. Concerning the question of jurisdiction under or by virtue of statute, the dissenting judge very aptly 28ks: Suppose that in the trial of a murder case the court deemed it material, in order that the ends of justice be subserved, that the body be exhumed; has the court no power in the premises? Can it be true that a magistrate may commit the relator to prison, and that the circuit court, upon an indictment presented to it, has no authority respecting an article which has been before the grand jury, and which is, in and of itself, criminating evidence? Is an exploded boiler, or the right of property therein, more sacred than the person? The right of an officer to pursue a fleeing criminal in and upon my premises, and into my dwelling, does not depend upon the statute. There is no statute which authorizes an officer to take from a prisoner such evidence of guilt as may be found on the person—the bloody knife, the revolver with an empty chamber, garments stained with blood, the shoe or boot which fits the track, the coat with the missing button, the knife with the broken blade, the hat found at the scene of the crime.

JETSAM AND FLOTSAM.

MASTER AND SERVANT—IMPLIED OBLIGATION OF SERVANT TO ACT PAITHFULLY.

In the case of Robb v. Green, 73 Law Term Rep. 15, lately decided in the English Court of Appeal, it appeared that the defendant entered into the service of the plaintiff as manager of the plaintiff's business. As manager he had access to the plaintiff's books, and he surreptitiously copied therefrom a list of the names and addresses of the persons dealing with the plaintiff, with the view of using the list for his own benefit and to the detriment of the plaintiff, after leaving his service. The defendant set up a business of his own and used the list he had copied from the plaintiff's books. It was held that the defendant had committed a breach of his implied contract to act with good faith towards the plaintiff. A judgment in an action by the master against the late servant was accordingly affirmed in the sum of £150 damages, and the defendant was ordered to deliver up to the plaintiff the list of names and addresses taken from the plaintiff's books, and he was restrained from making further use of such list .- American Law Review.

CORRESPONDENCE.

LIABILITY OF EMPLOYERS FOR THE NEGLIGENCE OF CONTRACTORS.

To the Editor of the Central Law Journal:

In your issue of the JOURNAL of Feb. 7th, last, I have read with much interest an able article by Wm. Rogers Clay of Lexington, Ky., in which he discusses the legal question of "liability of employers for the negligence of contractors." I have lately had a case involving this question which has been passed upon by the Supreme Court of Minnesota, and will soon appear in the Northwestern Reporter. It is the case of Stephen Schip v. Pabst Brewing Company, and the facts briefly stated were these: The defendant was the owner of an old dilapitated stone building, six stories high, in the city of St. Paul, which, on account of age and imperfect construction, was about to fall down. It had become so dangerous that the building inspector of the city had condemned it and ordered it taken down by the defendant. The defendant advertised for bids to take down and remove the old structure and received several bids, and let the job to one Charles Gorton, the lowest bidder. The complaint alleged, and it was admitted by the defendant for the purposes of the trial at least, that this man, Gorton, was an utterly incompetent and unfit person to perform this work and was insolvent; all of which the defendant knew before it engaged him to perform the work.

Schip, the plaintiff, was a common laborer and was

employed by Gorton to assist in tearing down this building, and had no knowledge of Gorton's incompetency, but was seriously injured while working upon this building. The defendant claimed Gorton was an independent contractor, and for that reason defendant could not be held liable to a servant of Gorton.

The court in an opinion by Canty, J., hold that defendant is not liable to plaintiff for a personal injury, although it knowingly employed an incompetent and insolvent contractor, whose carelessness and negligence caused the injury, to perform this dangerous work.

I don't think this is good law and it is certainly not supported by the considerations of justice. Judge Canty seemed to think the defendant was not liable because there were not sufficient cases cited as precedents to sustain plaintiff's contention. Nearly all of the cases cited by Mr. Clay in his article were used and commented on, but we were told that Lawrence v. Shipman, 39 Com. 586, was not a case that sustained us, as well as other cases cited.

Mr. Clay, in making certain exceptions to the general rule that an owner is not liable for the acts of an independent contractor, who pursues his own methods as to doing the work, and the owner exercising no control over the work, says: "The employer having to respond in damages where the case comes under one of these exceptions (viz: where he knowingly employs an incompetent contractor), he will be prompted to secure a skillful and reliable contractor, and to use every means to prevent the work being of such a character as will result in a nuisance or obviously expose others to peril.

Now, suppose he has taken all these precautions, will his liability for the negligence of the contractor tend to prevent the injury? Certainly not. He may live in one city and the work be performed in another. At any rate, he can have no voice in employing or directing the contractor's servants. The matter has gone beyond his control. How, then, will the purpose of the law be best accomplished?" My answer to the above is: if the owner secures a skillful and reliable contractor, the presumption overwhelmingly is that no injury or accident would happen through the contractor's negligence. The owner, no doubt, protects himself from liability by placing a dangerous piece of work in the hands of a competent contractor, but, on the other hand, when the owner knowingly places such work in the hands of an incompetent man, or incompetent contractor, if you would call him such, why should not he, the owner, be held liable? He has been guilty of doing the first negligent act which caused the injury, and his act is the proximate cause of the injury. There are authorities which hold that the owner would be liable to a passer-by or to an adjoining owner, either to his person or property for the negligent acts of an independent contractor, and we would like to know by what reason, sense or logic, should the owner he held not liable to a servant of the contractor; the servant being rightfully about the building lawfully and properly performing his work, and not guilty of contributing negligence.

In this case, I established a sound and logical proposition of law and the owner under such a state of facts should certainly be held liable, and it looks beggarly, indeed, to have a court defeat you because apparently, you have not referred it to some authorities in point which specially sustain you.

An able court (as our State Supreme Courts are supposed to be), don't need authorities to establish a sound legal principle, when a novel question arises,—

they don't necessarily have to decide against a sound principle because there is an old precedent two hundred years old which once held otherwise, but they sometimes do so.

St. Paul, Minn.

S. P. CROSBY.

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This is a valuable compilation of the law of the evidence as applied during the examination of witnesses. It is in the shape of selected cases with notes by Mr. Austin Abbott. That gentleman is well known as a lawyer of ability, and a law writer of rare qualification. Whatever Mr. Abbott has done in the literary legal line has been well done, and this work forms no exception to that general rule. The book is full of exhaustive and well-prepared annotations to leading cases, the latter of which are well selected and!logically arranged. It is a book of nearly eight hundred pages. Published by the Diosey Law Book Company, New York.

GENERAL PRINCIPLES OF THE LAW OF SALES.

The author of this work, Mr. Reuben M. Benjamin. a distinguished professor of law in the Bloomington Law School, published in 1889 a handbook of the "Principles of Contracts," which was a well prepared and methodical statement of the fundamental principles of contracts. The form of the present treatise on Sales is similar thereto and naturally follows it. In a concise and clear manner it gives us the general principles regarding the American law pertaining to the sale of goods. Like the earlier work, too, it is in the shape of rules with comments and illustrations a manner of treatment which should commend it to the student of law. In successive chapters are stated the rules and subrules of law applicable to the formation of the contract of sale, conditions and warranties, effects of the contract, performance of the contract, rights of unpaid seller against the goods, and actions for breach of the contract. To this is appended the English

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"Sale of Goods Act" which went into effect January 1, 1894, and which is generally regarded as the best embodiment of the principles of the common law in relation to the sale of goods. In relation to the work it seems sufficient to say that the rules as laid down by the author are well expressed and present a satisfactory statement of the law as embodied in the best decisions, that the cases selected for illustration are the leading cases upon the various points, and that in addition the author has cited all the cases which shed light upon the propositions advanced. We commenced the work to students and to the profession. It is a book of over three hundred pages and in its beauty of arrangement and type and general mechanical execution reflects great credit upon its publishers, Bowen Merrill Co., Indianapolis & Kansas City.

HUMORS OF THE LAW.

"Now," thundered an attorney, who was cross-examining a female witness in Quarter Sessions Court recently, "Weren't you lately prosecuted in this court?"

"Well," reluctantly admitted the witness," I was prosecuted for delicious mischief."

At a public dinner in Philadelphia some years ago, the presiding officer, with a cigar in hand, asked Mr. Evarts for a match, meaning that that gentleman should hand to him the box just beyond on the table. When Mr. Evarts said, "I have none," the presiding officer rejoined, "Very well, I shall have to introduce you as the matchless orator from New York." And yet some people say that Philadelphia is "slow."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except these that are Published in Full or Commented upon in our Notes of Recent Decisions.

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- 1. ACTION—Commencement—Summons.—In issuing a summons to commence an action for the recovery of money, in order that the suit may be considered commenced or pending, the justice who issues such summons must sign it.—COLBORN V. BOOTH, W. Va., 23 S. E. Rep. 556.
- 2. ADMINISTRATION—Allowance to Widow.—Where it did not appear that the first allowance to a widow was insufficient for her immediate necessities at that time, it was error for the court to make a second allowance two years afterwards.—PORTER V. PORTER, Mass., 42 N. E. Rep. 565.
- 3. Admiratty—Collision—Injuries to Passenger.—A steamer guilty of culpable negligence contributing to a collision is liable for resulting injuries to passengers on the other vessel, although the latter also may be guilty of fault contributing to the disaster.—The Willamette, U. S. C. C. of App., 70 Fed. Rep. 874.
- 4. ADMINISTRATOR Declarations of Deceased. Declarations of deceased that his estate was of a certain value, and that he had a large sum of money in his house, is not competent in an action to remove his administrator for falling to account for moneys received.—IN RE WELCH'S ESTATE, Cal., 42 Pac. Rep. 1689.
- 5. ADMIRALTY JURI DICTION—Maritime Contract.—Upon the trial of a libel to recover a balance of freight, respondent paid into court a certain amount conceded to be due, and the evidence showed that the remainder consisted of money advanced by the steamship company to pay charges for railway transportation of the goods from an interior town to the port at which they were taken by the vessel: Held, that in respect to these advances the contract sued on was not a maritime contract, and the libel must be dismissed for want of jurisdiction.—PACIFIC COAST STRAMSHIP CO. V. FEEGUSOM, U. S. D. C. (Cal.), 79 Fed. Rep. 870.
- 6. ADVERSE POSSESSION—What Constitutes.—A grantee of a lot and a right of way over a strip of an adjoining lot, who uses the strip as a garden, with the consent of the lot owner, and with him maintains a fence between the strip and the rest of the lot, and maintains a gate at the outlet of the strip to the street, does not hold the strip adversely to the owner of the lot, where he never claimed title thereto other than as conveyed to him, and the lot owner paid the taxes thereon.—Downing v. Dinwiddle, Mo., 38 S. W. Rep. 470.
- 7. APPEAL FROM STATE COURT—Final Decree.—In general, if a case be remanded by the State appellate court to the lower court for further judicial proceedings in conformity with the opinion of the appellate court, the decree is not final, so as to authorize a review by the supreme court; and this is especially the case when the opinion to which the decree is required to conform does not appear.—UNION MUT. LIFE INS. Co. v. KIECHOFF, U. S. S. C., 16 S. C. Rep. 318.
- 8. ASSESSMENT LIEN—Compliance with Statute.—A contract reciting that plaintiff would construct curbing and gutter ways in accordance with the specifications thereto annexed, but to which no such specifications were annexed, is not a sufficient compliance with the statute requiring all contracts to be in writing and signed by the contractor; and under it no lien can be fixed, in invitum, against abutting property.—SCHWIESAU V. MAHON, Cal., 42 Pac. Rep. 1065.
- 9. Assignment BY HUSBAND TO WIFE—Evidence.—A written assignment from husband to wife confers on her during coverture the equitable and beneficial interest, and at his death the legal title, and is therefore admissible as evidence to prove her title in a joint suit that has survived to her by reason of his death.—HUNTER V. STRIDER'S ADMX., W. Va., 28 S. E. Rep. 567.

- 10. ATTORNEY'S FEES-Personal Liability of Administrator.—An administrator is personally liable for attorney's fees in an action begun by him against a railroad company for the wrongful death of his intestate, whether his contract with the attorneys was personal, or in his representative capacity.—Tucker v. Grace, Ark., 38 S. W. Rep. 530.
- 11. Banks—Special Deposit.—A person deposited money with a bank, taking from it a deposit slip in the form used for general deposits. Upon such slip were the words, "Security for signing bond to be held by bank." Subsequently the depositor, in order to change the security so that \$700 would be available for one purpose and \$900 for another, drew an ordinary check, which was marked "Paid," and a certificate of deposit for \$900 made out, to be held by the surety, and \$700 to secure other bondsmen. The first-named certificate was afterwards paid by the bank. The depositor testified that the deposit was a special one: Held, a general deposit and not a trust fund in the hands of a receiver.—Dearborn v. Washington Sav. Bank, Wash., 42 Pac. Rep. 1107.
- 12. BARKS AND BANKING—Loans and Discounts—Authority of Cashier.—A cashier on whom, by continued absence of the directors, has devolved the duty of making loans and discounts, will be liable for losses through overdrafts and discounts made by him only where it appears that he failed to make reasonable inquiry into the financial standing of those making the overdrafts, and those whose paper was discounted, and failed to exercise the care and discretion which an ordinarily prudent man would exercise in his own business.—PRYSE V. FARMERS' BANK OF BEATTYVILLE, Ky., 38 S. W. Rep. 582.
- 18. Bastardy—Acquittal—Costs.—Costs in a bastardy case, in event of an acquittal, cannot be taxed against the county; the statute fixing costs therein falling to make any one bound therefor in such event, and bastardy being the subject of civil proceeding, so that costs cannot be assessed against the county, as in criminal proceedings, and the State or county not being bound for costs, even by legal provisions, unless specifically or by necessary implication named or referred to therein.—STATE v. BLACKBURN, Ark., 38 S. W. Rep. 529.
- 14. Bona FIDE PURCHASER—Notice—Husband and Wife.—Where land is occupied by two persons, as, for instance, by husband and wife, and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other.—KIRBY V. TALL-MADGE, U. S. S. C., 16 S. C. Rep. 349.
- 15. Carriers—Bills of Lading.—Where a railroad company issues original shipper's order bills of lading, deciaring that the consignment is in its possession, to be delivered only on their presentation, not conditioned to be void in case of delivery on duplicate bills issued for protection, the company will be liable on its original bills to one holding them as assignee for a valuable consideration, though it has already delivered the freight to the shipper on his presenting one of the duplicate bills.—MIDLAND NAT. BANK V. MISSOURI PAC. RY. CO., Mo., 33 S. W. Rep. 521.
- 16. Carriers of Passengers—Cancellation of Ticket.—Where a railroad company has adopted a rule that only one editorial pass shall issue to each paper that does its advertising, and the editor of a newspaper who has been doing such advertising, in order to pay its indebtedness to a party who has just been discharged from his employ, falsely represents to such railroad company that said party is on his editorial staff, and thus induces the said company to issue a 1,000-mile ticket in favor of such party, if the party to whom it is so issued has notice of the fraud by which said ticket was obtained, the ticket would be invalid, and on discovering such fraud the company has the right to take up and cancel the ticket.—Moore v. Ohio River R. Co., W. Va., 23 S. E. Rep. 539.
- 17. CARRIERS—Passenger—Contributory Negligence.—It is negligence to go from one car to another while

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the train is in motion. If a passenger on a train in motion attempts to go from one car to another, and is thrown from the platform by the sudden jerk of the train, the defendant corporation is not responsible. In such a case the defective coupling of the train will not justify a verdict in favor of plaintiff, as the passing from one car to another is the proximate cause of the injury.—Bemiss v. New Orleans City & Lake R. Co., La., 18 South. Rep. 711.

19. Carriers—Passenger—Contributory Negligence.—Where a passenger goes on the side of a platform car opposite the platform, and not at the place arranged to receive passengers, and attempts to climb on the train from between the cars, and in so doing places his foot on the bumper, where it was injured by the engine moving up to couple the train, he is guilty of contributory negligence, and cannot recover.—WARDLAW V. CALIFORMIA RY. CO., Cal., 42 Pac. Rep. 1075.

19. CARRIERS—Ejecting Passenger.—Where two rallroad companies employ the same ticket agent and use the same track, and it was the custom for each company to accept the tickets of the other on its trains, and the agent, after selling a passenger a ticket of one company, directs him to get on a train of the other, and the conductor refuses the ticket and ejects the passenger, both companies are liable.—Texas & P. Ry. Co. v. Dye, Tex., 33 S. W. Rep. 551.

20. CHATTEL MORTGAGE — Validity — Recording.—In this State it is competent for the owner and operator of a "threshing rig" to mortgage the future earnings thereof. But such mortgage must be filed for record in the same manner as a mortgage upon any other personal property, and if not so filed, it is void as against a creditor of the mortgagor who became such in ignorance of the existence of the mortgage, after the same was executed, and before it was filed for record, relying upon the mortgagor's apparent ownership of such earnings.—Symbol v. Hannawall, N. Dak., 65 N. W. Ren. 82.

71. CONDEMNATION OF LAND—Building of Levees.— Land in Louisiana bordering on a navigable stream is subject to the State law allowing the public to impose servitudes on such land without compensation for the making and repairing of levees, even though the title to the land is derived from the United States.—EL-DRIDGE V. TRELEVANT, U. S. S. C., 16 S. C. Rep. 345.

22. Constitutional Law-Ejectment against Railroad Company.—The provisions of sections 2660, 2661, Gea. St. 1894, allowing the plaintiff reasonable attorney's fees in actions brought under the statute to recover possession of land taken, without compensation, by a railroad company, for its right of way, are constitutional.—Cameron v. Chicago, M. & St. P. Ry. Co., Minn., 65 N. W. Rep. 652.

23. CONSTITUTIONAL LAW—Error in Proceeding.—It is not a right, privilege, or immunity of a citizen of the United States within the meaning of the Const. Amend. 14, to have a controversy, in the State court prosecuted or determined by one form of action, rather than by another.—IOWA CENT. BY. CO. V. STATE OF IOWA, U. S. 8. O. 16 S. C., Rep. 344.

24. COETRACT—Authority of Agent.—While an action for damages for refusal to execute a consummated contract to loan money lies as in other cases, it must be a complete and consummated contract.—Wells v. Michigan Mut. Life Ins. Co., W. Va., 23 S. E. Rep. 527.

25. COPTRACT — Evidence—Non-performance.—In an action to recover upon a contract to furnish materials and labor for plastering a house, the plastering to be of a certain quality, an answer which sets forth that the plastering was not such as the contract required, and that by reason of the inferior materials used and unakiliful workmanship the plastering was worthless, and of no benefit to defendant whatever states a good defense.—Nollman v. Evenson, N. Dak., 65 N. W. Rep. 686.

26. CONTRACT—Validity — Public Policy.—An agreement by a stockholder to give a person part of his

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stock, if such person would become a director of the corporation is not necessarily against public policy.—ALMY V. ORNE, Mass., 42 N. E. Rep. 561.

27. CONTRACT BY NATIONAL BANK—Ultra Vires.—Under Rev. St. U. S. § 5187, ols. 3, 7, empowering a national bank to make contracts, and to exercise all powers necessary to carry on the banking business, an agreement by a national bank to procure a person applications for insurance, if he would procure for it a customer, is ultra vires.—DRESSER v. TRADERS' NAT. BANK, Mass., 42 N. E. Rep. 567.

28. CONTRACT OF EMPLOYMENT — Construction. — Plaintiff and defendant, a corporation, entered into an agreement by the terms of which the latter employed the former as assistant manager upon a stated yearly salary, payable in monthly installments, said employment to continue so long as the business of the corporation should be continued, provided plaintiff properly and efficiently discharged his duties, and only so long as he should own and hold in his own name 50 shares of capital stock fully paid up, in defendant corporation: Held, that the period of employment was for such time as plaintiff continued to own and hold the stock shares, not exceeding the period during which the corporate business was being transacted, and was fixed with sufficient definiteness; and, further, that there was no lack of mutuality of consideration.—McMULLAN V. DICKINSON CO., Minn., 65 N. W. Rep. 661.

29. CORPORATIONS — Stockholders' Liability—DistillingCorporations.—Rev. St. U. S. § 3251, making, "every person in any manner interested in the use" of any still jointly and severally liable for the taxes imposed on the liquors distilled therefrom, renders the stockholders of a distilling corporation liable for such taxes.—RICHTER V. BLASINGAME, Cal., 42 Pac. Rep. 1077.

30. CORPORATION—Trustees—Lease.—Where a public corporation vested with State property for public use makes a lease of it which is ultra vires, a private person cannot sustain a suit to contest it, this can be done only by the State or the corporation.—SMITH V. CORNELIUS, W. Va., 28 S. E. Rep. 569.

31. CRIMINAL EVIDENCE — Confessions.—Coufessions are not inadmissible because the party making them was in custody provided they were not extorted by inducements or threats.—PIERCE v. UNITED STATES, U. S. S. C., 16 S. O. Rep. 321.

32. CRIMINAL LAW — Appeal — Remarks of Judge.— Where the jury came back for further instructions, and the court gave them, and added that he hoped they would agree before morning, but, as defendant's counsel was absent, no exception was taken to the remark at the time, it cannot be considered on appeal, though the exception was afterwards allowed. — COMMONWEALTH V. KELLY, Mass., 42 N. E. Rep. 578.

33. CRIMINAL LAW-Evidence—Dying Declarations.—Declarations made when deceased had some hope of recovery should be excluded.—COMMONWEALTH v. BISHOP, Mass., 42 N. E. Rep. 560.

34. CRIMINAL LAW — Examination by Committing Magistrate.—It is an imperative requirement that the examination by a committing magistrate must be taken as soon as the circumstances of the case will permit. But in the exercise of a sound discretion he may postpoue the examination, if the witnesses, important and material for the State, are in no physical condition to attend the examination.—STATE V. AUCOIN, La., 18 South. Rep. 709.

35. CRIMINAL LAW—Forgery.—One who, being present at the time, procured T J P of H county to sign the name of T J P of M county to a bond, intending to pass the bond as that of T J P of M county, and so passed it, was guilty of forgery, whether or not the person who signed the name knew of the contents of the bond and its purpose.—PREL V. STATE, Tex., 33 S. W. Rep. 541.

36. CRIMINAL LAW-Gift Enterprises—What Constitute.—St. 1884, ch. 277, making it a penal offense to sell property on a representation that anything other than



what is specificially stated to be the subject of sale is to be delivered, does not prohibit the sale of tobacco under a promise to give a photograph to each purchaser of a package, though a purchaser is allowed to select his photograph from among a number.—Com-MONWEALTH V. EMERSON, Mass., 42 N. E. Rep. 559.

37. CRIMINAL LAW—Homicide—Self-defense.—Defendant and deceased having had no difficulty prior to the quarrel which resulted in defendant shooting deceased an instruction that the provocation must arise at the time of the commission of the offense had reference to the provocation which brought on the quarrel, and did not restrict it to the very time of the shooting, particularly as the charge authorized the jury to consider all the facts in the case, and as the alleged provocation consisted only in insulting words to defendant.—Graham v. State, Tex., 83 S. W. Rep., 557.

38. CRIMINAL LAW-Offenses against Property.—An indictment merely alleging that defendant drove away a horse without the knowledge or consent of the owner, against the peace and dignity of the State, charges no offense.—COLE v. STATE, Ark., 53 S. W. Rep. 529.

39. CRIMINAL PRACTICE—Amendment of Indictment.

—Under Cr. St. § 57, providing that a defect in the form of an indictment may be amended if it does not change the nature of the offense, an indictment stating the year of the offense as "one thousand eight hundred and ninety—," may be amended by filling in the proper year.—STATE V. MAY, S. Car., 23 S. E. Rep. 518.

40. CRIMINAL PRACTICE — Burglary — New Trial.— Where an indictment contains two counts, one for burglary and another for larceny, and a general verdict of guilty is returned, the court, if there is no evidence of burglary, should grant a new trial.—STATE v. JOHNSON, S. Car., 28 S. E. Rep. 619.

41. DEED OF TRUST—Foreclosure Sale.—When a deed of trust is executed, the law existing at the time of its execution enters into and forms a part of the contract, and such trust is to be enforced as to terms of sale in accordance with the statute on the subject existing at the time said trust was executed, and a subsequent statute providing for sales under deeds of trust, which provides that such sale shall be on a credit, when the law at the date of the trust provided that the sale shall be for cash, will not affect the original contract, and the sale may be made for cash notwithstanding said subsequent statute.—WALKERY. BOGGESS, W. Va., 28 S. E. Rep. 550.

42. DESCENT AND DISTRIBUTION — Effect of Advancements.— Where a child has received a certain portion in full of his share of his father's estate, on the death of his father he is ordinarily barred from further participation in the distribution or partition of the residue of such estate, and, in case of his death before his father's, his children will be barred from such participation for the same reason, and to the same extent, their father would be barred.—COFFMAN V. COFFMAN, W. Va., 23 S. E. Rep. 523.

43. DIVORCE — Constructive Service.—When all the requirements of the statute in relation to bringing a suit for divorce have been compiled with, and defendant has been duly notified by publication, the district court acquires jurisdiction to grant a divorce, and a decree made where jurisdiction has thus attached establishes conclusively the nullity of the contract of marriage, and also annuls and terminates the status of the marriage relation of the parties which arises from the marriage, so as to leave them in precisely the same condition as if no marriage had ever taken place between them.—WESNER v. O'BRIEN, Kan., 42 Pac. Rep. 1098.

44. DIVORCE—Desertion.—Under the divorce law of this State, husband and wife cannot each of them be guilty at one and the same time of willful desertion of the other, and either or both be entitled to a divorce from the bonds of matrimony.—Wass v. Wass, W. Va., 28 S. E. Rep. 587.

45. DIVORCE — Jurisdiction — Collateral Attack.—Where a judgment of divorce recited that defendant was duly served with process by publication, the presumption of the court's jurisdiction of defendant's non-residence, neither the property rights of the parties nor the rights of their children being determined thereby; and particularly as defendant received notice of the proceedings, and both regarded the divorce as valid, and again married.—AMY V. AMY, Utah, 42 Pac. Rep. 1121.

46. ELECTIONS — Ballots.—Under Laws 1895, ch. 810, providing in the printing of the official ballot that the names of the nominees shall be printed under their respective party names and emblems, a faction of a party nominating nominees for local offices only, which is accustomed to support the nominees of the regular party for State and judicial offices, is not entitled to have the names of the candidates of the regular party for the State and judicial offices printed in its column.—IN RE MADDEN, N. Y., 42 N. E. Rep. 584.

47. ELECTIONS—Ballots — Indorsement.—Sess. Laws 1890, ch. 80, § 180, providing that any ballot which is not indorsed by the official stamp, "or" has not the name or initials of the judge of the election, as provided in this act, shall not be counted, requires that both the official stamp and the name or initial of the judge appear on the ballot.—SLAYMAKER V. PHILLIPS, Wyo., 42 Pac. Rep. 1049.

48. ELECTIONS — Ballots — Mistake in Preparation.—
The election law (Act 1895, ch. 810, § 105), provides that none "but ballots provided in accordance with the provisions of this act shall be counted." The act provides for the preparation of an official ballot, and also for the use of substituted unofficial ballots in certain contingencies: Held, that section 105 did not prohibit the counting of official ballots improperly prepared by reason of the insertion in the column of faction of a political party nominating only candidates for local offices of the nominees of the regular party for the State offices.—PEOPLE v. WOOD, N. Y., 42 N. E. Rep. 586.

49. ESTOPPEL — Acquiescence.—A party who permits another to buy property in his name and for his benefit at a tax sale, and takes a counter letter, and afterwards, for a consideration, instructs the party in whose name the title vested to retrocede the property to the tax debtor, and is present when the deed is made, will be estopped from asserting claim to the property.—FIMLAY V. PERES, La., 18 South. Rep. 702.

50. EVIDENCE—Declarations.—Dying declarations of a person as to the validity or existence of a note executed by him are, in an action on such note against his personal representatives, inadmissible in their favor.—THAYER V. LOMBARD, Mass., 42 N. E. Rep. 568.

51. EVIDENCE — Master and Servant — Defective Machinery.—On the issue as to whether the manner of fastening beiting on machinery was reasonably safe, evidence that the fastening used was in ordinary and common use is admissible.—MCCARTEY v. BOSTON DUCK CO., Mass., 42 N. E. Rep. 568.

52. EVIDENCE—Parol Evidence — Contract.—Before parol evidence can be admitted to contradict the terms of a written contract, on the ground of mistake, it must clearly appear that such mistake was mutual. Hence, when the testimony of a witness showed that he had talked with but one party to the contract, it was not error to refuse to let him state his understanding of what the contract between the parties was, for the purpose of establishing a mistake in the written contract.—WILLIAM DEERING & CO. V. RUSSELL, N. Dak., 65 N. W. Rep. 691.

\$3. EVIDENCE—Res Gestæ—Negligent Homicide.—On trial for negligent homicide through defendant's rapid driving while in a wagon with decedent, declarations of defendant made at the scene of the accident, a few minutes after its occurrence, as to decedent's actions before the accident, and defendant's opinion of such

actions, are part of the res gestæ.—Morris V. State, Tex., 33 S. W. Rep. 539.

- 54. EXECUTION—Levy on Equity of Redemption.—A mere equity of redemption cannot be levied on and sold under a writ of feri facias.—DOHENY V. ATLANTIC DYNAMITE CO., W. Va., 23 S. E. Rep. 525.
- 55. FRAUDULENT CONVEYANCE Action to Set Aside. —A purchaser of land at execution sale brought an action against the debtor and his grantee to set aside a conveyance of land, for fraud: Held, that the decree setting the conveyance aside, and declaring the land subject to the judgment under which the sale was made, was not vitiated by the facts that the sale was void, and that plaintiff hence acquired no title thereunder.—Lindell Real Estate Co. v. Lindell, Mo., 38 S. W. Rep. 466.
- 56. FRAUDULENT CONVEYANCE—Assignment to Debtor of Accounts.—Gen. St. § 1520, providing that all assignments of goods or things in action made in trust for the use of the person making the same shall be void as against existing creditors of the assignor, does not ap ply where a debtor, on being called on for a settlement, assigned all his book accounts to the creditor, the accounts being worth less than the amount of the debt.—WILSON V. AMERICAN NAT. BANK OF PUEBLO, Colo., 42 Pac. Rep. 1087.
- 57. FRAUDULENT CONVEYANCES Evidence.—On the issue as to whether a sale by a debtor of his stock of goods to a creditor in payment of a pre-existing debt was fraudulent as to other creditors, evidence of dealings between the vendor and the vendee in another and distinct transaction is inadmissible in evidence.—Cocke v. Carrington Shob Co., Miss., 18 South. Rep. 683.
- 58. Highway Dedication Negligence.—The mere use of a road by the public, for however long a time, will not make it a public road. On the contrary, the mere permission by the owner of the land to the public to pass over the road is, without more, to be regarded as a license, revocable at pleasure. If intended to be dedicated to the public by the owner of the land, it must in some way, directly or by inference, be accepted by the county court or municipal corporation upon its record before it can become a public road.—DICKEN V. LIVERPOOL SALT & COAL CO., W. Va., 28 S. E. Rep. 562.
- 59. HIGHWAY BY PRESCRIPTION Evidence.—On an issue as to whether a certain street was a public way by prescription, an ancient deed, describing the lots therein conveyed as being bounded by said street, and referring to a plan showing said lots to be bounded on said street, was admissible for the purpose of showing the origin and location of said street.—BAGLEY V. NEW YORK, N. H. & H. R. CO., Mass., 42 N. E. Rep. 571.
- 60. Homestrad Abandonment.—Two years before execution was levied on defendant's old homestead, he built a dweiling for the use of his family as a house, on an acre lot, several blocks from his old residence, and thereafter lived in the new house. His law and real estate office was elsewhere, but he had left in the old building some books and an office desk, and immediately after the levy he moved his office into the old dwelling. He continued to keep his beehives on the place, and had fruit trees and flowers on the old place: Held, that all of the premises, with the exception of a horse or cow lot and stable, which he had continued to use, were abandoned as a homestead.—Davis v. Taylor, Tex., 33 S. W. Rep. 543.
- 61. INSURANCE—Assignment of Policy—Action by Assignee.—If, therefore, the insured, before loss by fire under a policy of insurance, assign the right to the damages in case of loss, and the insurer consents to the assignment, the assignee may, in his own name, as holding legal title, recover such damages after loss; and a reassignment to the insured party after loss, not assented to by the insurer, would not divest the assignee of his legal title, so as to prevent recovery in the name of the first assignee.—Bentley v. Standard Firm Ins. Co., W. Va., 23 S. E. Rep. 584.

- 62. INSURANCE—Interest of Husband in Wife's House.

 —The interest of a husband in the dwelling house of his wife, used as a homestead by the family, is sufficient to support a recovery by the two jointly on a policy of fire insurance issued to both.—Webster v. Dwelling House Ins. Co., Ohio, 42 N. E. Rep. 546.
- 63. INSURANCE POLICY—Iron-safe Clause.—Pasted on a fire policy was a rider on which was printed a warranty by the insured to keep his books and the last inventory in an iron safe at night and all times when the store was not kept open for business, and in it was the description of the property insured, and the amount of insurance, which appeared no place else in the policy, and the rider was signed by the agents of the company as part of the policy: Held, that the iron-safe clause was a warranty, non-compliance with the terms of which was fatal to a recovery.—American Fire ins. Co. v. Center, Tex., 33 S. W. Rep. 554.
- 64. INTOXICATING LIQUORS—Prescription—Physician.
 —Under Code, ch. 82, § 7, if a physician gives a prescription to enable one to obtain liquor from a druggist as medicine, either stating that it is, or that he believes it is, absolutely necessary as a medicine, and not as a beverage, when he either knows, or believes, or has reason to believe it is not so necessary, or when he does not know it to be so necessary, he vio lates said statute, and is guilty of the offense it creates. The physician must act in entire good faith. It is his duty to examine and ascertain whether the liquor is absolutely necessary as a medicine.—STATE V. BERKELEY, W. Va., 28 S. E. Rep. 608.
- 65. INTOXICATING LIQUORS Sales to Minor. On trial for selling beer to a minor, the burden is on defendant to show that the sale was made with the consent of the minor's parent.—HANNAMAN V. STATE, Tex., 88 S. W. Rep. 588.
- 66. INTOXICATING LIQUORS To whom Sold.—On a prosecution for seiling liquor to a certain person it is enough to prove a sale to him either as principal or as agent.—COMMONWEALTH V. WOODS, Mass., 42 N. E. Rep. 565.
- 67. JUDGMENT-Injunction-Fraud.—In case of a default judgment, the mere fact that plaintiff did not notify defendant of the entry of judgment, and did not sue out execution until after the lapse of a year, in order that defendant might not petition for a writ of review, is not such fraud as will entitle defendant to restrain the enforcement of the judgment.—TRUSTEES OF AMPERST COLLEGE v. ALLEN, Mass., 42 N. E. Rep. 570.
- 68. JUDGMENTS Validity-Jurisdiction .- An action was brought against a Nebraska corporation in a Colorado State court. The defendant appeared specially, and objected to the jurisdiction of the court on the ground that the service upon it was insufficient. Its objections having been overruled, the defendant, protesting against the jurisdiction, but without appealing answered to the merits, and filed a counterclaim. Judgment was rendered against it, and a suit afterwards brought on such judgment in the United States Circuit Court in Nebraska: Held, that the judgment of the Colorado court, even if erroneous, was not void, and in the suit on such judgment it was not open to the defendant to insist that the question of the jurisdiction of the Colorado court should be again litigated. -HUBBARD V. AMERICAN INV. CO., U. S. C. C. (Neb.), 70 Fed. Rep. 808.
- 69. JUDICIAL SALE—Liability of Defaulting Bidder.—If one becomes a purchaser at a judicial sale, and falls to complete his purchase as required by the decree, he is liable for the difference between the amount of his bid and the sum realized at a second sale; but, to hold him liable, the sale must be reported, and a rule awarded and served upon him to show cause why he should not complete his purchase, or, in default, the property be resold at his expense, and at his risk of liability for any difference between the sum for which he agreed to purchase and the sum realized on a resale.—Stout v. Phillippi Manufacturing & Mercantille Co., W. Va., 23 S. E. Rep. 571.

- 70. Landiord and Tenant Lease Conditions Waived.—Where plaintiff, in an action for forfeiture of a lease, alleges non-performance of certain conditions by defendant, as grounds of forfeiture, and defendant denies the allegation, he cannot, in support of a verdict for himself, urge that plaintiff, with knowledge of his non-performance of the duties, waived the same.—MURRAY V. HEINZE, Mont., 42 Pac. Rep. 1057.
- 71. LIEN—Stable Keeper.—The lien given to a stable keeper by section 5486, Comp. Laws, is not lost, even as to an attaching creditor, because the horse is temporarily in the possession of the owner when it is levied on, who is using it in the usual manner; it being the purpose of the owner to return the horse to the stable as soon as he finishes his temporary use of it; the arrangement under which the horse is being boarded being still in existence at the time the levy is made.—Welsh v. Barnes, N. Dak., 65 N. W. Rep. 675.
- 72. LIFE INSURANCE—Certificate—Failure to Pay Assessment.—An insurance certificate provided that on failure to make payments at maturity in January, April, July, or October, the membership should be forfeited. The insured was mortally wounded April 28th, and died May 1st. The last day of April fell on Sunday, and the April assessment was not paid. Code: Civ. Proc. § 13, provides that, when any contract is to be performed on a holiday, it may be performed upon the next business day: Held, that the last day to pay the assessment was May 1st, and, the insured having died on that day, the membership was in force.—NORTHEY v. BANKERS' LIFE ASS'N, Cal., 42 Pac. Rep. 1079.
- 73. LIMITATION OF ACTIONS Trust. No statute of limitations runs against an express trust, nor does lapse of time avail, until the duties are ended, or the trust disarmed.—GAPEN V. GAPEN, W. Va., 23 S. E. Bep. 579.
- 74. MANDAMUS—Collateral Attack of Judgment.—On mandamus to compel levy of a tax to pay a judgment against a county the judgment cannot be attacked.—PEOPLE V. BOARD OF COMR'S OF RIO GRANDE COUNTY, Colo., 42 Pac. Rep. 1082.
- 75. MASTER AND SERVANT Assumption of Risk.—Where a farm laborer, being directed to take ensilage from a silo, works from the bottom, and undermines the pile, and is injured by its falling upon him, he cannot recover, having assumed the risk.—WELCH V. BRAIMARD, Mich., 65 N. W. Rep. 667.
- 76. MECHANIC'S LIEN—Building Contracts—Payments.
 —When the building contract provides for payments as the work progresses, payments made when the work has been substantially flaished to the required stages cannot be considered premature, so as to subject the owner to liability to material men to the additional extent of the payments so made.—STIMSON MILL CO. v. RILET, Cal., 42 Pac. Rep. 1072.
- 77. MORTGAGE Foreclosure.—Pub. St. ch. 181, provides that, after the breach of condition of a mortgage, the mortgage may recover possession by action or peaceable entry, and that such possession, if continued peaceably for three years, shall foreclose the right of redemption; and that, where a mortgage contains a power of sale, the mortgage may, instead of a writ of possession, have a decree of sale: Held, that a court of equity has no jurisdiction to decree a foreclosure and sale under a mortgage not containing a power of sale.—HALLOWELL V. AMES, Mass., 42 N. E. Rep. 559.
- 78. MORTGAGE—Foreclosure—Parties.—The personal representative of a deceased mortgagor, because by law the mortgage debt is primarily charged on the personal assets, need not be made a party to the foreclosure of the mortgage.—HARLEM CO-OPERATIVE BUILDING & LOAN ASS'N V. FREEBURN, N. J., 33 Atl. Rep. 514.
- 79. MUNICIPAL CORPORATION Dismissal of Policeman. A city police board, authorized to dismiss policemen summarily and on conviction of misconduct, on complaint for certain misconduct, cannot, on acquittal thereof, adjudge the policeman

- guilty of other misconduct, and direct his dismissal.—WILKINSON V. BOARD OF POLICE COME'S OF CITY OF SAGINAW, Mich., 65 N. W. Rep. 668.
- 80. MUNICIPAL CORPORATIONS—Obstructions in Street. —In an action against a municipality to recover damages resulting from an injury caused by the negligent act of the defendant in permitting an obstruction (i. e. a steam threshing engine) to stand upon the traveled portion of one of its public streets, at which the horse behind which plaintiff was riding became frightened and momentarily unmanageable, and the injury resulted, it is not necessary to allege any actual contact with such obstruction.—OUVERSON V. CITY OF GRAFTON, N. Dak., 65 N. W. Rep. 676.
- 81. MUNICIPAL CORPORATIONS Ordinances-Paving Contracts.-A petition alleging that street paving has been done under a contract pursuant to certain ordinances; that the contract and ordinances are invalid, because in violation of certain provisions of the city charter, in that the contract, as required by ordinances, embraced not only the construction, but subsequent maintenance of the paving, that the city is about to issue special tax bills against petitioners' property for the cost of such construction; that such tax bills will be registered, and, when so issued and registered, will, by certain provisions of the city charter, become a lien on petitioners' adjoining property. and will be a cloud on petitioners' title to said land, and will damage and injure their title thereto and the value of the land; and that petitioners have no adequate remedy at law, and that, unless the issuing and registering of the special tax bills is enjoined, plaintiffs will suffer irreparable injury-states a case for equitable cognizance and injunctive relief, on the grounds of cloud on title and inadequate legal remedy, though it is alleged that, because of such violation of the city charter, the tax bills and proceedings under which they are issued are null and void; the defects in the proceedings previous to the tax bills requiring legal acumen to discover them .- VERDIN V. CITY OF ST. LOUIS, Mo., 83 S. W. Rep. 480.
- 82. MUNICIPAL CONTRACTS—Purchase from Member of Council.—Though a purchase of tiling by a town for a sewer was not made with the regular proceeding in the council, and was made from a member of the council, yet, the council having ratified the payment of the price by approving the treasurer's account, the price having been fair, the tiling having been laid, and the town being in the enjoyment thereof, and unable to restore it, the price paid therefor cannot be recovered by the town.—FRICK v. Town of BRINKLEY, Ark., 33 S. W. Rep. 527.
- 83. MUNICIPAL CORPORATIONS Rights in Streets—Grants to Railroad Companies.—A municipal corporation has no proprietary rights in the streets, levees, or other public grounds within its territorial limits. Whatever rights it has in them it holds merely in trust for the public.—CITY OF ST. PAUL V. CHICAGO, M. & ST. P. RY. CO., Minn., 65 N. W. Rep. 649.
- 84. NATIONAL BANES Liability of Stockholders—Pleading.—In an action by the receiver of a national bank to enforce the individual liability of a stockholder, an allegation in the complaint that on a given date the comptroller, having ascertained and determined that the assets, property, and credits of the bank were insufficient to pay its debts and liabilities, and as provided by the act of congress, made an assessment and requisition on the shareholders of the said bank of a given sum upon each share held and owned by them, respectively, at the time of its default, and directed the receiver to take all necessary steps to enforce the liability, is sufficient.—NEAD v. WALL, U. S. C. C. (N. Y.), 70 Fed. Rep. 806.
- 85. NEGLIGENCE—Railroad Employee—Contributory Negligence.—A car repairer, who had been engaged for three years in that work, went under the last car of a train, with the knowledge that a caboose was to be attached to the rear of the car, without putting out a flag or other signal to give warning of his being under

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the car: Held, that he was guilty of negligence.— SOUTHERN PAC. Co. v. POOL, U. S. S. C., 16 S. C. Rep.

- 86. NEGOTIABLE INSTRUMENTS Contract between Sureties.—Where a wife pledged land to pay a note made by her husband and others, if the same "should be allowed to remain due and unpaid," the other makers were primarily liable on the husband's default, though it was expressly agreed between them and the husband, before the note was signed, that they should not be liable till the security was exhausted, and though the wife knew that the proceeds of the note were used by her husband alone, and that, as between him and the other makers, he was primarily liable.—McCollum v. Boughton, Mo., 38 S. W. Rep. 476.
- 87. NEGOTIABLE INSTRUMENT Promissory Note Bons Fide Holder.—Where a negotiable instrument is transferred as collateral to secure a valid pre-existing debt, by being properly indorsed and delivered, or by delivery only when indorsed in blank or made payable to bearer, so that the transferee becomes a party to the instrument, and he takes the same before matrity, in good faith, and without notice of equities, he thereby becomes, without more, a holder for value, in the usual course of business.—HOTCHKISS V. FITZGERALD PATENT PREPARED PLASTER CO., W., Va., 23 S. E. Red. 576.
- 88. NEGOTIABLE INSTRUMENT Renewal of Note—Agreement.—Where a note, appearing on its face to be overdue, recited that, if it was not paid at maturity, it was thereby renewed from year to year, at the option of the holder, to maintain the defense that the note was not due, defendant must affirmatively show that the holder had renewed the note.—California STATE BANK V. WEBBER, Cal., 42 Pac. Rep. 1066.
- 89. NEGOTIABLE INSTRUMENT Surety on Note Release.—Whether the indorser of the note is a surety or indorser in the strict mercantile sense, he will be released, if, without his consent, the holder releases the maker of the note.—UNION NAT. BANK OF NEW ORLEANS V. GRANT, La., 18 South. Rep. 705.
- 90. OFFICE AND OFFICERS Discharge Union Soldiers.—Laws 1894, ch. 716, amending Laws 1894, ch. 312, providing for the giving of preferences to Union soldiers in all public departments, and that the Derson having the power of appointment shall have the power of removal for incompetency and conduct inconsistent with the position held by the employee, does not prevent a Union soldier from being discharged for incompetency or misconduct without a hearing.—PEOPLE V. MORTON, N. Y., 42 N. E. Rep. 588.
- 91. PARTNERSHIP Judgment.—Where a judgment is rendered against two partners on a partnership debt, and one of the partners has not been served with process, nor appeared to answer the action, such judgment is valid as to the partner served with process; and an execution issued thereon should not be quashed, on his motion, on the sole ground that the process was not served on his copartner.—ILEE v. HASSETT, W. Va., 28 S. E. Rep. 559.
- 92. PARTNERSHIP Power of Partner to Bind Firm.—Where a partner sells firm goods under an agreement that one-fourth of the price should be applied on a private debt owed by the partner to the purchaser, the firm cannot recover such one-fourth.—GROVER v. 8MITH, Mass., 42 N. E. Rep. 555.
- 93. PARTHERSHIP—Surviving Partner—Accounting.—Code Civ. Proc. § 1585, gives a surviving partner possession of the partnership property, and requires him to settle the affairs without delay, and to account to the personal representative of his deceased partner: Held, that the right to demand such accounting of the administratrix of a surviving partner is in the personal representative of a deceased partner alone.—BOBERTSON V. BURRELL, Cal., 42 Pac. Rep. 1086.
- 94. PAYMENT—Acceptance of Notes.—Defendant, in settlement of a conceded balance due from him to plaintiff, paid the latter a portion of it in cash, and

turned over to plaintiff certain notes of third persons, which were to be accepted by plaintiff in payment of the balance if approved by plaintiff: Held, that the duty rested on plaintiff of ascertaining whether it would accept such notes as payment, and of notifying defendant as to its decision within a reasonable time after the delivery of the notes.—ACME HARVESTER CO. V. AXTELL, N. Dak., 65 N. W. Rep. 680.

95. PLEADING — Granting Relief not Asked.—Where, in practice under the Code, an instrument comes in question in an issue, and is relied on as an estoppel, the court, on deciding that the instrument is void, may order the same to be canceled, though there is no prayer in the complaint for such relief.—MCKENZIE v. SIFFORD, S. Car., 23 S. E. Rep. 622.

- 96. Public Lands—Constable's Deed.—A constable's deed to an unconditional land certificate, describing it correctly by class and number, and as issued by the land commissioners of a certain county, is not invalidated by a variance describing it as issued to the assignee of the original owner of the conditional certificate, instead of as issued to the heirs and legal representatives of such owner.—Davis v. Bargas, Tex., 33 S. W. Rep. 548.
- 97. Public Land—Lands Acquired by State for Canal.—Lands of which the State in any manner acquired possession under the acts of February 4, 1825, and February 7, 1826, and used in the construction of its canals, became the property of the State, in fee.—STATE V. SNOOK, Ohlo, 42 N. E. Rep. 544.
- 98. QUIETING TITLE Evidence.—A grantor who has conveyed real property by warranty deed, with full covenants, and has delivered possession to the grantee, under an agreement with him that a part of the purchase money shall be deposited in the hands of a third person, not to be paid over until a cloud upon the title is removed, has sufficient interest in the subject-matter and in the land to maintain a bill in equity to remove the cloud, and to quiet the title.—STYER V. SPRAGUE, Minn., 65 N. W. Rep. 659.
- 99. RAILROAD Depot Grounds Killing Stock.—Grounds at a flag station at which trains are regularly stopped whenever there are passengers, freight, or express to be taken, though no depot building is erected thereon, are depot grounds, which the railroad company is not required to fence.—SCHNEEKLOTH V. CHICAGO & W. M. RY. CO., Mich., 65 N. W. Rep. 668.
- 100. RAILROAD COMPANY Electric Railway—Use of Cable Track.—In estimating the compensation which an electric railway company should pay a cable company for the use of the latter's tracks under the provisions of a city charter, the cost of building the cable conduitshould be considered, though it cannot be used by the electric company, and its construction made the cost of the cable road much greater than that of an electric road.—GRAND AVE. RY. CO. V. PEOPLE'S RY. Co., Mo., 33 S. W. Rep. 472.
- 101. RAILROAD COMPANIES Foreclosure Sale Betterments.—Where a foreclosure sale of a railroad by a receiver, under direction of a federal court, is had, and the sale confirmed, but possession not delivered for more than four years, the vendee and his successors will be liable, on a claim for personal injuries accruing between the dates for sale and delivery, to the extent of permanent improvements to the road made by the receiver between such dates, and paid for out of the earnings of the road accruing during, but not prior to, such period.—Crawford v. Houston & T. C. B. Co., Tex., 33 S. W. Rep. 534.
- 102. RAILEOAD COMPANY—Street Railroads—Injury to Person.—While it is held that it is the duty of those in charge of a car, at crossings particularly, to be careful and watchful, those who use street crossings must exercise a reasonable degree of care and watchfulness.—MCLAUGHLIN v. NEW ORLEAMS & C. R. Co., La., 18 South. Rep. 703.
- 103. RAILROAD COMPANY Street Railroads Negligence.—In a suit for damages for personal injuries re-

ceived from a collision with the car of an electric-car company, proof that the company may have falled in its duty in the employment of a particular motorman, or in furnishing to a particular car its proper equipment, is not sufficient for a plaintiff to recover. The proof must show that the accident was caused by reason of these particular breaches of duty.—SNIDER v. NEW ORLEANS & C. R. Co., La., 18 South. Rep. 695.

104. RAILROAD FORECLOSURE—Intervention by Stockholders.—In a special case, where it is alleged that the directors, for the purpose of sacrificing the interests of the stockholders, refuse to defend a suit, a court of equity will permit the stockholders to intervene and become parties defendant, so as to protect their own interests and the interest of the other stockholders who may choose to join them in the defense.—GUAR-ANTEETRUST & SAFE-DEPOSIT CO. V. DUL. TH & W. R. CO., U. S. C. C. (Minn.), 70 Fed. Rep. 803.

105. REMOVAL OF CAUSES — Petition—Federal Question.—Where the petition alleges that defendant is "a corporation duly chartered by law, and owns and operates a line of railway through" a certain county in Texas, and has a local agent in such county, the case cannot be removed to a federal court, on the ground that it is one arising under the federal laws, because defendant's charter was granted by the United States, though the petition for removal shows that the charter was so granted.—TEXAS & P. RY. CO. V. HIGHTOWER, TEX., 33 S. W. Rep. 541.

106. REPLEVIN—Evidence.—A suit in replevin under the laws of Kansas is a possossory action for the recovery of specific personal property, and the gist of the action is the wrongful detention of the property, and such facts as tend to show the defendant does not wrongfully detain the property claimed are competent evidence on the trial of the right of possession.—SHATTUCK V. HALL, Kan., 42 Pac. Rep. 1101.

107. SALE—Fraud of Vendee—Bona Fide Purchaser.—One who purchases from a vendee, for a fair consideration, goods which the vendee has procured a sale of to himself by fraud, is not liable in conversion for the goods to the original vendor, unless he purchased with notice of such fraud.—George L. Peterson Co. v. Steiner, Ala., 18 South. Rep. 638.

108. SHERIFFS AND CONSTABLES — Wrongful Execution.—The seizure and sale of property in the hands of a railroad company, on execution issued by a judgment creditor of the owner after the service by such officer of a writ of garnishment on the company in an action by another person against such owner, do not render the officer liable for the value of the property to the person at whose suit the writ of garnishment was issued.—GODDARD v. PARSONS, Utah, 42 Pac. Rep. 1134.

109. Specific Performance — Transfer of Stock.—Specific performance lies to compel a transfer of stock where it appears that the stock has no market value, that plaintiff purchased it with a view to increase in value, and that he cannot purchase other shares because no holder will sell any.—Krouse v. Woodward, Cal., 42 Pac. Rep. 1084.

110. STATUTES — Authentication — Journals of the Houses.—Under the act approved July 19, 1876, requiring all bills to be signed by the governor after they have passed the legislative assembly, the journals of the two houses are inadmissible to show that parts of the bill, as passed by the houses, were omitted from the enrolled bill, as signed by the president of the council, speaker of the house, and governor.—HAR WOOD V. WENTWORTH, Ariz., 42 Pac. Rep. 1025.

111. Tax Salk.—In proceedings to sell real estate as delinquent for the non-payment of taxes, the sheriff should not only advertise such sale to take place at the front door of the courthouse, but the sale should take place at such front door to constitute a legal sale.—SOMMERS V. WARD, W. Va., 23 S. E. Rep. 520.

112. TAX SALE—Purchase by Owner.—One who is under any legal or moral obligation to pay taxes on land cannot, by neglecting to pay the same, and allowing

the land to be sold in consequence of such neglect, add to or strengthen his title, either by purchasing at the sale himself, or suffering a stranger to buy and then purchasing from him.—STATE v. EDDY, W. Va., 23 S. E. Rep. 529.

113. TOETS—Injuring Plaintiff's Business.—The law, protecting the lawful business by which a man gains a livelihood, gives him an action of damages for improper language and conduct of another tending to the injury of that business; the language and conduct being directed and designed so as to affect persons disposed to deal with the injured party, and deter them from buying from him.—Graham v. St. Charles St. R. Co., La., 18 South. Rep. 707.

114. TRIAL—Jurors—Waiver of Objections.—Husbands whose wives are second cousins are not related by affinity, and one of them is not disqualified as a juror in an action to which the other is a party, under Rev. St. 1894, § 240 (Rev. St. 1891, § 240), prohibiting a person from serving as a juror in a case where he is related to a party by affinity within a certain degree.—TEGARDEN V. PHILLIPS, Ind., 42 N. E. Rep. 549.

115. USURY—What Constitutes.—Where a party buys a tract of land, paying therefor by the assignment of notes taken to himself for money loaned at a usurious rate of interest, apparent on the face of the notes; afterwards the notes are counted up at the usuribus rate, a bonus added, and new notes therefor given by the debtor to the assignee, with a deed of trust to secure their payment, and the new transaction is given the color of being the original sale of the land, rescinded, and the land resold, held, the transaction is usurious.—CRIM v. POST, W. Va., 23 S. E. Rep. 613.

116. VENDOR AND PURCHASER-Executory Contract-Construction.—Under an executory contract of sale of laud, where the purchaser was let into possession, with full use of the premises, but bound to pay a stipulated price therefor, and to pay each year "so much as the one-half of all crops on said land shall amount to," held, that no relation of landlord and tenant could arise under such contract, nor would the parties be tenants in common of the crops grown on such land by the vendee, unless the contract created such relationship by express language or necessary implication.—Moen v. Lillestahl, N. Dak., 65 N. W. Bep. 694.

117. VENDOR AND VENDEE—Land Contract—Time.—In contracts for sale of real estate, time of performance of its stipulations is not in general, in equity, of the essence of the contract, producing loss or forfeiture of rights.—JARVIS V. COWGER'S HEIRS, W. Va., 28 S. E. Rep. 522.

118. VENDOR'S LIEN — Parol Evidence.—A writing being the repository of the true final agreement of the parties to it, and the highest and safest evidence of it, in the absence of fraud or mistake, oral evidence of prior or contemporaneous conversations or stipulations will not be admitted, to incorporate them in it, so as to add to, alter, or contradict the agreement spoken by the writing.—Long v. Perine, W. Va., 23 S. E. Rep. 611.

119. WATERS — Irrigation — Easement.—Where the owner of two adjoining mining claims, across one of which a water ditch extended to and upon the other, mortgaged the claim over which the ditch extended, and, in an action to foreclose the mortgage, subsequent mortgages of the other claim were made parties defendant, and, instead of asserting their lien on the right to use the ditch in the former claim, disclaimed all interest in that claim, the judgment rendered against them on such disclaimer extinguished their lien on the easement.—Dixon v. Schermeier, Cal., 42 Pac. Rep. 1091.

120. WILLS-Revocation — Marriage of Testator.—St. 1892, ch. 118, approved March 81st, which went into effect July 1st, providing that a man's will shall be revoked by marriage, does not apply to marriages prior to the time the act went into effect.—SWAN V. SAYLES. Mass., 42 N. E. Rep. 570.

Central Law Journal.

ST. LOUIS, MO., MARCH 6, 1896.

The statutes of some of the States provide for the summoning and selection of what is known as "special juries" for the trial of particular causes. To practitioners in such States the leading case of this issue—St. Louis, Keokuk & N. W. Ry. Co. v. Withrow, decided by the Supreme Court of Missouri,will probably be of as much interest as to those in the city of St. Louis, whose special jury system is directly affected. By this decision the Supreme Court of Missouri very properly uphold the right of nisi prius judges, under the law, to make reasonable rules for the government of their courts, and declares valid a rule of court governing the selection of special juries in the city of St. Louis, which authorizes the selection of a certain number of "good and lawful men" as special jurors without further designation of qualifications. The court shows very clearly that there is no warrant for the contention made by those who oppose this apparent innovation, that a special jury is and must be a jury of "more than ordinary intelligence." The old method of selecting special juries, framed upon that idea, was clearly unfair to litigants. It is of common knowledge that in cases where corporations were parties the juries were largely composed of officers or friends of corporations. The new method has been adopted after careful consideration by the judges of the court, and it is a matter of congratulation that the supreme court has indorsed its reasonableness and validity. Post- p. 198.

Considerable adverse criticism has been directed towards the decision of Mr. Justice Mayham of New York in denying a motion for a new trial in the case of People v. Shea, convicted of murder and recently executed. This was the case growing out of political strife at the polls of Troy, New York, and about which so much has appeared in the daily press. The motion for new trial was made upon the ground of newly discovered evidence—as disclosed by the affidavit of one McGough, that he, and not Shea, fired the abot that caused the death of Ross. It is

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a well understood proposition of law that a court has power to grant a new trial when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, provided it is made to appear by affidavit, that upon another trial, the defendant can produce evidence such as if before received might have changed the verdict: if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence. We understand that Judge Mayham found that the newly discovered evidence had been discovered since the trial and that there was no want of diligence in failing to produce it there but he held that it was cumulative and that if it had been received on the trial it would not probably have changed the verdict. He held that the newly discovered evidence is cumulative because it tends to show that some other person than Shea killed Ross, and several witnesses examined for the defense on the trial testified that the fatal shot was fired by one Boland. The judge who presides at the trial of a case, is of course, better qualified to pass upon a question of this character, at least so far as the facts are concerned, but it will suggest itself to many that by the same method of reasoning as that adopted by Judge Mayham any newly discovered evidence tending to show the innocence of the accused in any case might be called cumulative because the purport of all the evidence offered for the defendant in every trial is to prove that he was not guilty. Conceding that, in a technical sense, the evidence above mentioned may be cumulative, there are well defined exceptions to the general rule which denies a new trial predicated thereon. These are when the evidence goes right to the merits of the case, and where such evidence might change the result. 1 Hayne's New Trial, § 90, p. 256; 7 Crim. Law Magazine, p. 182; Anderson v. State, 45 Conn. 519; Levitzky v. Johnson, 35 Cal. 43. These exceptions are reasonable, and in a criminal case at least, consonant with justice. The view of Judge Mayham on the subject of the probable effect of the newly discovered evidence upon another jury seems equally unsatisfactory in point of law. It does not need to appear, in behalf of a defendant, that the newly discovered evidence would produce a different re-



sult. It is a well settled proposition that in cases where the new evidence is material and it is doubtful how it might affect the jury a new trial should always be granted. As we gather from the report of Judge Mayham's decision he not only applied, in all its strictness, the technical rule as to cumulative evidence, but also solved the doubt, which he admitted existed on the subject of the probable effect of the new evidence, in favor of the State. If this be true it is quite clear that he committed error.

NOTES OF RECENT DECISIONS.

CORPORATIONS—STOCKHOLDERS—ENFORCE-MENT OF LAWS OF OTHER STATES-KANSAS STATUTES.—The constitutional provision of Kansas, that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law," has again been held as not self-executory, but requiring legislation as seen by the judgment of the New York Court of Appeals in Marshall v. Sherman, 42 N. E. Rep. 419. It will be remembered that the Supreme Court of Illinois made a like ruling in reference to the Kansas constitution in Fowler v. Lamson, 146 Ill. 472, and in Tuttle v. National Bank, etc., 9 Nat. Corp. Rep. 316, still pending on rehearing.

Discussing the subject-matter of the enforcement of State laws in another State jurisdiction, the court of appeals held that the doctrine has many limitations and qualifications, and generally each sovereignty determines for itself their true scope and extent. While the courts of New York are open to all suitors, there is a large class of foreign laws and statutes, which, under the rule of comity, have no force in that jurisdiction. It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without at the same time neglecting the duty which it owes to its own citizens or subjects.

Particularizing upon the subject the court said: "It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women as well as the local statutes of

frauds and statutes authorizing distress and sale for non-payment of rent, are not recognized in another jurisdiction under the principles of comity. Morgan v. Neville, 74 Pa. St. 52; Waldron v. Ritchings, 3 Daly, 288; Siegel v. Robinson, 56 Pa. St. 19; Kelly v. Davenport, 1 Brown (Pa.), 231; Ross v. Wigg, 34 Hun, 192; Ludlow v. Van Rensselaer, 1 Johns. 95; Skinner v. Tinker, 34 Barb. 333. It is well understood, also, that the statutes of one State, giving a right of action to recover a penalty, have no force in another. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224. So, also, rights of action arising under foreign bankrupt, insolvent or assignment laws, are not recognized here when prejudicial to the interests of our own Warner v. Jaffray, 96 N. Y. 248; In re Waite, 99 N. Y. 433, 2 N. E. Rep. 440; Barth v. Backus, 140 N. Y. 230, 35 N. E. Rep. 425; Douglas v. Insurance Co., 138 N. Y. 209, 33 N. E. Rep. 938. There is another class of cases where the right to enforce the foreign statute is conditioned upon the existence of a law substantially similar here. Wooden v. Railroad Co., 126 N. Y. 10, 26 N. E. Rep. 1050. Statutes giving a right of action for negligence resulting in death belong to that class. Whitford v. Railroad Co., 23 N. Y. 465."

CRIMINAL LAW—TRIAL VERDICT RENDERED IN ABSENCE OF ACCUSED.—The Supreme Court of Michigan held, in Frey v. Calhoun, 64 N. W. Rep. 1047, that a verdict in a trial for felony is not invalid because rendered in the absence of the accused, notwithstanding a statutory provision that no person indicted for a felony shall be tried unless personally present during the trial, where it appeared that the accused was out on bail and the verdict was rendered during court hours. The following is from the opinion of the court:

The general rule is that a trial for a felony cannot be had without the personal presence of the accused. We have a statute which recognizes and embodies this rule. How. Ann. St. Sec. 9568. It is also well settled that the trial is not concluded until the verdict is received and recorded. There are cases which hold that a verdict rendered in the absence of a prisoner, whether he be in custody or out on bail, is void. State v. Hurlbut, 1 Root, 90; Clark v. State, 4 Humph. 254; Sneed v. State, 5 Ark. 431. Few cases will be found which go to this extent, and in nearly all of the cases where a verdict rendered in the absence of the accused has been held erroneous the respondent has been in custody, and has therefore been prevented from attending. When, however, the absence of the

prisoner is not an enforced absence, but is voluntary, as when he is out on bail, and has been present pending the trial, but voluntarily leaves the court room pending the deliberations of the jury, or neglects to appear at the adjourned hour of the court, the clear weight of authority favors the rule that a verdict rendered under such circumstances is valid and binding. In Arkansas a statute enacted since the decision of Sneed v. State, supra, Brown v. State, 24 Ark. 620, and Osborn v. State, Id. 629, provides that, if defendant escape from custody pending the trial, or, if on bail, he shall absent himself, the trial may either be stopped or progress to a verdict, at the discretion of the prosecuting attorney. The constitutionality of this statute was upheld in Gore v. State (Ark.), 12 S. W. Rep. 564. In Hill v. State, 17 Wis. 697, it was held that the burden was upon the prisoner to show that he was deprived of the right to be present. In Wilson v. State, 2 Ohio St. 319, held that when defendant is on bail it is not error to receive a verdict in his voluntary absence. In Fight v. State, 7 Ohio, 181, respondent, being on bail, had absconded during the trial, and it was held proper to proceed with the trial. In Rose v. State, 20 Ohio, 31, the prisoner was in custody, and it was held that a verdict received in his absence should have been set aside. In Sallinger v. People, 102 Ill. 241, held that, where a prisoner, pending the trial, voluntarily abandons the court room, he will be regarded as having waived a right which is guarantied to him, and the court may proceed in his absence. In Price v. State, 36 Miss. 581, it was held that, where defendant voluntarily absents himself, he cannot complain. In Finch v. State, 53 Miss. 363, respondent was in custody. In Barton v. State, 67 Ga. 653, the court say the presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury. "Any arrangement he had made with a private person to let him know when the jury would be ready to deliver the verdict, and the failure of such person to comply with his promise, cannot affect the point. It was his duty and obligation in his bond, as well as his right, to be present until the close of his trial—the rendition of the verdict; and, being free, it was for him to provide so as to be present." The court distinguishes that case from former decisions where respondent was in custody at the time of the rendition of the verdict. In Lynch v. Com., 88 Pa. St. 189, defendant was on bail, and left the court room while the jury were out, and in his absence the jury came in and rendered the verdict. Held to be no ground for a motion in arrest of judgment. The New York cases called to our attention do not determine the question here presented. In People v. Perkins, 1 Wend. 91, the prisoner was in custody. In Maurer v. People, 43 N. Y. 1, the jury returned into court at midnight, and, in the absence of the prisoner, asked certain questions, to which the court replied. It does not appear from the reported case whether the prisoner was at liberty or not. In Mills v. Com., 7 Leigh, 751, the verdict was defective, in that the jury had not fixed the term of imprisonment, and the court undertook to supply the omission after the discharge and separation of the jury. State v. Alman, 64 N. C. 364, involved the right of the court to discharge the jury, which had failed to agree, in the absence of the accused. In the recent case of Com. v. McCarthy (Mass.), 40 N. E. Rep. 766, the question has been fully considered, and the rule adopted that, when a defendant on trial for felony, who is on bail, voluntarily absents himself without leave when the jury retire for deliberation, and remains absent, a verdict rendered in his absence will be binding.

MARRIED WOMAN—FUNERAL EXPENSES.—In Gould v. Monlohan, 33 Atl. Rep. 483, decided by the Prerogative Court of New Jersey, it was held that where a married woman dies, leaving an insolvent husband surviving her, a proper third person, who has borne the necessary expenses of her suitable burial, may recover from her estate. The court says:

Every person has the right to have his or her body. after death, decently buried. Reg. v. Stewart, 12 Adol. & E. 773; Chapple v. Cooper, 13 Mees. & W. 252; Patterson v. Patterson, 59 N. Y. 583; McCue v. Garvey, 14 Hun, 562. The reasonable and necessary expense of according that right is chargeable to his or her estate. Patterson v. Patterson, supra. The duty of securing the right ordinarily rests with the personal representative, and if there be no such representative, or, if existing, the representative fails to act, the exigency of the situation will permit a proper third person to afford the right, in favor of whom the law will imply, from the representative's obligation, a promise upon the part of the latter to reimburse the reasonable expense of the interment, to the extent of the assets of the decedent's estate which may become available for that purpose. The implication of such a promise is a recognized exception to the rule that an action will not lie for a voluntary courtesy. Force v. Haines, 17 N. J. Law, 389; Patterson v. Patterson, supra; Lakin v. Ames, 10 Cush. 221. In case of the death of a married woman, the duty to bury her and discharge the expense of so doing devolves upon her husband, if he shall survive her. Jenkins v. Tucker, 1 H. Bl. 90; Bertle v. Lord Chesterfield, 9 Mod. 31; Ambrose v. Kerrison, 10 C. B. 776; Bradshaw v. Beard, 12 C. B. (N. S.) 344; Cunningham v. Reardon, 98 Mass. 538; Weld v. Walker, 130 Mass. 432; 2 Bright, Husb. & W., 521; Macq. Husb. & W., 191; Schouler, Husb. & W., section 412; Eversley, Dom. Rel. 305. His liability for the expense of the interment does not arise in virtue of any interest he may have in the wife's property, but from the personal advantage it is to himself to have those personæ conjunctæ with him, his wife and lawful children, properly maintained during life, and suitably buried at death. The question whether, if the husband shall perform this duty, he may be reimbursed from his wife's separate estate, is not presented in this inquiry. The cases dealing with that subject appear to be somewhat at variance. See, among others, Gregory v. Lockyer, 6 Madd. 99; McCue v. Garvey, 14 Hun, 562; Freeman v. Colt, 27 Hun, 447; In re M'Myn, 38 Ch. Div. 575; Darmody's Estate, 18 Phila. 207. The point in the present inquiry is whether, where the husband is unable to bear the expense of his wife's burial, her estate may be held liable for it. But for the husband's survival of his wife, the obligation to bury her, and to pay the expense of that burial, would rest upon the representative of her estate. Is the husband's obligation in such case substituted for the representative's so that its existence discharges the representative's or is it additional and primary thereto? I am of opinion that the latter clause of this question is entitled to the affirmative answer; that there is a double obligation when a married woman dies leaving a husband—a primary obligation on the husband, and a secondary obligation upon the representative of her estate; and that the mere existence of the husband's primary obligation does not discharge the estate's secondary obligation, although the husband's

performance of his obligation may effect such discharge. The wife is entitled to be suitably buried at the expense either of her husband or of her estate; otherwise the wealthy wife of an insolvent husband might be subjected to the burial of a pauper. And it appears to me to follow that upon the failure of the primary obligation, for any reason, the secondary may be enforced. Common decency and humanity are regarded by the authorities as authorizing a speedy burial of a decedent by any proper person, unobstructed by hesitation in measuring the responsibilities of the husband and representative, and such exigency affords a strong reason why both those responsibilities for reimbursement shouldremain available. By the stipulation in the present case, it appears that the husband is insolvent, and therefore any effort to recover from him as the primary obligee would be abortive, and hence that immediate demand against the representative is proper.

EXTENT OF THE POWER AND AUTHORITY OF THE PRESIDENT OF A CORPORATION TO BIND IT BY CONTRACTS.

§ 1. The extent of the power and authority of the president of a corporation to bind it by contracts is not well defined or established by the authorities, although it is a matter of great importance in these days, when so much of the business of the country is controlled by and in the hands of corporations. The difficulty in drawing any general rule from the decided cases arises out of the fact that, in considering the subject, courts have approached the matter from different points of view, and generally with a fixed determination to arrive at a desired result—generally the correct one—in the particular case.

§ 2. The Law of Agency as Applied to the Question.—In many cases the subject is considered solely in the light of the law of agency. Thus, in Sparks v. The Dispatch Transportation Co., in discussing the power of the president of a corporation to bind it by notes given by him for mules purchased by him for the corporation, it is said: "The power of Jackson (the president) to bind the defendant (the corporation), is governed by the law of agency. The principle underlying is the same whether the principal be a corporation or an individual. may, without any special authority from the board of directors, perform all acts of an ordinary nature, which by usage or necessity are incident to his office, and may bind the

¹ (1891) 104 Mo. 531, p. 589.

corporation by contracts in matters arising in the usual course of business." It is to be noticed that the last sentence quoted is subject to this criticism, viz.: that the last clause thereof is not in harmony with the first, unless it is taken with the qualification that the "acts of an ordinary nature, which by usage or necessity (sic) are incident to" the president's office, are such acts as he has been allowed by the directors to do for such a length of time as to establish a uniform custom and thus to furnish proof of an agency to do the acts by implication of law.

§ 3. The Agency View Continued.—In support of this view that the principles of the law of agency should control and determine the power of the officers of a corporation, it may be said that a corporation is a distinct legal entity: an artificial person clothed with certain rights and privileges, and that its corporate acts must all be done by natural persons representing it. The officers are not, in contemplation of law, the corporation.2 In transacting its business they act for and in its behalf. The board of directors is the governing body, and they, acting as a board, may exercise all the power which has been conferred on it by law.8 In case an act of an officer affecting, or apparently affecting, the rights of the corporation comes under review, the question arises did the officer have authority to do this act? If the question is answered with reference to the rules of law relating to the powers of agents, which seems to be a reasonable treatment of the subject according to legal conceptions, it will be found that the source of the powers of an agent is threefold: First. Powers expressly granted by the principal. Second. Powers which are implied from the known usages of trade and business, of which the courts take judicial notice, in respect of the particular species of agency; or which, in case of officers of a corporations considered as agents, are held to have been conferred, and therefore are implied by law, from evidence of a uniform course of business or custem established by the corporation in the

² Numerous cases announce this apparently self evident proposition. The following are cited as aptly illustrating the same. Humphreys v. McKissock (1890), 140 U. S. 304, 312; Hill v. Rich Hill Coal Mining Co. (1893), 119 Mo. 9; England v. Dearborn (1886), 141 Mass. 590.

⁸ Idem.

management of its affairs in relation to matters of the same general nature as the particular act in controversy. Third. Powers which arise, upon a principle of estoppel, by the acquiescence of the principal in the acts of the agent done in behalf of the principal, without express authority previously granted. In addition to these means of proof of the powers of an agent, may be mentioned: Fourth. The adoption of the unauthorized act of an agent by a subsequent ratification by the principal after coming to a knowledge of the doing of the unauthorized act.⁴

§ 4. Means of Proof of the Authority of the Officer.—The authority of the officer to do the particular act may be shown in many The charter of the company may have conferred the power; the by-laws or a special resolution of the board of directors may have conferred it; or it may be inferred as a matter of fact from the usage and practice of the company in permitting the officer to transact matters of the same nature as the act in question. This view is well stated in Fifth Ward Savings Bank v. First National Bank.5 "The powers of the officers of a corporation over its business and property are strictly the powers of agents—powers either conferred by the charter or delegated to them by the directors or managers, in whom, as the representatives of the corporation, the control of its business and property is vested. Where in the usual course of business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and responsibility will be laid upon the principal for the acts of the agent within the apparent authority so conferred upon the agent—a doctrine which which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limita-In such cases the authority of the officer does not depend so much on his title, or on the theoretical nature of his office as on the duties he is in the habit of performing."

⁴ The Famous Shoe & Clothing Co. v. The Eagle Iron Works (1892), 51 M. A. 66.

⁵ (1866) 48 N. J. L. 518.

- § 5. Authority Implied from Usual Course of Business.—The company may, by a course of conduct with its officers and the public, give to such officers authority and confer upon them powers they would not have as such officers but for the usages of the corporation.⁶ And where the authority of the officer is left to be inferred by the public from powers usually exercised by him, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject matter.⁷
- § 6. Facts Evidentiary of Implied Authority.—Under such circumstances the authority of the officer may be proved by parol and need not be in writing. It may be collected from the circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been permitted without interference, to conduct such affairs. It may be implied from the conduct or acquiescence of the corporation, as represented by its board of directors. When during a series of years or in numerous business transactions he has been allowed, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the corporation and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from, or authority given by those who have the right to control his operations.8
- § 7. By-laws of Corporations as Affecting Implied Authority.—In cases where the limit of the authority of an officer to bind the corporation by his acts in its behalf depends upon and is to be ascertained from the usual course of conduct pursued by him in transacting the business of the company, and the recognition of his acts by the corporation, it is quite obvious that the limitations upon the authority of such officer contained in the bylaws of the company are immaterial if they

⁸ Martin v. Webb (1884), 110 U. S. 7. See, also, cases cited below, note 16.

⁶ Winsor v. Lafayette Co. Bank (1885), 18 M. A. 665; Merchants' Bank v. State Bank (1870), 77 U. S. (10 Wall. 604; State ex rel. v. Heckart (1892₁), 49 M. A. 280; First National Bank v. The N. Mo. Coal Co. (1885) 86 Mo. 125.

⁷ Merchants' Bank v. State Bank (1870), 77 U. S. (10 Wall.) 604; First Nat'l Bank v. N. Mo. Coal Co. (1885), 86 Mo. 125.

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are in conflict with the general course of conduct so followed and recognized. In such cases it is uniformly held that the rules and regulations of a corporation as to making contracts, and its by-laws defining the pow-So Va. 683, ers and duties of its officers are not binding on persons who have dealt with the officers in good faith and without notice of rules. The by-laws such by-laws and only accessible private and the officers and members of the company, and in this respect are like the secret instructions given to a general agent, not binding on those who deal with the officers whose authority has become established by a uniform course of conduct pursued in disregard of the by-law or other rule of government adopted by the company, and which have thus been allowed to pass into desuetude.9 But where the authority of the officer is not established by evidence of a general course of conduct, and no circumstances exist out of which the law, in its aim to enforce natural justice, raises an estoppel in pais against the corporation, it is held that a person dealing with a corporation is bound to take notice of its constitution or charter, by-laws, and ways of doing business thereby prescribed.10 And in such a case, where a by-law gives the president of a corporation "the general charge and direction of the business of the company, as well as all matters connected with the interests and objects of the corporation." this does not include authority to do an act, which another by-law expressly gives to a separate committee. The matter of authority in such a case must be determined by the by-laws.11

§ 8. Authority of the President of a Corporation. General rule Formulated.—Touching the authority of the president of a corporation, an examination of the decided cases leads to the following conclusions, which seem to be based upon considerations of wise, public policy, and the necessities growing out of cases of this nature.

(1.) Authority Presumed Virtute Officii.— The president of a corporation is the legal head of the body, and in the absence of legislative enactment, or express provisions made in the by-laws, the corporation acts through him. When an act pertaining to the business of the company is performed by him, in his official capacity, and its effect upon the company is in question, the presumption will be indulged in that the act is legally done and is binding on the company.12

§ 9. (2.) Authority Presumed.—In such cases, and until the contrary is shown, it will be presumed that the president, virtute officii, is the general agent of the corporation with authority to do the act done by him in his official capacity, if it be done in the line of business of the corporation, or if it be necessary to carry on such business.18

§ 10. (3.) These Presumptions may be Repelled.—But this presumptions is not conclusive, and may be repelled by evidence that the authority to do the act in question was not vested in the president, but in some other officer, or in a committee, either by the bylaws of the company, or by special resolution of the board of directors; and if in point of fact he has not authority to do the act, the company will not be bound by it. For, after all, the president is not the corporation, but merely its agent, and the principal will not be charged by his act unless it falls within the scope of his agency.14 And if it is shown that the act done is not one fairly falling within the usual course of business of the company, or is not incident to such business

12 Musser v. Johnson (1868), 42 Mo. 74; Smith v. Smith (1872), 62 III. 493; McKiernan v. Lenzen (1880), 56 Cal. 61; Mo. Fire Clay Works v. Ellison (1888), 30 M. A. 67; Bambrick v. Campbell (1889), 37 M. A. 460 p. 463; Sherman, etc., Co. v. Swigart (1890), 43 Kan. 292, 19 Am. St. Rep. 137; McDonald v. Chisholm (1890). 131 Ill. 273; Glover v. Wells (1890), 40 Ill. App. 850; Glover v. Lee (1892), 140 Ill. 102; State ex rel. v. Heckart (1892), 49 M. A. 280.

18 Washburne v. Nashville, etc., R. R. Co. (1859), 8 Head (Tenn.), 638, 75 Am. Dec. 784; Oakes v. Cataraugus Water Co. (1894), 143 N. Y. 430, and cases cited in note 12.

14 Websterfield v. Radde (1877), 7 Daly (N. Y. Com. Pleas), 326, followed in Rathburn v. Snow (1889), 3 N. Y. Suppl. 925; and Bohn v. Loewer's Gambrinus Brewery Co. (1890), 9 N. Y. Suppl. 514; Bockover v. Life Asso. of Am. (1883), 77 Va. 91; Bocock v. Alleghany Coal & Iron Co. (1887), 82 Va. 913, 3 Am. St. Rep. 128; Credit Co. v. Howe Machine Co. (1887), 54 Conn. 857, 1 Am. St. Rep. 128; Hyde v. Larkin (1889), 35 M. A. 365; Asher v. Sutton (1884), 31 Kan. 286; Sparks v. The Despatch Transportation Co. (1891), 104 Mo. 581.

⁹ Smith v. Smith (1872), 62 Ill. 493; Walker v. Railroad Co. (1886), 26 S. Car. 80; Arapahoe Cattle & Land Co. v. Stevens (1889), 13 Colo. 534, 22 Pac. Rep.

¹⁰ Relfe v. Rundle (1880), 103 U.S. (13 Otto) 222, p. 226; Bockover v. Life Asso. of America (1883), 77 Va. 85 p. 90; Bocock v. Alleghany Coal & Iron Co. (1887), 82 Va. 913, 3 Am. St. Rep. 128.

⁴ Twelfth Street Market Co. v. Jackson (1888), 102 Pa. St. 269.

the presumption of authority arising from the official station of the president is not available. 15

§ 11. (4.) Corporation Bound by Unauthorized Act of President, if Facts Raise an Estoppel against it .- But, notwithstanding the fact that there may be no express authority given in the charter or by-laws to the president to do or transact the particular act or business matter in controversy; and notwithstanding the fact, that there may be a by-law of the corporation, or a resolution of the board of directors vesting the power in some other officer or committee, and directly, or by necessary implication taking it out of the president's hands, still the company may be bound by the act, if circumstances are shown which raise an estoppel in pais against the corporation; or which tend to prove the fact that the president has generally done acts or transacted business of the same general nature, for a period sufficiently long to establish a a settled course of business; or that he has been allowed, with the knowledge of, but without interference, by the board of directors to conduct such affairs; or, that he has been permitted through a series of years, or in numerous similar business transactions, to pursue a particular course of conduct in his official capacity, without objection, it will be presumed, as between the corporation and those who, in good faith, deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control his actions in that regard, and the company will be bound by his acts.16

¹⁵ N. Y. Iron Mine v. Negaunee Bank (1878), 39 Mich. 644, 651; Asher v. Sutton (1884), 31 Kan. 286.

16 Sherman v. Fitch (1867), 98 Mass. 59; Merchants' Bank v. State Bank (1870), 77 U.S. (10 Wall.) 604; Washington Mutual Fire Ins. Co. v. St. Mary's Seminary (1873), 52 Mo. 480; Kiley v. Forsee (1874), 57 Mo. 390, 396; Kraft v. Freeman (1881), 87 N. Y. 628; Martin v. Webb (1884), 110 U.S. 7; First Nat'l Bank v. N. Mo. Coal Co. (1885), 86 Mo. 125; Fifth Ward Savs. Bank v. First National Bank (1886), 48 N. J. L. 518, p. 527; Credit Co. v. Howe Machine Co. (1887), 54 Conn. 357, 1 Am. St. Rep. 123; Indianapolis Rolling Mill v. St. Louis, Fort Scott & W. R. R. Co. (1887), 120 U. 8. 256; Glover v. Wells (1890), 40 Ill. App. 350; Sparks v. Despatch Transportation Co. (1891), 104 Mo. 531; Washington Savings Bank v. Butchers' & Drovers' Bank (1891), 107 Mo. 133; Moore v. Gaus & Sons Mfg. Co. (1892), 118 Mo. 98; Oakes v. Cataraugus Water Co. 1894), 143 N. Y. 430; Leroy & C. V. Air Line R. R. Co. v. Sidell (1895), 66 Fed. Rep. 27 p. 4; Mo. Pac. Ry. Co. v. Sideli (1895), 67 Fed. Rep. 464.

§ 12. (5.) The same Result follows if the Unauthorized Act is Ratified .- And so although the act is done by the president without authority in the first instance, if the corporation, after coming to the knowledge of the act done it its behalf ratifies or adopts the same—as for instance, by accepting the benefits thereof-it will be bound as effectually as if the act had been done with full original authority.17 Such ratification need not be manifested by a vote or formal resolution. It may be proved by acquiescence or silence: and only slight evidence is required when knowledge is brought home to the corporation.18 But there must be evidence of knowledge, or of facts from which knowledge may be inferred as a legal consequence, before a ratification can be charged against the cor-And in this connection it must be poration. borne in mind that the knowledge of the officer acting in behalf of the corporation without actual authority is not imputable to the corporation.19

§ 13. (6.) Where Authority is Implied or the Company is Estopped to Raise the Question, By-laws are not Available to Prove Want of Authority.-Where the acts done have been done under such circumstances as to raise an estoppel in pais against the corporation, the existence of a by-law or special resolution of the board of directors, limiting the president's authority to do the act in question, or depriving him wholly thereof, if the other party had no notice of the same, is immaterial; for in such cases these are regarded as secret instructions to a general agent, of which the other party to the transaction, acting in good faith and in ignorance thereof, is not bound to take notice, and by which he is not affected.20

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¹⁷ Railway Companies v. Keokuk Bridge Co. (1888),
131 U. S. 371; Fitzgerald Const. Co. v. Fitzgerald
(1890), 137 U. S. 98; Washington Savings Bank v.
Butchers' & Drovers' Bank (1891), 107 Mo. 183.

18 Idem.

¹⁹ Twelfth Street Market Co. v. Jackson (1883), 102 Pa. St. 269; Hyde v. Larkin (1889), 35 M. A. 365, p. 373.

²⁰ Royal Bank of India's Case (1869), L. R. 4 ch. 252; Smith v. Smith (1872), 62 Ill. 493; Walker v. R. R. Co. (1886), 26 S. Car. 80; Arapahoe Cattle & Land Co. v. Stevens (1889), 13 Colo. 534,22 Pac. Rep. 823; McDonald v. Chisholm (1890), 131 Ill. 273; Glover v. Lee (1892), 140 Ill. 102. As a contract of the same

TRIAL COURTS — ADOPTION OF RULES—SE-LECTION OF SPECIAL JURY—PROHIBITION.

ST. LOUIS, KEOKUK & N. W. RY. CO. V. JAMES E. WITHROW.

Supreme Court of Missouri, February 18th, 1896.

The circuit court of the city of St. Louis has power under the statutes and constitution of the State to adopt reasonable rules governing the selection of a special jury to try causes therein.

An order of such court upon the jury commissioner, to draw and furnish for the trial of a cause, a special venire "of forty-five good and lawful men" without other designation of qualifications is valid.

The supreme court has discretionary power to award a writ of prohibition to keep a trial court within the confines of its authority although such question might be determined on a review, by appeal or writ of error, of the cause wherein erroneous jurisdiction may be asserted.

BARCLAY, J.: This is an original application for a writ of prohibition to Judge Withrow, one of the judges of the circuit court in the city of St. Louis. The purpose is to prohibit him from enforcing a rule of court in regard to the selection and empanelment of special juries that may be ordered in that court. Both parties to a cause pending in the division (or special term) over which Judge Withrow presides unite in the application for a prohibitory writ. The facts are admitted. The object of the action before Judge Withrow is to condemn for railroad purposes a strip of land in St. Louis. The railway company is plaintiff, and the Knapp-Stout & Co. Company is defendant. The defendant applied in due time "for a special jury." The application was granted, upon a deposit of the required sum to meet the expenses thereof. The order further declared. "And the court doth direct the jury commissioner of the city of St. Louis to draw and furnish to the sheriff of the city of St. Louis, the names of forty-five good lawful men, and said sheriff is ordered to summon the persons so named to be and appear in room 3 of this court on Monday, October 14th, 1895, at 10 o'clock A. M., then and there to serve as special jurors until discharged by the court." Neither the application for the special jury nor the order allowing it contains any specification of qualifications of the jury, by class, trade, occupation, residence, or otherwise. The case came on for a hearing. The judge announced that the parties would be required to select the trial jury in accordance with rule 37 of the court which is as follows:

1. When a special jury is ordered, the court making the order will designate therein the number of jurors to be drawn, not less than forty nor more than fifty, and thereupon the jury commissioner shall draw the number so designated from the jury wheel in the same manner as jurors for ordinary service are drawn, and shall furnish a list of the names so drawn to the sheriff to be summoned, and shall also furnish four other lists, two for the court, one for the plaintiff, and one for the defendant.

2. On the day of the return of the special venire, after the sheriff, on order of the court, shall have called the list and ascertained who of them are present in court, the lists for the parties will be given them or their attorneys, showing those jurors who have answered the call; then when the trial is to begin, all the jurors of that venire present, except such as may have been excused by the court, will be called into the box to be questioned on their voir dire, and the court will hear and determine all challenges for cause, if any, and purge the list of the disqualified; then from the list so purged, the plaintiff and defendant, or their attorneys respectively, will select eighteen jurors, to-wit, nine each; this selection will be made as follows: The plaintiff will mark on the list nine names, then the defendant will mark nine names; this selection will be so conducted that the jurors selected will not know by whom they are chosen; from this array of eighteen jurors so selected each side will strike off three names, and the remaining twelve will be the jury to try the cause; should either party decline to participate in the selecting or striking off of the names of jurors as above described, the sheriff will perform that duty for him, and should both sides so decline the sheriff will do so for both.

3. If, after the list has been purged, as provided in paragraph 2, supra, there should remain less than twenty-seven names of qualified jurors from which the eighteen are to be selected as above prescribed, the court will postpone the trial to a convenient time later, and order an additional number of jurors, who will be drawn, summoned and selected in like manner as above provided, so as to bring the number of qualified jurors from whom the array of eighteen are to be selected up to at least twenty-seven."

The forty-five jurors had been duly summoned in accordance with the order, but both parties moved to vacate it and to "quash the panel," because the order had required the jury commissioner to furnish the names of the jurors to the sheriff. On various grounds both parties indicated objections to the rule mentioned, and to its enforcement in the condemnation case. After overruling the objections, the judge adjourned the trial to a future day in order to allow the parties time to have the correctness of his action reviewed in the present proceeding, which was promptly brought. The defendant 'judge in response to the rule to show cause, after admitting the facts set forth in the application for a prohibition, made further return as follows: "That said rule was unanimously adopted by the judges of said court in general term by authority of Sec. 27, Art. 6, of the constitution of Missouri authorizing them to make rules, and of Sec. 29, of article 21, of the appendix to the revised statutes of 1889, directing that special juries shall be selected by the jury commissioner in the manner directed by the court, which provision of the statute is found on page 2160, revised statutes of

1889. That it was formulated and [adopted by saidfjudges as the result of their long experience in the practical operation of the special jury law applicable to the eighth judicial circuit. That the same is a valid exercise of judicial power under the constitution and laws of this State, and is binding upon him and he deems it to be his duty to enforce the same unless prohibited therefrom bvithis honorable court." In this state of the record the case here has been argued by the plaintiffs; and submitted for decision, as upon an application to make the rule absolute. The seven circuit judges of St. Louis (including Judge Withrow have submitted printed suggestions indicating the grounds on which they saw proper to adopt rule 37. 1. Neither party questions the propriety of the use of prohibition to reach a prompt decision upon the validity of the rule of court. But that fact does not warrant us in ignoring all inquiry as to our jurisdiction to entertain the proceeding. It is evident that either party to the case before Judge Withrow might except to the court's action in regard to the jury, let that cause go to judgment, and thereafter review the ruling by appeal or writ of error. But, on the other hand, a decision as to the correctness of the circuit ruling is said to involve a decision upon the power and authority of the court to proceed as indicated by the rule in dispute, and hence of its lawful authority to enforce the rule. The petitioners here insist that the circuit court has no authority to require the cause to be tried in the manner indicated by its orders and rulings already made. Prohibition undoubtedly is applicable, legitimately, as well to keep a court within the orbit of its power in dealing with some phase of a case, as to prevent its taking cognizance of an action or proceeding which the court has no power to entertain at all. State v. Riddell (1831), 2 Bailey (S. C.), 560; Appo v. People (1860), 20 N. Y. 531. Especially may the writ be used for the former purpose by a court invested with "general superintending control" over the circuit courts, as is the supreme court according to our fundamental law. Const. 1875, Art. 6, Sec. A question of jurisdiction in respect of an incidental matter of procedure in a pending cause does not ordinarily form a basis for demanding, 28 matter of right, a writ of prohibition. If the court of which that writ is asked is of opinion that the remedy by appeal or writ of error is ample and adequate to correct an erroneous ruling on such a question, it may decline to interfere during the pendency of the original litigation. But if the mooted question involves an issue of jurisdiction in the trial court to act in the particular matter complained of, the superintending court has discretionary power to award the writ of prohibition to keep the court of first instance within the confines of its authority, where the circumstances justify the call for that remedy. In cases of the kind just described the use of prohibition is truly discretionary, when appeal or error would be also ultimately available. The recent statute

regulating proceedings in prohibition (Laws, 1895, p. 95) does not change the pre-existing law as to the proper occasions for the awarding of that writ. It merely undertakes to prescribe certain rules of procedure to obtain it. We shall not, however, pause further to inquire into the applicability of the remedy in this instance, inasmuch as we are of opinion that no prohibition should be granted on the merits. We are not entirely satisfied that it should be denied on the preliminary issue as to the appropriateness of the relief sought, so we have looked into the substance of the controversy. 2. The chief complaint of plaintiffs in the case at bar is that the order by Judge Withrow did not direct any selection of the jurors either by the jury commissioner or by the sheriff, or point out any qualifications which the special jurors should possess. But plaintiffs also challenge the power of the court to require the panel for the case to be chosen in accordance with the thirty-seventh rule of the circuit court of the city of St. Louis. The ordinary method of selecting jurors for service in St. Louis is pointed out by the law of 1879, Rev. Stat. 1889, p. 2160, art. 21. That statute has been since amended in some particulars which need not be specially noted, but one amendment is as follows: "In every city in the State of Missouri having over one hundred thousand inhabitants, all courts of record in which juries are required shall have power, upon the application of either party, to order a special jury for the trial of any cause, if the application be made at least three days before the trial, and when ordered the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said courts the names of the persons to be summoned for such special jury, and said officer shall summon them according to the order of the court. and make out and deliver to each party, or his attorney, a panel of the jury so summoned; but the costs of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the costs of the special jury shall be taxed as other costs against the losing party. The provisions contained in sections 17, 18, 19, 20, 21, 23, 24 and 25 of this act, in relation to the summoning and service of common jurors, and to the duties and liabilities of persons in said sections respectively mentioned, and to the penalties in said sections respectively provided for in respect to common juries, shall, in like manner, be construed to apply also to the summoning and service of special juries, as by this section provided for." Laws 1885, p. 74; Rev. Stat. 1889, p. 2169,

The general provisions on this topic in the last revision of the statutes (1889), are these: "Sec. 6089. Special Venire — How Obtained and Paid.—Either party to a cause pending in the circuit court, or court of common pleas or criminal court of any county or city, and triable by a jury,

shall be entitled, as of course, to an order for special venire, on motion made therefor, three days before that on which the case is set for trial: but the cost of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the case was one for the trial of which a special jury should have been ordered, in which case the costs of the special jury shall be taxed as other costs against the losing party. This section shall apply to cities having over three hundred thousand inhabitants, as fully as to all other parts of the State." It will not be needful in this case to consider any clash there may be between the terms of this section and of the act of 1885 quoted. Turning now to the law regulating the circuit court, city of St. Louis, we note that the present court was organized under a special statute in 1865 (Laws 1865, pp. 70-76, Rev. Stat. 1889, p. 2145), which has since been occasionally amended. But in the original act of 1865 occurs the following passage which has never been altered or repealed: "In addition to the ordinary powers of making rules conferred by the general law, the court may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein. But all rules for the government of the court at special term shall be the same before each of the judges at such term." Laws, 1865, p. 73, Sec. 14; Rev. Stat. 1889, p. 2147, Sec. 11. In State v. Smith (1889), 44 Mo. 112, the supreme court, in a unanimous opinion by Judge Wagner, held valid a rule of the St. Louis circuit court requiring bills of exceptions to be submitted there within five days, instead of within the term, as then allowed by the existing statute of the State. The same view was taken of another rule of that court in regard to the mode and manner of applying for continuances (Frederick v. Rice [1870], 46 Mo. 24), and again in respect of the time for objecting to the form of questions in depositions. Fox v. Webster (1870), 46 Mo. 181. The same opinion of this power to make rules was also expressed by the court of appeals in State v. Boyle (1877), 3 Mo. App. 603; State v. Wickham (1877), 3 Mo. App. 604; and State v. Wickham (1878), 5 Mo. App. 301. The supreme court decisions already cited were rendered and published (and hence well known to the public) long before the adoption of the constitution of 1875. In that instrument we find the following language in regard to the St. Louis circuit court:

"Sec. 27. Circuit Court of St. Louis County, etc. The circuit court of St. Louis county shall be composed of five judges, and such additional number as the general assembly may from time to time provide. Each of said judges shall sit separately for the trial of causes and the transaction of business in special term. The judges of said circuit court may sit in general term, for the purpose of making rules of court, and for the

transaction of such other business as may be provided by law, at such time as they may determine, but shall have no power to review any order, decision or proceeding of the court in special term." This provision of the organic law is strongly confirmatory of the power already conceded to that circuit court by the statute, and by the supreme court, in regard to declaring rules of practice. There are many reasons for the grant and exercise of such authority, growing out of the peculiar formation and duties of the court, and of the needs of the people whom it chiefly serves in administering the law of the State. The statutes and decisions already cited will suggest many such reasons to the careful reader, and more could be pointed out by reference to other statutes, imposing peculiar powers and duties on that court. But whatever the reasons therefor, "the power exists," as Judge Wagner said in one of the cases above cited, and the constitution has expressly confirmed the grant. The power, however, relates only to modes of procedure and is limited in its application to cases wherein a rule of court might fairly be held to have a legitimate bearing toward facilitating the business of the court. Even so broad a power to make rules of practice could not justly or reasonably be held applicable to deprive a suitor in that court of any right conferred by the substantive, positive law of the State. The limitations of the power need not be further discussed at this time. The rule 37 is not in conflict with any law touching the mode of empaneling the jury. It conforms to the statute (section 6081) allowing each party to the action to challenge peremptorily three jurors, and it recognizes fully the statutory right of challenges for cause (section 6083). In matters of mere detail it prescribes the mode of proceeding to bring the final jury into the box; but in so doing it does not clash with any command of the written law, and we think that it cannot justly be held to go beyond the proper range of the power of the court to regulate its procedure. We therefore hold that it is valid. 3. But beyond the issue as to the mode of selecting the panel, by means of the legal machinery described in rule 37, lies the further inquiry as to the power of the court to order a special venire "of 45 good and lawful men," without other designation of qualifications. (See the order already recited.) This power plaintiffs deny.

The rule 37 does not touch this point. It opens with the words: "When a special jury is ordered," etc. It would be entirely practical (under that rule and under the system of selecting jurors in St. Louis, established by the law of 1879) for the court to order in a particular case a jury of mechanics, bankers, merchants or architects, and have their names drawn by lot by the jury commissioner. We do not mean at this time to imply whether such an order would be correct, for no such question is in judgment. But the rule of court quoted would not prevent the execution of such an order. Under a former law regulating

juries in St. Louis (before the separation of the city and the county) a method of procedure was pointed out for promptly drawing jurors, the principle of which could be readily applied to the selection of a special jury designated by occupation or residence, though drawn from the wheel by lot in the usual way. Laws, 1857, p. 487, Sec. 3. In the case in view in the trial court there was no order for that sort of a special jury. The call was merely a special one for 45 jurors in the particular case, and we are expected to decide whether the court had authority to make such an order. From an early date in Missouri there has been general legislation authorizing the use of special juries. As early as 1845 the following section appeared in the statutes, slightly changing the law of 1835 on the same topic (Rev. Stat. 1836, 2d ed., p. 343, Sec. 14): "Sec. 14. All courts before whom juries are required have the power to order a special jury of eighteen, for the trial of any civil cause, and when ordered the sheriff shall summon them according to the order of the court, and make out and deliver to each party, or his attorney, a panel of the jury so summoned." R. S. 1845, p. 628, Sec. 14. In the revision of 1855 the number of the special jury was increased to twenty-four, and the section last quoted was subsequently repeated with that change. R. S. 1855, p. 912, Sec. 24. By the revision of 1865, the opening lines of the section were amended so as to read thus: "All courts of record in which juries are required shall have the power to order a special jury of twenty-four," etc. The rest of the section was retained as last-above written. R. S. 1865, p. 599, Sec. 23. In the statutes of 1879 (section 2802) was a section in all material respects the same as section 6089 of the revision of 1889, already quoted. In these revisions no requirement is found as to the number of a special jury, further than may be inferred from general remarks committing the subject of number of jurors to the discretion of the court. R. S. 1889, Secs. 6084, 6087. One of the local laws regulating the selection of juries in St. Louis and in a few other counties refers to special juries as proper in certain circumstances. Laws, 1850-1, p. 228, Sec. 7. In several reported cases in the supreme court questions have arisen involving the powers and duties of the trial courts in regard to special juries. In Fine v. Pub. Schools (1860), 30 Mo. 166, the St. Louis circuit court ordered a special venire for a jury to be summoned outside the city limits; and the order was sustained. That ruling was afterwards approved in Rose v. St. Charles (1872), 49 Mo. 509. In Union Sav. Assn. v. Edwards (1871), 47 Mo. 448, the supreme court was called upon to consider an exception to a special jury of "bankers, merchants and manufacturers" (as recited in the record of the cause, though the precise terms of the order do not appear in the opinion). After referring to the statutory power authorizing an order for a special jury to be summoned "according to the order of the court," Judge Wagner, on behalf of all the judges,

declared: "The special panel may discretion of the court." dered in the It is noteworthy in this connection that the law of 1885, already quoted, requires special juries in St. Louis to be selected and summoned by the jury commissioner and sheriff, according to the direction or order of the court. Do not those provisions imply that the court itself is invested with the discretion to determine what sort of special jury shall be summoned? At no time in the history of the State have the trial courts in St. Louis been commanded (by any statute we have been able to discover) to direct the empanelment as special jurors of any particular class or kind of citizens, from among those liable to general jury duty. Nor have those courts been adjudged by any decision to be bound to order such a special jury. That subject has, so far, been left entirely to the judgment and discretion of the trial judge, as the cases above cited indicate. The mode of selecting special juries in vogue in England during the last century is thus described by the great commentator on the English law: "Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel." 3 Bl. Com. p. *357. It should be observed that such juries were ordered, under the common law system, not only on account of the difficulty of the cause, but also, in some instances, to secure impartiality in the selection of the jury, irrespective of the nature of the action. The English law of a more recent period prescribes with considerable particularity the qualifications for special jurors and provides for their selection by lot, unless the court (as it may) shall direct a different course. The Juries Act, 1870 (33 & 34 Vict.) ch. 77, Secs. 6 and 17. In North Carolina where such jurors may be selected by lot, that mode of choice has been commended as preferable to that of committing the matter to the choice of an executive officer of the court. State v. Brogden (1892), 111 N. C. 656; State v. Whitson (1892), 11 N. C. 695. In Wisconsin the designation of a jury by the trial court itself was held a constitutional application of judicial power over the subject of juries in Perry v. State (1859), 9 Wis. 19. While in our own State the naming of two jurors of such a panel by the judge himself was held a proper exercise of authority in Barr v. Kansas City (1894), 124 Mo. 22, 25 S. W. Rep. 562. In the last cited case it was also ruled that in Kansas City "special juries should be drawn from the wheel the same as juries ordered to serve generally for the term or some other stated period of time." No law of this State has been pointed out which expressly or impliedly requires the court to order a special jury "of more than ordinary intelligence," or "of business men" or of any special class, at the instance of any party who chooses to apply for a special venire. It cannot be possible, nor does the language of any designated law suggest that any party to the most trivial suit may, by paying in advance certain costs, secure an "extra good" jury as "of course." Section 6089 simply purports to confer the right, "as of course, to an order for a special venire," on certain terms. And the law of 1885 quoted commands that when a special jury is ordered "the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said courts the names" of the special jury, who are then to be summoned "according to the order of the court," etc. R.S. 1889, p. 2169. Granted that the word "select" is used to describe the action of the jury commissioner, it must also be remembered that the section from which we have just quoted is but part of a chapter or article regulating the selection of juries in large cities, including St. Louis. The rest of the law on that topic must be considered in attempting to reach a correct interpretation of the word "select" in the place where it is found in the act of 1885. All statutes on a given subject should be kept in view in interpreting any portion of them. The jury commissioner in ascertaining the names of an ordinary jury is not absolutely bound to place on any jury list every name drawn therefor from the wheel. If, for instance, it appears that he has drawn the names of persons whom the jury register shows to be dead, or to have removed permanently from the city, after their names were placed in the wheel, the commissioner may draw additional names to supply the deficiency. R. S. 1889, p. 2165, Sec. 16. Furthermore, the language of the law generally in regard to juries plainly shows that the legislature has often used the word "select," in connection with that subject, so as to include as well the idea of drawing persons by lot for a panel, as of the chosing of persons to be so drawn. The "selection of juries," within the plain intent of our statute law, is a term frequently applied indifferently and broadly to all the steps prescribed to obtain the final panel that hears a case. R. S. 1889, Secs. 6059; 6973, and p. 2169, Sec. 27. But whatever doubt there be, springing from a strictly etymological consideration of the word "select," we think should vanish upon weighing the force of the context with which the word appears in the law of 1885 before us. The special jury is to be "selected" by the commissioner "as he may be directed by the court." The court may order a jury to be selected by the jury commissioner by process of drawing, as it may order a jury to be summoned by the sheriff without the intervention of the commissioner at all, under section 16 (R. S. 1889, p. 2165). Cases may be

supposed wherein the commissioner might have to exercise a limited power of selection in drawing the special jury, for example, where the court's order called for a jury of men of named occupations, or residing within (or without) certain limits of territory. But the power of such selection is expressly confined within the limits marked by the order of the trial court, to which is thus committed the authority to determine what sort of special jury shall be "selected" and summoned. The commissioner is the hand to execute the order of the court. We consider that the statute does not design to vest in him a discretionary power of selecting special jurors, independent of the directions the court may give. The case at the bar of Judge Withrow's court is a condemnation proceeding in which the valuation of real estate is presumably the only issue involved. Can it be justly said that a court abuses its discretion, in any view of the subject, by refusing a special jury of extraordinary qualifications to try a cause of that nature? Within the meaning of the present law we regard a special jury as one summoned to try a particular case and nothing more, and we hold that it is within the discretionary power of the court ordering the same to determine whether any other than general directions to summon a panel for the special case should be given. Compare 12 Am. & Eng. Ency. of Law, 320. As the court in this instance merely called for 45 good and lawful men, it is not necessary to discuss the effect or validity of any other order for a jury that might have been entered in the cause. We consider that the kind of jury to be summoned in the condemnation case was a matter within the sound discretion of the trial judge, and we discover no abuse of his discretion in ordering a special jury of good and lawful men, and then in following the terms of rule 37 in the manner he saw fit to do. In our opinion the rule for a prohibition should be discharged, and a judgment for the defendant entered. Brace, C. J., and Robinson, J., concur. MacFarlane, J., dissents. But we all agree to transfer the cause at once to court in banc in order to expedite a final decision.

NOTE.—Rules of Courts.—Rules of court are necessary to the proper exercise of the functions of a court, and have become a very important branch of the law affecting the practice and proceedings of the courts. Works on Jurisdiction of Courts, p. 177. The right may be given and regulated by statute but exists as an inherent power independent of positive law. Shaw v. McNeill, 77 Iowa, 459, 41 N. W. Rep. 166. Without this power it would be impossible for courts of justice to dispatch the public business. Delays would be interminable and delay not unfrequently is the object of one of the parties. Every court, therefore, must have stated rules to go by and they are the best judges of their rules of practice. Snyder v. Bauchman, 8 S. & R. (Pa.) 336; Robinson v. Bland, 1 W. Black. 265; Fullerton v. Bank of United States, 1 Peters (U. S.), 604; Barry v. Randolph, 3 Binney (Pa.), 277; Dubois v. Turner, 4 Yeates (Pa.), 361; Kennedy v. Cunningham, 2 Metc. (Ky.) 538; Brooks v. Boswell, 34 Mo. 474; Resher v. Thomas, 2 Mo. 98;

Vail v. McKernan, 21 Ind. 421; Redman v. State, 28 Ind. 205; Sellars v. Carpenter, 27 Me. 497; Vanatta v. Anderson, 3 Binney (Pa.), 417; Harris v. Commonwealth, 35 Pa. St. 416; Walker v. Ducro, 18 La. Ann. 703; Hill v. Barney, 18 N. H. 607; Ogden v. Robertson, 15 N. J. L. 124; Ferguson v. Kays, 21 N. J. L. 481; Estate of Boyd, 25 Cal. 511; Shoecraft v. Cain, 23 Ind. 160; Coffin v. McClure, 23 Ind. 356; Ollam v. Shaw, 27 Ind. 388; Fox v. Conway Fire Ins. Co., 53 Me. 107; Quynn v. Brooke, 22 Md. 288; Bell v. Betton, 18 N. H. 48; Towamencin Road, 10 Pa. St. 195; Gannon v. Fritz, 79 Pa. St. 308; Stadler v. Hertz, 13 Lea (Tenn.), \$15; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Seymour v. Phillips Construction Co., 7 Biss. (C. C.) 460; Texas Land Co. v. Williams, 48 Tex. 602; Haley v. Davidson, 48 Tex. 615; Fisher v. National Bank of Commerce, 78 Ill. 84; Angell v. Plume, etc. Manufacturing Co., 78 Ill. 412; Wyandotte Rolling-Mills Co., 78 Ill. 412; Wyandotte Rolling-Mills Co. v. Robinson, 84 Mich. 428; People v. Chew, 6 Cal. 686; Lynch v. State, 9 Ind. 541; De Lorme v. Pease, 19 Ga. 220. Such rules, however, must be reasonable and must not conflict with the constitution or law of the land. People v. McClellan, 81 Cal. 101; Luckley v. Rotchford, 12 Gratt. (Va.) 60; Gormerly v. McGlynn, 84 N. Y. 284; Redman v. The State, 28 Ind. 205; Wyandotte Rolling Mill Co. v. Robinson, 34 Mich. 428. A court cannot make and enforce a rule that will deprive a party of a right given him by law or granting the right upon terms more onerous than those fixed by law. Krutz v. Griffith, 68 Ind. 444; Krutz v. Howard, 70 Ind. 174; People v. McClellan, 81 Cal. 101; Rice v. Ehele, 55 N. Y. 518. Rules of court should be adopted of record within a reasonable time (State v. Ensley, 10 Iowa, 149; Owens v. Ranstead, 22 Ill. 161; Mix v. Chandler, 44 Ill. 174), and should not be retrospective in their terms. Dewey v. Humphrey, 5 Pick. (Mass.) 187. In many of the States the power to make rules is expressly given by statute, and where such power is limited by statute such limitations must be observed. Gormerly v. McGlynn, 84 N. Y. 284; Works on Jurisdiction, p. 178. A rule of court adopted under a statutory provision authorizing it becomes a law binding upon the court as well as upon the litigants before it. Thompson v. Hatch, 3 Pick. (Mass.) 512. And it is held in some cases that so long as a rule of court remains unrepealed it cannot be dispensed with or suspended in a particular case. Thompson v. Hatch, 3 Pick. (Mass.) 512. But the general rule on the subject is that a court has the power at all times to suspend its own rules or to except particular cases from their operation whenever the purposes of justice require it. United States v. Breitling, 20 How. 252; Clark v. Brooks, 20 How. Pr. 285; Martine v. Lowenstein, 68 N. Y. 456; Manhattan Life Ins. Co. v. Francisco, 17 Wall. 672; Symons v. Bunnell, 20 Pac. Rep. 859; Sheldan v. Risedolph, 23 Minn. 518; Pickett v. Wallace, 54 Cal. 147. This is a power which should be rarely exercised and only for the purpose of avoiding injustice. Walcott v. Schenck, 23 How. Pr. 385. Whether a rule shall be suspended or not is within the discretion of the court, and cannot be claimed as matter of right. Manhattan Life Ins. Co. v. Francisco, 17 Wall. 672. Courts have full power to construe their own rules. Martine v. Lowenstein, 68 N. Y. 456; Bair v. Hubartt, 139 Pa. St. 96, 21 Atl. Rep. 210; Gannon v. Fritz, 79 Pa. St. 303. In some cases it is held that an appeal will not lie from an order of a court that gives a construction to its own rules. This is no doubt true where the question is one of discretion, and the rule affects merely the time when a thing shall be done or the like, but it cannot be true that a court may, in all cases, disregard, misconstrue or violate its own rules and that no appeal will lie from its action. Works on Jurisdiction, p. 179; Thompson v. Hatch, 3 Pick. 512; Ex parte Whitney, 13 Pet. 404. But unless it clearly appears, on appeal, that a rule of the court below has been violated the construction put upon it by the latter court will not be reviewed. Nevin v. Morrison, 18 Atl. Rep. 636.

Special Jury .- A special or struck jury is one returned for the trial of a particular case. 12 Amer. & Eng. Encyclopedia of Law, p. 320. According to Bouvier it is a jury "selected by the assistance of the parties." In many of the States, statutes regulate the mode of selection and provide where a special jury shall be granted. The difference between the English method and that used in most of the States is that in the former the officer charged with the duty of making up the list from which the special jury is struck is not obliged to take the names in any order in which they stand on the regular list; he may make a selection. Thompson & Merriam on Juries, § 18. See, also, M. & E. R. R. Co. v. Thompson, 77 Als. 448. In some States special jury is allowed as of course; in others only in cases of exceptional difficulty or importance. See Thompson & Merriam on Juries, § 12, for general discussion of the subject.

JETSAM AND FLOTSAM.

CURRENT CASE LAW.

In its abstract of recent decisions, a late number of the Albany Law Journal has the following:

"Frauds, Statute of-Contract.-The value of work and labor supplied under a contract void by the statute of frauds, is recoverable upon the theory that a benefit has been received, from which springs an implied undertaking to pay the value of such work and labor. Baker v. Henderson (N. J.), 82 Atl. Rep. 700." We have always understood that the prime object of the department of the Albany Law Journal, from which the above excerpt is taken, is to keep busy lawyers posted in current case-law, involving either the exposition of new doctrine or some modification of long-settled principles, and that it was not intended to constitute an asylum, so to speak, for veteran rules of law with which every practitioner may reasonably be expected to be familiar. This being conceded, it strikes us that such a case as the above ought to have found no place there. The principle enunciated in this case has been recognized in England, certainly since the case of Mavor v. Payne, 3 Bing. 285, was decided in 1825, and was approved by the Supreme Court of New York in 1826 in the case of Burlingame v. Burlingame, 7 Cow. 92, and affirmed in the same court in the case of Shute v. Dorr, decided in 1830 (5 Wend. 204). That it has long been regarded as law generally in America seems obvious from an article on quantum meruit in 20 Cent. L. J. 828.—Canada Law Journal.

BOOK REVIEWS.

FOSTER ON THE CONSTITUTION.

The volume before us is volume one of a series which is to contain commentaries on the constitution of the United States, historical and judicial, with observations upon the ordinary provisions of State

constitutions and a comparison with the constitutions of other countries. The author is Roger Foster, a distinguished member of the New York bar, author of a most valuable treatise on federal practice, and lecturer at the Yale Law School. The present volume treats of the features of the constitution from the preamble to the article on impeachment. The author, in its construction, exhibits great learning, much thought and painstaking care, neither the style nor the substance of the book is that of the ordinary dry law book. It is written in an entertaining manner and contains avast deal of general information. It is a volume of seven hundred pages, bound in cloth, and published by the Boston Book Company, Boston.

MERWIN ON EQUITY.

The lectures which compose this book were delivered by Mr. Merwin at the law school of Boston University, and appear now for the first time in print. Though designed and perhaps better adapted for the uses of the student than the practitioner, the latter will find it valuable as laying down in concise and clear manner the underlying or bed-rock principles governing the important subject of equity. To the student it may be said that this is a most excellent treatise, and one which it would be well for him to read carefully. The clear and logical presentation of the subject, the accurate and concise manner in which the doctrines are stated, give it an especial value to him who desires to start out right by constructing a safe foundation upon which to erect the superstructure to follow later. Published by Houghton, Mifflin & Co., Boston and New York.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resert, and of the Supreme, Circuit and District Courts of the United States, except these that are Published in Fail or Commented upon in our Setes of Recent Decisions.

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1. ABATEMENT — Action on Joint Contract.—If one of two or more defendants in an action at law upon a joint contract die before verdict, the suit abates as to the dead one, and cannot be revived and proceeded against his representative and the survivor.—HENNIES V. FARNSWORTH, W. Va., 23 S. E. Rep. 663.

- 2. ACCOUNTING Laches—Relief.—A bill by the surviving legatees and their heirs against the sureties on an executor's bond for an accounting will not be sustained where it appears that 15 years have elapsed since the last partial settlement, that neither the executor nor any person having knowledge of the accounts is alive, and no reason is given why a settlement was not had before, and the evidence is such as to render it impracticable to do justice.—Rives v. Mornis, Ala., 18 South. Rep. 745.
- 8. ACCOUNT STATED Conclusiveness.—A stated account never gives to a party claiming under it the benefit of an absolute estoppel. It establishes prima facie the correctness of the items, and, unless this presumption is overcome by proof of fraud, mistake, or error, it becomes conclusive; but that an account stated may be impeached for fraud, mistake, or error is well settled. The party impeaching it, however, has the affirmative of the issue and the burden of proof.—Martyn v. Amold, Fla., 18 South. Rep. 791.
- 4. ACTIONS Survival—Colorado Statute.—Au action for damages for personal injuries, which, under the common law forms of procedure, would have been an action of trespass on the case, does not survive to and against executors and administrators by virtue of the statute of Colorado which provides that "all actions at law whatsoever, save and except actions on the case for slander, or libel, or trespass for injuries done to the person," shall so survive.—MUNAL v. BROWN, U. S. C. C. (Colo.), 70 Fed. Rep. 967.
- 5. ADMINISTRATION—Allowance to Widow.—The fact that the widow and children left the State on the death of the busband and father, and continued to reside outside thereof, did not deprive them of the right to the further allowance for their maintenance pending settlement of the estate given by Code Proc. § 973.—GRIESEMER V. BOYER, Wash., 43 Pac. Rep. 17.
- 6. ALIEN—Contract Labor Law.—In an action to recover the penalty imposed by the contract labor law (23 Stat. 332, ch. 164, § 1, as amended by 26 Stat. 1084, ch. 551), the declaration should contain a particular allegation of a contract between the defendant and the alien whose migration is alleged to have been assisted, setting forth categorically in what such contract consisted, a distinct statement that labor was performed under such contract, and a distinct statement of the acts by which the defendant assisted the alien to immigrate.—UNITED STATES v. RIVER SPINNING Co., U. S. C. C. (R. I.), 70 Fed. Rep. 978.
- 7. ALIMONY When Granted.—Our statute in reference to the allowance of alimony to a wife in cases where she is a party defendant refers exclusively to cases of divorce. Where the suit is brought by the putative husband to obtain a decree declaring the marriage void ab initio, a court of chancery has power to grant alimony to the putative wife, independent of the statute, and as incident of the jurisdicion of the court in such cases.—PRINE v. PRINE, Fla., 18 South. Rep. 781.
- 8. ALTERATION OF NOTE—Materiality.—The addition to a note of the words, after the name of the payes, "or holder," and, "a lien is retained on said land until all the purchase money is paid," is a material alteration, and no action can be brought on such note.—MCDANIEL V. WHITSETT, Tenn., 33 S. W. Rep. 567.
- 9. APPEAL—Supersedeas Bond.—Where, in ejectment, the mesue profits are recoverable, a supersedeas bond on error to the federal supreme court covers rents and profits pending the proceedings in error.—TARPET V. SHARP, Utah, 43 Pac. Rep. 104.
- 10. Assignment Chose in Action.—The rule of the common law prohibiting the assignment of choses in action is not in force in this State.—Winn v. Ft. Worth & R. G. Ry. Co., Tex., 33 S. W. Rep. 598.



- 11. Assignment for Benefit of Creditors, directing the assignment for benefit of creditors, directing the assignment seel the personalty at any time, and to rent out the real estate, and providing that if the debts were not paid by a certain date then the trustee should sell the land, one-third cash, the balance in one and two years, is fraudulent, as hindering and delaying creditors.—Farmers' & Traders' Bank v. Martin, Tenn., 38 S. W. Rep. 565.
- 12. CHATTEL MORTGAGES Equitable Lien.—A mortgage describing the property as a certain number of head of cattle, bearing a certain brand, to be selected by the mortgagee from a herd of a larger number in a certain county, creates, as against a person purchasing the herd of cattle from the mortgagor, with notice, an equitable lien on the cattle.—LAY V. CARDWELL, Tex., 33 S. W. Rep. 595.
- 13. CHATTEL MORTGAGE What Constitutes.—A deed or bill of sale of either real or personal property, accompanied by a contemporaneous agreement for reconveyance of the same upon payment of consideration, which shows that the conveyance was made to secure indebtedness, is in effect a mortgage.—PRITCHARD v. BUTLER, Idaho, 43 Pac. Rep. 78.
- 14. Constitutional Law Collateral Inheritance Tax.—Acts 1898, ch. 174, providing for the taxation of estates passing by will to persons other than father, mother, husband, wife, children, or lineal descendants of the owner, is repealed in so far as it is in conflict with Acts 1898, ch. 89, § 7, passed on the same day as the former law, and expressly excluding estates so received by brothers and eisters of the decedent.—Bailey V. Drane, Tenn., 83 S. W. Rep. 573.
- 15. CONSTITUTIONAL LAW Police Power.—An act making it unlawful for the owner of hogs to permit them to run at large is an exercise of the police power.—HAIGH V. BELL, W. Va., 23 S. E. Rep. 666.
- 16. CONTRACT Damages Evidence.—In an action for breach of an agreement by a landlord to furnish the tenant water for irrigation, whereby the tenant's crops were injured, evidence merely as to the amount of crops which could have been raised if the proper amount of water had been furnished, together with evidence of the market value of such crops, is insufficient as a basis for recovery, without proof of the cost of raising and marketing the crops.—Knowles v. Leggett, Colo., 43 Pac. Rep. 154.
- 17. CONTRACT Suretyship Accommodation Indorsers.—Code Proc. § 758, providing that when any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may cause the question of suretyship to be tried, does not apply to an action on a note against the indorsers only.—ALLEN v. CHAMBERS, Wash., 43 Pac. Rep. 57.
- 18. CONTRACT—Time as Essence of Contract.—In contracts giving a person an option to purchase a chattel for a given price within a limited time, time is of the essence of the contract, so as to prevent specific performance on failure without excuse to purchase within the specified time.—ROBERTS v. NORTON, Conn., 88 Atl. Rep. 532.
- 19. CONTRACT—Transfer of Trust Property—Assumption of Debt.—One who, in consideration of the transfer to him of property held in trust for payment of claims of preferred creditors, promises the trustee to pay the claims, is liable on such promise directly to the preferred creditors.—BARTLEY V. RHODES, Tex., 39 8. W. Rep. 604.
- 20. CORPORATION—Rapital Stock—Directors.—The fact that, by statute, directors of a corporation named in the certificate of incorporation can hold office for one year only, does not operate to exempt directors who, on failure of the corporation to elect their successors, continued to act as directors after the year expired, from liability for debts contracted by the corporation while they were so acting, under Mills Ann.

- St. §§ 487, 491, making directors of a corporation liable for its debts in case of failure to file the certificate therein mentioned.—JENET V. NIMS, Colo., 43 Pac. Rep. 147.
- 21. CORPORATION—Dissolution—Liability of New Corporation.—When a new corporation, with different stockholders, is formed, it cannot be sued by the creditors, or be held liable for the debts of the eld corporation, except upon some special ground, such as having received assets of the old corporation without giving value therefor.—Donnally v. Harndon, W. Va., 28 S. E. Rep. 646.
- 22. CORPORATION—Execution of Instrument—Corporate Seal.—An instrument averring that the parties had set their hands and seals thereto, with an attesting clause alleging that a corporation party thereto had signed, sealed and delivered it in the presence of two witnesses, who signed their names thereto, sufficiently avers, as against a demurrer, that the seal attached in behalf of the corporation was its common or corporate seal.—JACKSONVILLE, M. P. RY. & NAV. CO. V. HOOPER, U. S. S. C., 16 S. C. Rep. 879.
- 23. CORPORATION Note.—A corporation cannot defend an action on a note executed in consideration of a loan made the corporation, on the ground of want of power on the part of the officers of the corporation to execute the note.—ALLEN V. OLYMPIA LIGHT & POWER Co., Wash., 48 Pac. Rep. 55.
- 24. CORPORATION-Stock—Assessments Transfer.—After a transfer of corporate stock has been duly made on the books of the company, the transferee becomes liable on assessments.—VISALIA & T. R. CO. V. HYDB, Cal., 43 Pac. Rep. 10.
- 25. CORPORATION—Stock Subscriptions Payment in Property.—Where all the stock of a corporation is issued in payment for property and franchises, honestly believed by the parties to be of the par value of the stock, a subsequent creditor of the corporation, with knowledge that the stock was so issued, cannot hold the stockholders liable on the ground of an overvaluation of the property.—Turner v. Bailey, Wash., 42 Pac. Rep. 115.
- 26. COUNTIES—Failure to Repair Bridges.—A county is not, unless expressly made so by statute, liable for injuries sustained from defects existing in a bridge, through failure of its officers to have it repaired.—BOARD OF COM'RS OF JASPER COUNTY V. ALLMAN, Ind., 42 N. E. Rep. 206.
- 27. COUNTIES Becovery of Money Paid Officer.— Money paid an officer of the county by the county commissioners in violation of the provisions of the constitution may be recovered back in a suit at law.—ADA COUNTY V. GESS, Idaho, 43 Pac. Rep. 71.
- 28. COUNTIES—Ultra Vires Contract.—A county has no power under Rev. St. art. 1514, to enter into a contract for a water plant to provide the county buildings and officials with water, by the terms of which private individuals are also to be supplied for a certain period gratuitously. That the contract into which plaintiff county entered with defendant, by which the defend ant was to supply the county and others with water, was ultra vires, is no defense to an action by the county to recover (the consideration paid therefor as the result of defendant's failure to carry out his contract.—EDWARDS COUNTY v. JENNINGS, Tex., 88 S. W. Rep. 585.
- 29. COURT-Appellate Jurisdiction—Removal of Public Officer.—A proceeding under Pen. Code, § 773, providing for the removal of a public officer for misconduct, on accusation presented to the superior court, in which proceeding, in case; the accusation is sustained, a judgment for \$500 is also to be rendered for the informer, is not appealable to the supreme court, as a "case at law," involving a demand in excess of \$300.—WHEELER V. DONNEL, Cal., 43 Pac. Rep. 1.
- 80. COURTS—Conflicting Judgments.—The rule that the judgment of the court first acquiring jurisdiction will prevail over that of another court subsequently

acquiring jurisdiction does not apply to judgments rendered by different departments of the superior court of the city and county of San Francisco, as all departments of such court, combined, form but one court.—BROWN V. CAMPBELL, Cal., 48 Pac. Rep. 12.

- 31. CREDITORS' BILL—Pleading Multifariousness.—A bill was brought by judgment creditors of a corporation against the corporation, its directors, and other parties; charging the latter] as fraudulent grantees, and seeking to recover the property; seeking to enforce against the directors a personal liability under the Illinois statute, because they consented to the creation of an indebtedness in excess of the capital stock; and also charging the directors with a liability for unpaid stock subscriptions: Held, that the bill was demurrable for multifariousness, because these separate causes of action were of such a nature that the satisfaction of a decree against one defendant would not be a satisfaction of a decree against the others.—Von Auw v. Chicago Toy & Fancy Goods Co., U. S. C. C. (III.), 70 Fed. Rep. 999.
- 32. CRIMINAL EVIDENCE Homicide—Justification.—
 On a trial for murder of one who met defendant's sister after defendant ordered him not to do so, correspondence between deceased and the sister, of which defendant, prior to the killing, had no knowledge, showing that deceased asked the sister to have sexual intercourse with him at such meeting, are incompetent to show such facts in justification of the killing.—
 ROBINSON V. STATE, Ala., 18 South. Rep. 782.
- 83. CRIMINAL LAW—Assault With Intent to Kill.—It was proper to refuse to charge that, if the evidence gave rise to two theories—one of the defendant's guilt, and the other of his innocence—and the jury could not tell which testimony presented the truth, they should acquit.—JACKSON V. STATE, Ala., 18 South. Rep. 728.
- 84. CRIMINAL LAW-Bunco Game—Larceny.—One who obtains possession of another's money by inducing him to put it up on a lottery operated in a bunco game, and with the assurance that the money would be returned after a certain number of drawings, the owner not intending to part with his title, is punishable for larceny.—People v. Shaughnessy, Cal., 48 Pac. Rep. 2.
- 85. CRIMINAL LAW Homicide—Plea of Former Acquittal.—A conviction of murder in the second degree on an indictment for murder in the first degree is an acquittal of murder in the first degree.—STATE v. MURPHY, Wash., 43 Pac. Rep. 44.
- 86. CRIMINAL LAW-Misconduct of Counsel.—The persistent misconduct of the district attorney in making remarks calculated to prejudice the jury against defendant after objection to such remarks were sustained, and the jury directed to disregard them, is ground for new trial.—Heller v. People, Colo., 48 Pac. Rep. 124.
- 87. CRIMINAL LAW-Reformatory School Constitutional Law.—Act March 11, 1899 entitled "An act to establish a school of industry," and providing for the detention therein of minors guilty of criminal offenses until majority, which may be a longer period than the term of imprisonment in the county jail provided for such offenses, is not unconstitutional as providing unequal punishment for the same offense.—Ex Parte Nichols, Cal., 43 Pac. Rep. 9.
- 88. CRIMINAL LAW—Separate Trial.—Certain defendants having made statements which were admissible only against themselves, they must be tried separately from the other defendants, as Sess. Laws, 1891, p. 182, § 1, provides that a defendant against whom there is evidence not admissible against other defendants shall be tried separately.—Davis v. People, Colo., 48 Pac. Rep. 122.
- 89. CRIMINAL PRACTICE Indictment Disorderly Houses.—An indictment alleging that defendant did keep and maintain a disorderly house, and a house where lewd persons did resort, does not state two offenses.—STATE v. DELADSON, Conn., 33 Atl. Rep. 581.

- 40. CRIMINAL PRACTICE—Larceny—Removal of Goods Levied On.—Code, § 8712, makes it larceny to "fraudu lently" dispose of or receive goods with intent to defeat a distress or levy made thereon: Held, that an indictment framed on the language of the statute, which charges that the goods were "aniawfully and injuriously" disposed of, without alleging that it was "fraudulently" done, is insufficient.—DUFF v. COMMONWEALTH, Va., 23 S. E. Rep. 643.
- 41. Damages Failure to Furnish Cars Cattle. Where defendant had notice of plaintiff's contract to deliver cattle at their destination on a certain day, and failed to furnish cars for the transportation thereof, as agreed, and the cattle depreciated in value by reason of the delay, the measure of damages is the difference between the contract price at their destination, and their market value in their damaged condition at the point of shipment, less the freight.—INTERNATIONAL & G. N. R. CO. V. STARTZ, Tex., 38 S. W. Rep. 575.
- 42. DEED—Description.—A decision of the trial court that a deed describing the land conveyed as "all that certain quarter of the east half of the southeast quarter of the southeast quarter of section 20 marked pink in the sketch hereunto attached, containing ten acres, more or less," is not void for uncertainty, will not be disturbed.—HUTCHCRAFT v. LUTWIG, Wash., 43 Pac. Rep. 29.
- 43. DEED—Quitclaim—Bona Fide Purchaser.—A deed reciting that the grantor did "bargain, sell, and convey" unto the grantee certain described land, and containing the habendum clause, is not a quitclaim deed, and is sufficient to sustain a plea of bona fide purchaser, if the other facts necessary are proven.—STANLEY V. HAMILTON, Tex., 33 8. W. Rep. 601.
- 44. DIVORCE—Desertion.—The voluntary separation of a wife from her husband while proceedings for divorce are pending between them, where such proceedings are not a sham and pretense, does not constitute such willful desertion as would authorize a divorce therefor.—Palmer v. Palmer, Fig., 18 South. Rep. 720.
- 45. DOWER ESTATE—Waste.—A widow in possession of a dower estate is not guilty of waste in cutting timber which worked no permanent injury to the estate in remainder, and particularly as the proceeds derived from the sale of said timber were used in making needful repairs.—LUNN v. OSLIN, Tenn., 38 S. W. Rep. 561.
- 46. Elections—Official Ballots—Estoppel.—Where a candidate for a county office neglects to have an alleged defect in the official ballot corrected as provided by section 59 of the election laws of this State, he cannot, after the election is had, and he finds himself defeated, raise the objection that the name of the successful candidate was improperly placed upon the official ballot.—Baker v. Scott, Idaho, 43 Pac. Rep. 76.
- 47. ELECTION CONTEST—Writing on Ballots.—Rev. Stat. 1899, § 4671, provides that a ballot voted with any writing thereon, except the names of persons and the offices to be filled, shall not be counted. Acts 1891, p. 185, § 8, provides that before delivering any ballot to the elector two election judges shall write their names or initials on the back of the ballot, and no other writing shall be on the back thereof, and section 13 repeals all acts inconsistent therewith: Held, that the latter provision repealed the former, so that a ballot on which was written the name of the voter, not appearing to have been placed thereon before it was delivered to him, nor for the purpose of identifying it, should be counted.—Lankford v. Gebhabt, Mo., \$2 S. W. Bep. 1127.
- 48. EVIDENCE—Parol Evidence Contemporaneous Writing.—Where parties make a spreement partly in writing and partly by parol, and do not profess to reduce the entire contract to writing, but only a certain part thereof, it is competent to show by parol evidence the entire contract; but the oral agreement must be consistent with and must not contradict the sipulations of the written contract.—Harman v. Harman, U. S. C. O. of App., 70 Fed. Rep. 894.



- 49. EXECUTION—Injunction.—The sale of property on execution issued on a void judgment will not on that account be enjoined, the remedy at law, in trespass for the seisure and sale of the property, being adequate.—GEERS V. SCOTT, Tex., 33 S. W. Rep. 587.
- 50. EXECUTION—Unmarried Man—Exemptions.—The word "householder," as used in Hill's Ann. Code, § 456, relating to exemptions, does not include an unmarried man who has no person dependent upon him for support.—Peterson v. Bingham, Wash., 48 Pac. Rep. 22.
- 51. FEDERAL COURTS—Circuit Court—Jurisdictional Amount.—A circuit court may take cognizance of a controversy in which the United States are plaintiffs or petitioners, or of a controversy between citizens of the same State claiming lands under grants of different States, without regard to the amount involved.—UNITED STATES V. SAYWARD, U. S. S. C., 16 S. C. Rep. 371.
- 52. FEDERAL COURTS Review on Appeal-Circuit Court.—The fact that, in an equity proceeding in the circuit court, a demurrer to the petition on the ground that a proper and final decree had been made, adjudicating all the issues in the cause, and that the court had no power or jurisdiction to grant the petitioners relief, was sustained, does not so clearly show that the jurisdiction of the circuit court was in issue as to dispense with the necessity of a certificate to that effect to the supreme court, as required by Act March 3, 1891, 5.—VAN WAGENEN V. SEWALL, U. S. S. C., 16 S. C. Rep. 50.
- 53. FEDERAL COURTS—Terms of Court—Adjournment.—A term of a United States circuit court may be adjourned, in the discretion of the presiding judge, to a distant day, and its regular and continuous session may be resumed on such day, as a part of the same term, though another term of the court has been held, during the adjournment, at another place.—STATE OF FLORIDA V. CHARLOTTE HARBOR PHOSPHATE CO., U. S. C. C. of App., 70 Fed. Rep. 883.
- 54. FEDERAL OFFENSE—Powers of United States Commissioner.—United States commissioners have no judicial power to hear and determine any matter. Their duties are those of examining magistrates, and upon the examination of a person accused of crime they have only to determine whether there is probable cause to believe that an offense was committed by the defendant, and have no authority to pass upon the credibility of testimony, or to find any fact.—United States v. Hughes, U. S. D. C. (S. Car.), 70 Fed. Rep. 372.
- 55. FRAUD-Estoppel to Assail.-Where a debtor makes a fraudulent sale of a stock of goods to defeat his creditors, a creditor who, after acquiring knowledge of such fraud, acquiesces therein, and takes no steps to impeach it, but on the contrary goes into partnership with the fraudulent vendee for the purpose of carrying on trade with such goods, treating the sale of such stock to such vendee as being valid, thereby inducing such vendee to alter his position by purchasing new goods from time to time to replenish said stock and to carry on the business, such acquiescing creditor will be estopped from afterwards questioning or assailing such fraudulent sale, as against such vendee, though he was no party to the fraud in its incipi-The law will not undertake to rectify one fraud by aiding a party in the perpetration of another fraud. -SIMON V. LEVY, Fla., 18 South. Rep. 777.
- 56. FRAUDS, STATUTE OF—Contract.—A centract for the sale of a mining and pumping plant to be manufactured in accordance with special specification, which requires the furnishing of special engines and pumps, connected by shafting specially fitted, the specially manufactured parts of which would be of little value except in connection with the plant, is not within the statute of frauds, though the bulk of the plant was made up of articles purchased as merchandse by the seller from other parties.—Pugger Sound Mace. Depor v. Right, Wash., 48 Pac. Rep. 89.

- 57. FRAUDULENT CONVEYANCE.—In an action by a creditor of a mortgager to set aside a mortgage as fraudulent, the complaint must show that plaintiff was a creditor at the time of the execution of the mortgage.—WEST COAST GROCERY CO. V. STINSON, Wash., 43 Pac. Rep. 35.
- 58. FRAUDULENT CONVEYANCE. The impeaching creditor, in order to set aside in whole or in part a voluntary conveyance procured to be made by the debtor husband to his wife, must, under our statute, bring his suit within five years from the execution of the conveyance, unless he shows that it was fraudulent in fact—that is, procured to be made with some dishonest intention; it is not enough to show it to be fraudulent in law, under the statute, by reason of being voluntary.—McCue v. McCue, W. Va., 23 S. E. Rep. 689.
- 59. FRAUDULENT CONVEYANCE.—Where property is incumbered to its full value by reason of prior liens thereon, an insolvent debtor may convey it in satisfaction of such prior liens, without rendering it subject to the provisions of § 2, chap. 74, of the Code; for such conveyance is not to the exclusion or prejudice of other creditors, but only amounts to the surrender of a valueless equity of redemption.—Johnson v. Riley, W. Va., 28 S. E. Rep. 698.
- 60. FRAUDULENT CONVEYANCE—Sale to Bona Fide Purchaser.—A bona fide sale, for a fair price, to an innocent purchaser, should not be set aside at the instance of the creditor of the grantor, on the grounds of alleged fraud, for the sole reason that in the opinion of sundry witnesses the property might have brought a larger price if sold on credit.—Douglass v. Douglass, W. Va., 23 S. E. Rep. 671.
- 61. Garnishmewr—Conflict of Laws.—Plaintiff is a resident of this State. Defendant is a resident of another State. After this suit had been brought defendant was garnished in the State where he resided as a debtor of plaintiff by a creditor of the plaintiff. After judgment had been rendered in this case, defendant moved the court to suspend the execution thereof until the question of plaintiff e liability should be determined in the suit in which defendant had been garnished. It was not error to overrule such motion.—Shrewsbury v. Tufts, W. Va., 23 S. E. Rep. 692.
- 62. Homestead—Partition.—Under Act 1877 (Acts 1876-77, p. 32, Code 1886, §§ 2507, 2543), providing that on the husband's death the homestead exempted to the widow and minor children may be retained by the widow and children, and if the estate is insolvent the homestead shall vest in them absolutely, a child, after reaching its majority, the estate being insolvent, is not, during the life of the widow, entitled to any part of the fee of the land, so as to entitle her to demand partition thereof.—SMALLEY V. CHISENHALL, Ala., 18 South—Rep. 739.
- 63. HOMESTEAD—Reservation in Conveyance.—A constitutional homestead is not an estate, or a condition attached to the land which runs with the estate, but is a determinable exemption, conferred on the home, steader, and not on the land, the right being personal, and not in rem; so that the right to a homestead in land may be lawfully reserved by an insolvent owner in a mortgage or deed of assignment for benefit of creditors which purports to convey the fee-simple to the land subject to such right.—Thomas v. Fulford, N. Car., 28 S. E. Rep. 635.
- 64. HUSBAND AND WIFE—Deeds—Evidence.—As between grantor and grantee, evidence that the deed was executed on the anniversary of the grantee's wedding; that immediately thereafter the husband of the grantee, by whom the consideration was paid, presented the deed to the grantee as a wedding present, is sufficient to prove that the land was conveyed to the grantee as her separate property.—NIXON v. POST, Wash., 48 Pac. Rep. 23.
- 65. INSURANCE—Condition as to Ownership.—Where an owner of property has it insured for more than the amount of a mortgage thereon, the mortgagee, to whom the policy is made payable, may, to the extent

of its debt, recover thereon in its own name, and is properly made a plaintiff with the owner in an action on the policy.—Georgia Home Ins. Co. v. Leaverton, Tex., 38 S. W. Rep. 579.

- 66. JUDGMENT—Appeal.—After a judgment has been affirmed on appeal, the trial court has no jurisdiction of a suit to enjoin the enforcement of said judgment.—COCHRANE V. DE VARTER, Wash., 43 Pac. Rep. 42.
- 67. JUDGMENT—Collateral Attack.—It will be presumed, in support of a decree rendered by a State court on a supplemental bill, when it is collaterally attacked in another State, that the judge correctly decided that service of a new subposna upon the defendant was not necessary, no statutory direction or reported decision of the supreme court of the State to the contrary being cited.—LANGE, REGENT U. S. S. C. 168.C. Rep. 366.
- cited.—LAING V. RIGNEY, U. S. S. C., 16 S. C. Rep. 366.
 68. JUDGMENTS FOR SAME TORT—Satisfaction.—A landowner sued the city and the officers thereof, in separate actions, for damage to her land from a broken sewer, alleging, in the suit against the city, neglectito repair, and, in that against the officers, negligence in making the repair, but in both, as the efficient cause of damage, the same overflow of sewage from the broken sewer. Judgments for damages were had in both actions, that against the city being the greater: Held, that a satisfaction of the judgment against the city was a satisfaction of that against the officers, since they were for the same tort.—BUTLER V. ASHWORTH, Cal., 43 Pac. Rep. 4.
- 69. LIBEL—Publication—Special Damage.—A publication by a mercantile agency that a party, not shown to be a trader in active business, owes a debt, is not libelous per se.—FRY V. McCORD, Tenn., 33 S. W. Rep. 868
- 70. LIBEL AND SLANDER—Pleading.—In libel, it is only where the imputation complained of is a conclusion or inference from certain facts that the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge.—FENSTER-MAKER V. TRIBUNE PUB. Co., Utah, 43 Pac. Rep. 112.
- 71. LIFE INSUMANCE—Suicide of Insured.—The personal representatives of one who, when sane, deliberately kills himself, with the intent to secure to his estate the amount of insurance he has effected upon his life, cannot recover the insurance money, though the policy contains no provisions respecting suicide.—RITTER V. MUTUAL LIFE INS. CO. OF NEW YORK, U. S. C. C. OF APP., 70 Fed. Rep. 864.
- 72. MALICIOUS PROSECUTION Pleading Probable Cause.—In a declaration for malicious prosecution, an allegation that plaintiff was bound over by a court of competent jurisdiction and indicted is prima facie evidence of probable cause, which can only be negatived by the averment of some additional fact showing that the binding over and indictment were procured by undue means; a general allegation that the prosecution was without probable cause being insufficient.—GIUSTI Y. DEL PAPA, R. I., 33 Atl. Rep. 525.
- 73. MALICIOUS PROSECUTION Rule of Contempt.—A rule for contempt is the judicial act of the court issuing it, and therefore cannot be the foundation for an action for false imprisonment, however erroneously issued, but may be for malicious prosecution, provided the application for the same is without probable cause, actuated by impure and malicious motives, and founded on falsehood or misrepresention.—TAVENNER V. MOREHEAD, W. Va., 23 S. E. Rep. 673.
- 74. Mandamus Exercise of Jurisdiction—Courts.—When a court refuses to exercise jurisdiction that it clearly possesses, mandamus is the proper remedy to compel its exercise.—STATE v. CALL, Fig., 18 South. Rep. 771.
- 75. MASTER AND SERVANT Fellow-servants Inspector of Machinery.—A person employed by a railroad company to inspect its locomotive boilers, and cause repairs to be made when necessary, is not a fellow-servant of other employees about the yards of the company; and, if they are injured by an explosion which might have been prevented by due care on his

- part, the company is liable.—TEXAS & P. RY. Co. V. THOMPSON, U. S. U. O. OF APP., 70 Fed. Rep. 944.
- 76. MASTER AND SERVANT—Railroad Companies—Fellow-servants.—Both the conductor and engineer of a train are the superiors of a brakeman on the same train, within the meaning of Comp. St. 1887, p. 817, § 697, providing that "the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior or to an employee not appointed or controlled by him, as if such servant or employee were a passenger."—CRISWELL V. MONTANA CENT. RY. CO., Mont., 42 Pac. Rep. 767.
- 77. MECHANIC'S LIEN Liability of Contractor Assumption by Owner.—In an action by a material-man against a contractor for lumber furnished for a house, it is no defense that the owner assumed the debt, unless there was a novation which released defendant.—ALDRITT V. PANTON, Mont., 42 Pac. Rep. 767.
- 76. MECHANICS' LIENS—Notice of Lien.—A notice of lien for labor and material furnished on three buildings, reciting that the buildings were all situated on the same lot, giving their relative positions on such lot, and stating the amount claimed on account of each, sufficiently shows a claim of lien on the entire lot and the buildings for labor and materials furnished on all the buildings.—SULLIVAN V. TREEN, Wash., 43 Pac. Rep. 38.
- 79. MORTGAGES Redemption.—Under Code Proc. § 519, providing that the purchaser, from day of sale until redemption, shall be entitled to the possession of the property, and that, in case it is in the hands of a tenant holding under an unexpired lease, he shall be entitled to receive the rents or the value of the use and occupation during such period, a purchaser cannot, on redemption, be made to account for the rents and profits received by him from the time of sale to the redemption.—KNIPE V. AUSTIN, Wash., 43 Pac. Rep. 25.
- 80. MUNICIPAL CORPORATION—Execution.—An acre of land owned by a city, not shown to have been used for municipal purposes, and separated by a railroad from a tract which was so used, is subject to sale under execution against the city.—MURPHREE v. CITY OF MOBILE, Ala., 18 South. Rep. 740.
- 81. MUNICIPAL CORPORATIONS Jurisdiction over Highways.—A city incorporated under Ann. Code, 1892, ch. 98, which provides, by section 2939, that each municipality shall constitute a "separate road district," and for the working of streets, and, by section 2945 et seq., that the municipality shall have power to vacate and lay out streets, and makes the street commissioner road overseer, with general control over the streets, has exclusive jurisdiction, as against the county, over highways included within the corporate limits, and may order the same to be closed.—BLOCKER V. STATE, Miss., 18 South. Rep. 388.
- 82. MUNICIPAL CORPORATION Ordinance Fixing Water Rates.—An ordinance requiring a water company to furnish water to citizens for domestic purposes at rates which should not exceed the average rates paid in other cities of similar size, and fixing a present basis of rates at six dollars a year for a building of five rooms and less, and one dollar a year for each additional room, other rates to be proportionate to those, —whether the occupants of the building consist of one, or more than one, family, and whether one or more faucets are used,—is not, as a matter of law, unreasonable.—Crossey v. City Council of Montgomery, Ala., 18 South. Red., 723.
- 83. MUNICIPAL CORPORATION—Public Improvements.

 —A city authorized only to grade streets at the cost of the land fronting on the street improved cannot contract for the grading of a street, the cost to be paid from the general funds of the city.—FINDLEY v. HULL, Wash., 43 Pac. Rep. 28.
- 84. MUNICIPAL CORPORATIONS Public Improvement —Collateral Attack.—Under section 18 of the statute providing that if, at or before the time fixed for hearing objections to street improvements, objections be

not filed by the owners of one-half of the front feet abutting on the portion of the street to be improved, the city council "shall be deemed to have acquired jurisdiction" to order the improvement, the decision of the council that such objections were not filed may be attacked in an action to enjoin the collection of assessments levied therefor.—ARMSTRONG V. OGDEN CITT, Utah, 43 Pac. Rep. 119.

- 65. MUNICIPAL CORPORATION—Water Companies—Insufficient Supply.—Under a contract between a city and a water company, by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen, whose property has been destroyed by fire through the alleged neglect of the water company in complying with the terms of such contract, has no right of action against the company.—BUSH V. ARTESIAN HOT & COLD WATER CO., Idaho, 48 Pac. Rep. 69.
- 86. NEGOTIABLE INSTRUMENTS-Defenses-Bona Fide Purchaser.—Where a party makes his negotiable promissory note, and intrusts it to the payee named therein, for the express purpose of being negotiated and discounted, and the proceeds applied by the payee, as his agent, to the purchase of United States bonds to be used in organizing a national bank, in which the maker of the note was to be interested as a stockholder, and the payee named in such note negotiates and indorses the same before maturity to a bona ide purchaser for value, who had notice of the purpose and object of the note, the subsequent misappropria-tion to his own uses by the payee of the funds received by him on the sale of such note, to which misappropriation the indorsee is in no wise a party, cannot be used as a defense by the maker of such note to a suit thereon by such innocent indorsee .- ARNAU V. FIRST NAT. BANK OF FLORIDA, Fla., 18 South. Bep. 786.
- 87. NEGOTIABLE INSTRUMENT—Promissory Notes—Indorsement.—Indorsement of a note by the payee, made after delivery thereof by him to a third person, in pursuance to a prior arrangement, is binding.—BROWN V. WILSON, S. Car., 23 S. E. Rep. 680.
- 88. NON-NEGOTIABLE INSTRUMENTS Assignment.—Where a party assigns a non-negotiable instrument calling for the payment of money by writing his name across the back and delivering it, he warrants by implication, unless otherwise agreed, its validity, and his right to assign, that it is a subsisting unpaid debt, and the solvency of the debtor.—Merchants' Nas. Bank of West Virginia v. Spates, W. Va., 23 S. E. Rep. 681.
- 39. OFFICERS—Refusal to Obey Statutes—Mandamus.
 —Executive officers of the State government, have no authority to decline the porformance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the constitution.—STATE V, HEARD, La., 18 South. Rep. 746.
- 90. Partition—Tenants in Common.—Where, in partition, it appears that the improvements placed on the lands by a tenant in common are equal to its rental value while he was in possession, he is entitled to recover such portion of the taxes on the land paid by him while in possession as inured to the other tenants in common.—Leake v. Hayes, Wash., 43 Pac. Rep. 48.
- 91. PARTMERSHIP.—As a general rule, the simple contract creditors of a partnership have no lien upon the partnership property until it is acquired by process of law, and a bona fde transfer of the partnership property, while it remains within the control and possession of the firm, made upon sufficient consideration, and with the consent of all the partners, places it beyond the reach of the partnership creditors.—Myers v. Tison, Kan., 43 Pac. Rep. 91.
- 22. PARTMERSHIP—Mortgage Trover.—A mortgage by a partner individually of his undivided partnership interest in a cotton ginnery and toli cotton to be earned during a specified time confers on the mortgagee no right of possession to the specific property mortgaged so as to enable him to sue partnership vendees of such property in trover for its con-

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- version or on the case for destroying his mortgage lien.—FIELDS v. BRICE, Ala., 18 South. Rep. 742.
- 93. PLEDGE—Bill of Lading—Title.—A party discounting a draft, and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft.—NELL V. ROGERS BROS. PRODUCE Co., W. Va., 23 S. E. Rep. 702.
- 94. PROCESS—Service [of—Corporations.—An Illinois corporation, publishing a newspaper in Chicago, had continuously in New York an agent who solicited advertisements for such newspaper, and had authority to contract for the publication thereof at regular rates, the making of such contracts being a substantial part of the corporate business: Held, that the corporation impliedly assented to be found in New York, and service of summons might be made upon it there.—Palmer V. Chicago Herald Co., U. S.C. C. (N. Y.), 70 Fed. Rep. 886.
- 95. PROCESS—Service—Privilege of Non-resident.—M, being a non-resident in attendance upon a term of the United States Circuit Court for the district of Idado as plaintiff in a suit brought by him against G, a resident of Idaho, was not exempt from service of a summons in an action commenced by G against him in the district court of Idaho.—GUYNN V. MCDANELD, Idaho, 43 Pac. Rep. 74.
- 96. Prohibition Private Person.—After the court has sustained a demurrer to a complaint in a suit to restrain the enforcement of a judgment, a writ of prohibition will not issue to prevent the court from interfering with said judgment.—STATE v. SUPERIOR COURT OF KING COUNTY, Wash., 43 Pac. Rep. 43.
- 97. RAILROAD COMPANY Fire—Proximate Cause.—
 One who negligently sets out a prairle fire, which
 causes the destruction of the property of another, is
 liable for the injuries sustained, when it is such as
 reasonably should have been foreseen as the natural
 and probable consequence of the negligent act.—
 UNION PAC. RY. CO. V. MCCOLLUM, Kan., 43 Pac. Rep.
 97.
- 98. RAILEOAD COMPANY—Negligence—Evidence—Custom.—Where an act of a brakeman in mounting a car was not per se negligent, it is competent to show that under the same circumstances experienced brakemen perform the same act as he did.—PROSSER V. MONTANA CENT. RY. Co., Mont., 43 Pac. Rep. 81.
- 99. REMOVAL OF CAUSES Suits against Federal Officers.—An action for damages for false imprisonment, based upon acts done by the defendants as marshal and deputy marshal of the United States, in execution of process of a federal court, is, without regard to the citizenship of the parties, within the jurisdiction of the federal courts, and may be removed thither from a State court, although the complaint is so framed as to conceal the fact the defendants were acting as federal officers if that fact must necessarily be shown by the plaintiff upon the trial and is disclosed by the petition for removal.—WOOD v. DRAKE, U. S. C. C. (Wash.), 70 Fed. Rep. 881.
- 100. Sale-Action-Damages.—Where a party sells a horse to another upon the condition that it is to remain the property of the vendor until paid for, and such horse is wrongfully killed by a railroad train while in the possession of such vendee, either the vendor or conditional vendee can sue for and recover damages for such tort, but a recovery by either will be a bar to any further recovery by the other.—SMITH V. GUFFORD, Fia., 18 South. Rep. 717.
- 101. SALE-Delivery of Possession-Retention of Interest.—An absolute present sale of chattels is valid between the parties without delivery of possession or payment of the price; and the seller is entitled to the price, the purchaser to the possession of the chattels. But as to subsequent purchasers without notice from the seller, or his creditors, the non-delivery of possession renders the sale prima facie void, as a matter of

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law, calling on the purchaser to show clearly the sale to be bona fide; but, if shown to be so, it is valid against such purchasers and creditors.—Poling v. Flanagan, W. Va., 23 S. E. Rep. 685.

102. SALE—Conditional Sale.—Where, in an action for the price of goods, the evidence shows that the goods were to be paid for on certain conditions, it must be shown that the conditions have been fulfilled.—HOLT LIVE STOCK CO. V. WATKINS, Colo., 48 Pac. Rep. 121.

108. SALE—Vesting of Title—Delivery.—In a contract of sale of personal property, the intent of the parties controls, and if they intended a present vesting of title, the title may in fact pass at once to the purchaser, although the actual delivery thereof is to be made subsequently, and whenever a dispute arises as to the true character of an agreement, the question of intent is rather one of fact than of law; and the finding of the trial court, when sustained by the evidence upon this question, will not be disturbed upon review.—KNEELAND V. RENNER, Kan., 48 Pac. Rep. 25.

164. SALE—Warranty—Parol Evidence.—Evidence of verbal statements and representations made during the negotiations for the sale of a horse is not admissible to contradict or enlarge a written warranty delivered at the time the sale is consummated, unless it is first shown that, through fraud or mistake, material parts of the warranty were omitted from the writing.—HUSTON V. PETERSON, Kan., 48 Pac. Rep. 101.

105. SCHOOL DISTRICTS—Officers—Authority.—The officers of a school district cannot by contract create a district liability for the building of a school house, unless they were first legally authorized so to do, on a site selected, and out of the funds provided for that purpose, by the electors of the district.—SCHOOL DIST. No. 80 v. Brown, Kan., 48 Pac. Rep. 102.

106. SPECIFIC PERFORMANCE.—An action for specific performance, and also to have certain conveyances set aside, and for partition of lands, and, if specific performance cannot be decreed, to have the moneys advanced by plaintiff declared a lien, is local, and not transitory.—STATE V. SUPERIOR COURT OF SNOHOMISH COUNTY, Wash., 48 Pac. Rep. 19.

107. SUBROGATION—Mortgages.—Where a person contracts with the maker of a note to pay the same, on payment thereof by the maker he is not entitled to be subrogated to the rights of the payee, and therefore can only recover the amount paid by him, with legal interest, instead of the rate of interest provided for in the note.—HALBERT V. PADDLEFORD, Tex., 33 S. W. Rep. 592.

108. TAXATION—Bank.—When the Citizen's Bank subjects property to its ownership, which was mortgaged to secure stock subscriptions, the property is not exempt from taxation as part of the capital of the bank.—STATE V. BOARD OF ASSESSORS, La., 18 South. Rep. 753.

109. TRADE-NAME—Injunction.—A corporation which, with arrangement with one R W R, takes his name and stamps it upon articles sold by it, with the purpose of inducing the public to think that in purchasing such articles they are purchasing the product of another "R" company of established reputation, will be restrained from using such stamp.—R. W. ROGERS CO. v. WM. ROGERS MANUE'G CO., U. S. C. C. of App., 70 Fed. Rep. 1017.

110. TRADE-NAME—Injunction. — The mere fact that one knows that cheap goods sold by him to the trade, stamped with his name, can and will be sold by dishonest dealers under representations that they are manufactured by a company of established reputation having a similar name, which manufactures a high class of goods, does not justify an injunction against the use of such stamp.—ROGERS v. WM. ROGERS MANUF'G CO., U. S. C. C. of App., 70 Fed. Rep. 1019.

111. TRESPASS — Exemplary Damages. — Exemplary damages cannot be recovered for a trespass unless it was committed maliciously, wantonly, or with cir-

cumstances of aggravation.—GARRETT V. SEWELL, Ala., 18 South. Rep. 737.

112. TRUST—Implied Trust.—When trust funds are invested in land by a trustee, and the title is taken in his own name, an implied trust will be raised in favor of the cestui qui trust. If such funds are paid in pursuance of the contract of purchase, it does not matter whether they were paid before, at the time of, or after the purchase.—WEBB V. BAILEY, W. Va., 28 S. E. Rep. 644.

113. VENDOR AND PURCHASER.—Where a vendee of land assumes the payment of a mortgage thereon securing notes of the grantor to a corporation, in an action by the corporation against the vendee on the notes, his privity with the grantor, who is estopped from denying the corporation's right to sue, and his payment of interest on the notes, render the admission in evidence of insufficient articles of incorporation harmless error.—STUYVESANT v. WESTERN MORTGAGE & INVESTMENT CO., Colo., 48 Pac. Rep. 144.

114. VENDOR AND PURCHASER - Sale of Land-Construction.-A contract for sale by defendant of a tract divided into lots provided for part payment in cash, and the balance in installments, secured by a vendor's lien. Plaintiff had an option to sell any of the lots, and in such case defendant was to join in a deed to the purchaser, on receiving from him at least one-third in cash, with notes for balance, secured by trust deed; payments and notes so received to be credited on plaintiff's notes. Plaintiff was not to sell any lots below a stated sum, but no maximum price was fixed: Held, that defendant was not liable for his refusal to convey to a purchaser procured by plaintiff, and to apply the price offered on plaintiff's notes, where such purchaser was to take a few of the lots at so high a price that plaintiff's notes for the price of all the lots would be canceled by the cash payment of one-third and the purchase notes, and that such cash payment was to be advanced by plaintiff .- WOLFF v. HELBIG, Colo., 48 l'ac. Rep. 133.

115. VENLOR AND PURCHASER—Vendor's Lien.—Where a vendor's lien is expressly retained, the duty rests on the vendor, if owner of the lien at the time, to execute at his expense a release, on payment of the purchase price.—ENGELBACH V. SIMPSON, Tex., 33 S. W. Rep. 596.

116. WATERS—Dam—Overflow—Damages.—One who erects a dam which caused the overflow of land is liable to the owner thereof for stock killed and injured by getting into mud left on the land on the receding of the water, and such reasonable expenses incurred in treating animals injured thereby.—HUGHES V. CITY OF AUSTIN, Tex., 33 S. W. Rep. 607.

117. WATERS-Riparian Owners-Accretions.—Where two irregular pieces of ground lie upon the north side of the Kansas river, at a point where the course of the river is southeast, and are separated from each other by a half quarter-section line, running north and south, the accretions formed by the recession of the river to the south belong to the respective tracts of land lying immediately north thereof, and the division line between the two tracts continues to be the half quarter-section line extended.—MCCAMAN v. STAGG, Kan., 43 Pac. Rep. 86.

118. WATER-COURSE—Damages—Limitations.—Where, in an action for injury to land from a dam built by a railroad, it appears that the injury is permanent, the damages must be computed on the value of the land when the dam was built, and not at the time of the trial.—Missouri, K. & T. Ry. Co. OF TEXAS V. GRAHAM, Tex., 33 S. W. Rep. 576.

119. WITNESS—Credibility—Jury.—The credibility of a witness or witnesses is a question peculiarly within the province of the jury, and when this is the sole question presented on writ of error to the judgment of the circuit court overruling a motion to set aside the verdict of the jury for this cause alone, this court will not disturb such judgment.—AKERS V. DE WITT, W. Va., 23 S. E. Rep. 669.

Central Law Journal.

ST. LOUIS, MO., MARCH 13, 1896.

The opinion of the Supreme Court of Missouri in the recent case of Bradley v. Reppell, 32 S. W. Rep. 645, is enlivened by a vigorous criticism of a statement which appears in Judge Thompson's new treatise on Corporations. That eminent author after stating the general rule, supported by numerous authorities, that where a corporation is brought to an end by lapse of time, that is, by the expiration of life as limited by its charter, any further exercise of its corporate powers may be questioned collaterally, says "on the other hand it has been ruled in Missouri that the question whether the charter of a corporation has expired by limitation of time can be adjudicated only in a direct proceeding by the State, and that such a defense cannot be set up collaterally in an action by the corporation" citing the single case of St. Louis Gas Light Co. v. City of St. Louis, 84 Mo. 202. The opinion of Judge Brace in the case first mentioned shows very clearly that no such point was decided in the St. Louis Gas Light Co. case and that what was said on the subject was obiter dictum. the other hand the court asserts that they have been unable to find any authority contrary to the general doctrine on the subject. exact point decided in the Bradley case was that after a corporation's period of existence has expired by force of a general statute, it cannot execute a valid conveyance; and defendant, claiming by adverse possession, and not being party or privy to the deed, is not precluded from questioning the validity of such deed as a link in plaintiff's chain of title, as it is not the act of a corporation de facto.

The question as to the responsibility of a corporation which has purchased all the stock, property and franchise of another and united its business with its own, practically consolidating it with itself, for the torts of the latter committed after the union of interests, is a very important and interesting one, though it seems to have but seldom arisen in courts. A question of that kind recently came up for decision by Judge Toney of the Vol. 42—No. 11.

Louisville Circuit Court. . The case was Kaufman v. Louisville Gas Company. It appeared that the Louisville Gas Company, having been empowered to make, distribute and sell electricity for illumination, and to buy stock in other companies necessary or convenient for the conduct of its business, bought up all the stock of the Louisville Electric Light Company. All of the original directors of the latter company resigned, and a sufficient number of the directors of the former were elected in their stead, one share of stock being transferred to each to qualify him, the gas company retaining possession of the rest. The vice-president of the former was elected president of the latter, the latter's office was removed to that of the former, and the same office thenceforth served for both.

The gas company guaranteed the mortgage debt of the light company, assumed the payment of its floating debt, guaranteed its contracts for the purchase of machinery, bought and paid for machinery to be used in operating the light company's plant, and removed that plant to and incorporated it with its own plant. The boilers of the light company's plant, however, still continued to be operated at their former situation; and while so operated, one of them exploded, through the negligence of the fireman, who was ostensibly an employee of the light company. The court very properly held the gas company liable. As an independent corporation, says the court in a vigorous opinion, solely responsible for its torts while being thus used, the Electric light company had no legal existence It is either merged or suspended as to its corporate existence by reason of the gas company owning it "body and soul," or it is a mere agent of the gas company in manufacturing, distributing and selling electricity; and if those theoretically the servants or employees of the electric light company, in the line of the general business of the gas company conducted by it, should commit a tort, the law will hold the principal responsible according to the very right and in despite of the legal fiction of a separate artificial existence of the electric light company. Louisville Gas Company, since it purchased and became the owner of all the stock of the electric light company, its plant, machinery and franchise, since it took control and management of the same for the purpose of man-

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ufacturing, distributing and selling electricity for illumination to the citizens of Louisville, has been held out to and been regarded by the public to be, as indeed it is in fact, the principal and owner in the manufacture, distribution and sale of electricity for illuminating purposes by the use of the plant and machinery which formerly belonged to the electric light company, and the law will hold it to maintain the truth of the situation, and estop it from using the fictitious theoretic existence of the electric light company as a shield and defense against liability for the torts committed by employees in its business. And even if the electric light company's existence was not, by reason of the consolidation, suspended, but it continued to exist as a corporation, then it was clearly the agent for the gas company which is liable for its torts.

NOTES OF RECENT DECISIONS.

ROYALTY ON INVENTION-RECOVERY BY EM-PLOYEE—CLAIM AGAINST THE GOVERNMENT.— In Gill v. United States, 16 S. C. Rep. 322, the Supreme Court of the United States says that an employee, paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot, by taking out a patent upon such invention, recover a royalty or other compensation for such use; that the fact that the employee made the invention out of working hours, and that he used neither the property of his employer, the government, nor the services of its employees, in conceiving, developing, or perfecting the inventions, is immaterial, if the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines that were made in putting the invention into practical use, was borne by the government, the work being also done under the immediate supervision of the employee. The mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor as his It appeared in this individual property. case that inventions made by an employee in a governmental arsenal were adopted in the

work of the arsenal by the commanding officer at the employee's suggestion. patterns and working drawing were prepared at the cost of the government, and the machines embodying the inventions were also built at its expense. The employee did not bring his inventions before any government agent as the subject of purchase and sale, and did not object to their use by the government, nor did the commanding officer undertake to incur any legal or pecuniary obligation on the part of the government for the use of the inventions or the right to manufacture thereunder. The employee's wages were advanced from time to time, and this was in part due to his practical ability as an inventor and the value of his inventions to the government. It was held that the employee acquiesced in the use of his invention by the government so as to be estopped from making any claim on account of the latter's use of it.

NUISANCE — MUNICIPAL CORPORATION — STREETS — OBSTRUCTIONS. — The Supreme Court of Alabama decides in Costello v. State, 18 South. Rep. 820, that the permanent maintenance of a fruit stand on a sidewalk is, as a matter of law, a public nuisance, irrespective of any inconvenience to the public, and even though the stand was erected over the open way to a cellar and that a city has not implied power to authorize the obstruction of sidewalks by fruit stands. The following is from the opinion of the court:

It is not and cannot be denied that the public has the right to the use of the entire sidewalk for the purpose of passage and other public purposes; that the appellants have, without lawful authority, permanently appropriated, to their own exclusive use and enjoyment, material portions of the sidewalks in question, thereby wholly depriving the public of the use of such portions. An unlawful deprivation of a substantial legal right necessarily implies injury to the party so deprived; and it is so with reference to the right of the public to the free use of the streets. When it is established that a party has, permanently and unlawfully obstructed a material portion of a public street which the public have a right to use, and, but for the obstruction, would use, for public purposes, it is thereby concluded that the public have been injured and put to inconvenience by reason of the obstruction, and this constitutes, in law, an indictable nuisance. Mr. Freeman tersely states the the law, as extracted from the numerous authorities he cites, in his extended annotation of Callanan v. Gillman (N. Y. App.), 1 Am. St. Rep. 840, 14 N. E. Rep. 264, as follows: "The public have a right to passage over a street to its utmost extent, unobstructed by any impediments. Any unauthorized obstruction, which necessarily impedes the lawful use of a high-

way, is a public nuisance at common law." And Judge Ruffin, a distinguished jurist, said in State v. Edens, 85 N. C. 526: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and, as such, is not permitted by the law to be done with impunity." Confusion of ideas upon this subject grows out of the failure to properly distinguish between street obstructions which are per se unlawful and capable of working public detriment, and those which are not, in themselves, unlawful, but may be so, by virtue of circumstances necessary to be shown in evidence in order to establish the criminality of the act. There are classes of highway obstructions which may create public inconvenience, and yet are not unlawful. Mr. Freeman also makes these appear very clearly. After laying down the principle above credited to him, he proceeds, in the same annotation to say: "Temporary obstruction and partial occupation of streets may, however, be justified on the ground of necessity. The street may be so obstructed by placing thereon materials for building or repairing, if it be done in such a way as to occasion the least inconvenience to the public, and the obstruction be not continued for an unreasonable length of time. So, too, a private person, carrying on business may occupy a portion of the street for a reasonable length of time for the necessary purpose of receiving and delivering his goods. A street may also be used for the purpose of moving a building from one place to another, provided it be done in a reasonable and judicious manner. Streets may be lawfully used for other purposes than the accommodation of the traveling public, provided such use be not inconsistent with the reasonable free passage of travelers over them. Slight inconveniences and occasional interruptions in the use of a street, which are temporary and reasonable, are not illegal merely because the public may not, for the time being, have the full use of the highway. · · If a person finds it necessary to obstruct a public street, he must see to it that the inconvenience to the traveling public be as slight as possible, and that it be allowed to continue for a reasonable time only. And a reasonable time is such as is necessary, in the ordinary course of business, for its removal. A teamster has no right to keep his team standing in the street in such a manner as to impede travel for an unnecessary length of time. If his wagon breaks down, and he is compelled to throw his goods upon the street, he must remove them out of the way in a reasonable time. A tradesman has no right to deposit his goods and wares on the street for the purpose of exposing them for sale. An individual has no right to appropriate a part of the street to his exclusive use in carrying on his business, even though enough space be left for the passage of the public. Nor has a storekeeper any right to use the sidewalk in front of his store as a sort of annex to his place of business. If a man's premises are not sufficiently extensive for the transaction of his business, without encreaching upon the street or sidewalk, he is bound to seek more spacious quarters elsewhere. The public convenience is paramount to the necessities of private individuals." No doubt, the habitual and constant compation of a material portion of the sidewalk for displaying goods for sale, which would naturally intariere with public passage, would be declared a nuibee per se. Speaking of permanent structures, he ** Permanent structures, obstructing streets, and interfering with their unimpeded use by the public, are nuisances which may be abated, although there be space left for the passage of the public. The following are instances of such structures, held to be nuisances: A barn occupying nearly half the street in a populous village; a show case in front of a store extending beyond the house line; a bay window sixteen feet above the sidewalk, and projecting three and a half feet over the sidewalk; a bridge extending across a street from the second story of a building on one side of the street to the second story of a building on the opposite side, supported by the buildings, and being 13 feet and 3 inches above ground; hav scales in the street, in the front of the owner's premises; a fruit stand encroaching upon the sidewalk; a show board extending eleven and a half inches over the sidewalk in front of a shop; a wooden awning in front of a store, extending over the sidewalk. But in Hawkins v. Sanders, 45 Mich. 491, 8 N. W. Rep. 98, it was held that such an awning was not per se a nuisance. So, too, in Osborn v. Ferry Co., 53 Barb. 629, it was held that a log of wood placed by the defendant in the public street, at the threshold of its gate, was a nuisance." Mr. Freeman collects and cites a great array of authorities in support of the principles he lavs down. We have read the most of them, as well as a number of others, and they establish to our entire satisfaction that obstructions of the kind in the present cases are per se nuisances. Being in themselves, without more, unlawful infringements of the public right to have the free use of the whole of the streets, which includes the sidewalks, for the purposes for which the streets were dedicated or established, they are, without more, conclusive of public injury. In such cases, evidence would not be admitted that public injury did not result. Such evidence, beyond what the acts themselves manifest, would consist in the opinions of witnesses merely. One jury might accord such weight to such opinions as to result in conviction, another in acquittal, when the acts are, without dispute, identical and unlawful, and the legal consequences of both are necessarily the same. It would be a very discordant administration of justice to have Costello convicted and Stathakis acquitted, when both have, without question, committed the very same unlawful acts, with the same consequences, merely because one jury viewed the opinions of men, as to the consequences, one way, and another jury the other way. Inasmuch as the law, upon the undisputed facts, declares both the nature of the act and its consequences, such opinions, will not be received.

The rule is different where one is charged with an improper and detrimental exercise of his public right to use the street. Thus, for instance, as we have seen, a merchant has the right to use the street for receiving and delivering his goods, but he must do so in a reasonable and proper manner—in a manner that will not unreasonably impede public travel. The act of using the street for such purpose is not, in itself, unlawful. The unlawfulness of the act consists in the unreasonable manner of its performance, producing unnecessary public inconvenience. These are the elements which give the character of wrong to the act otherwise right, and they must be proven, in order to establish the criminal offense. Indeed, it is not so much the improper manner of exercising the right which constitutes the criminal offense, as the inconvenience to the public which results from that manner. Judge Ruffin in his opinion referred to, supra. after stating the principle we quoted, in reference to permanent structures, drew the distinction between the two classes of cases, as follows: "But the very

object of a highway is that it may be used; and, though travel be its primary use, it still may be put to other reasonable uses; and whether a particular use of it, which does not of itself amount to a nuisance, is reasonable or not, is a question of fact to be judged of by the jury according to the circumstances of the case. Unlike the case of a permanent obstruction just referred to, it is not the manner of using the highway which constitutes the nuisance, but the inconvenience to the public which proceeds from it; and, unless such inconvenience really be its consequence, there is no offense committed." Nothing can better settle the principle than this emanation from so distinguished a judge.

Our own adjudications support our conclusion: State v. Mayor, etc. of Mobile, 5 Port. (Ala.) 279; Hoole v. Attorney General, 22 Ala. 190; City Council v. Wright, 72 Ala. 411; Webb v. City of Demopolis, 95 Ala. 116, 13 South. Rep. 289. The following are also some of the many authorities upon the questions here raised: Hart v. Mayor, etc., 9 Wend. 571, 24 Am. Dec. 165; Rung v. Shoneberger, 2 Watts, 23, 26 Am. Dec. 95; Com. v. Wilkinson, 16 Pick. 175, 26 Am. Dec. 654; People v. Cunningham, 1 Denio, 524, 43 Am. Dec. 709; Johnson v. Inhabitants of Whitefield, 18 Me. 286, 36 Am. Dec. 721; Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536; State v. Berdetta, 78 Ind. 185, 38 Am. Rep. 117 (a case of a fruit stand, like the present); City of Allegheny v. Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649; Reimer's Appeal, 100 Pa. St. 182, 45 Am. Rep. 373; Bybee v. State, 94 Ind. 443, 48 Am. Rep. 175; Smith v. Simmons, 108 Pa. St. 32, 49 Am. Rep. 113; Callanan v. Gilman, 107 N. Y. 360, 14 N. E. Rep. 264, and 1 Am. St. Rep. 831; Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. Rep. 18, and 10 Am. St. Rep. 860; Cohen v. Mayor, etc., 113 N, Y. 532, 21 N. E. Rep. 700, and 10 Am. St. Rep. 506, and note. Desty, in his work on Criminal Law, states that front steps are part of the building, and, when they project, the building is in the highway, and such structure is a nuisance at common law; citing Com. v. Blaisdell, 107 Mass. 235; Hyde v. Middlesex Co., 2 Gray, 267. Also, a stall for the sale of fruits and confectionaries placed on a public footway is a nuisance, though rent he paid to the adjoining owner; citing Com. v. Wentworth, 4 Clark (Pa.), 324.

NEGOTIABLE INSTRUMENT — BANK CHECK—ACTION.—The Supreme Court of Ohio decide in Cincinnati, D. & H. Ry. Co. v. Metropolitan Nat. Bank, that an action cannot be maintained against a bank by the holder of a check for refusal to pay it, unless the check has been accepted, although there stands to the credit of the drawer on the books of the bank a sum more than sufficient to meet the check. The court says in part:

The question presented is whether or not a payee of a bank check can maintain an action against the bank where the latter, on presentation, refuses to pay it, the drawer having at the time a credit on the books of the bank more than sufficient to meet the check. Questions bearing some relation to this have been considered by this court, but the precise question has not heretofore been determined. Authority is found supporting the affirmative of this proposition. The grounds urged are not identical in all cases, nor is the reasoning wholly consistent, but the following is be-

lieved to be a fair resume of the conclusions: Because of the universal usage of banks to cash the checks drawn by a depositor where he has sufficient unincumbered balance standing to his credit, a duty is implied on the part of the bank to so pay, and the holder takes the check relying upon this usage. Serious injury may result to the holder by the bank's refusal to pay, for, while he may have an action against the drawer that would prove delusive in the frequent instance of the drawer's insolvency, the bank's wrongful action would be the real cause of the loss. The law therefore implies a contract on the part of the bank with its depositors to pay their checks as presented so long as the fund is sufficient, and should, for like reasons, imply a contract with whoever may become the holder of such check to pay on presentation. The check is treated as an equitable assignment pro tanto of the fund in the hands of the bank, and by the act of presentation the check holder is brought in privity with the bank, his right to sue completed, and he may sue the drawer and the bank in one action, the former as drawer and the latter as an implied acceptor. He may also sue the drawer on the check's dishonor, or the bank for money had and received. Forcible and ingenious arguments in support of the right to maintain the action are presented by Mr. Morse in his valuable work on Banking; by Mr. Daniel in his trea ise on Negotiable Instruments (volume 2, § 1638), where the arguments pro and con are stated, and ably reviewed; and by a number of decisions, some of which are the following: Munn v. Burch, 25 Ill. 35; Insurance Co. v. Standford, 28 Ill. 168; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212 (but see opinion in Essex Co. Nat. Bank v. Bank of Montreal, 7 Biss. 195, Fed. Cas. No. 4,532); Roberts v. Corbin, 26 Iowa, 315; Lester v. Given, 8 Bush, 357; Fogarties v. Bank, 12 Rich. (S. C.) 518; Gordon v. Muchler, 34 La. Ann. 608; Fonner v. Smith, 81 Neb. 107, 47 N. W. Rep. 632. The contrary doctrine is maintained by many text-writers and decisions. Following are some of the authorities: 2 Randl. Com. Paper, p. 280; Pom. Eq. Jur. § 1284; Van Schaak, Bank Checks, 212; Bank v. Millard, 10 Wall. 152; Bank v. Whitman, 94 U.S. 343; Bank v. Schuler, 120 U.S. 514, 7 Sup. Ct. Rep. 644; Mining Co. v. Brown, 124 U. S. 391, 8 Sup. Ct. Rep. 531; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82; Attorney General v. Continental Life Ina. Co., 71 N. Y. 325; Bullard v. Randall, 1 Gray, 605; Carr v. Bank, 107 Mass. 48; Saylor v. Bushong, 100 Pa. St. 23; Kuhn v. Bank (Pa. Sup.) 11 Atl. Rep. 440; Bank v. Shoemaker, 117 Pa. St. 94, 11 Atl. Rep. 304; Creveling v. Bank, 46 N. J. Law, 255; Moses v. Bank, 34 Md. 580; Purcell v. Allemong, 22 Grat. 742; Harrison v. Wright, 100 Ind. 538; Grammel v. Carmer, 55 Mich. 201, 21 N. W. Rep. 418; Brennan v. Bank, 62 Mich. 343, 28 N. W. Rep. 881; Bush v. Foote, 58 Miss. 5; Bank v. Merritt, 7 Heisk. 177; Pickle v. Muse, 88 Tenn. 380, 12 S. W. Rep. 919; Cashman v. Harrison, 90 Cal. 297, 27 Pac. Rep. 283; Boettcher v. Bank, 15 Colo. 16, 24 Pac. Rep. 582; Satterwhite v. Melczer (Ariz.), 24 Pac. Rep. 184; Hopkins v. Forster, L. R. 19 Eq. 74; Wald, Pol. Cont. 190, 204; 2 Ames, Bills & N. 735.

It is not doubted that, as a general proposition, there can be no cause of action upon a contract unless there is privity of contract between the obligor and the party complaining. But it is urged in argument here that, while the want of privity is a good objection to the action in those States which deny the right of a third party for whose benefit a contract is made to maintain an action upon it, in Ohio the objection of want of privity cannot prevail for the reason, as held

by this court in a number of cases, that an agreement made on a valid consideration by one person with another to pay money to a third can be enforced by the latter in his own name, and that the third person is not named does not affect the right to enforce it. The most recent case involving this principle is that of Emmitt v. Brophy, 42 Ohio St. 82. The action was upon a bond given by Emmitt to the county commissioners in the sale of a bridge by the Scioto Bridge Company, in which Emmitt obligated himself "to pay off and liquidate all claims and demands, whether in judgment or otherwise, existing against said bridge, so that the full use of said bridge may inure to the public without let or hindrance." Brophy at the time was a judgment creditor, and the owner of all of the claims enumerated in the bond. Owen, J., in the opinion, after reciting the facts, observes: "These facts are strongly suggestive that it entered into the contemplation of the parties to this bond, at the time of its execution, that this particular lien of the plaintiff upon the bridge was to be discharged by Emmitt. Its existence was known to them, and they seem to have left nothing to conjecture. Indeed, if Brophy and Potter had been expressly named as the lienholders, it is difficult to see how this would have added to the definiteness of the bond, or made more certain the intention of the parties. This seems to be a conclusive answer to the suggestion that there is a want of privity." No one of the cases cited carries the doctrine further than the foregoing. In no one of them is it held that a right to sue in a stranger can be raised by mere implication. Nowhere is it held that the obligation will attach in favor of future creditors not named and not known, and as to amounts not specified, or then ascertainable, to the extent of giving to such creditors a right of action on the contract. It must be apparent, even on brief reflection, that it does not follow from these decisions that there is privity between check holder and bank before acceptance; and that, in order to cover the case at bar a marked extension of the doctrine must be made. Bessons urged for such extension, however plausible, do not seem sufficient. On the contrary, strong reasons against the proposition may be adduced; among others, this: The transaction of giving the check does not, as will be shown further on, substitute the check holder for the drawer. The latter may maintain an action for the breach of the contract to honor his check, and, if the holder has a similar right, the result is that two persons may maintain separate actions upon the same instrument at the same time to recover against the same defendant as a principal debtor. The inference that the right to recover by the check holder is denied only in the States where a right of recovery is refused to one for whose benefit a contract is made by another arises from a misapprehension of the authorities. In many States where the right of a check holder to sue the bank is not assented to the right of one for whose benefit a contract is made to recover upon it is recognized. See Lawrence v. Fox, 20 N. Y. 268; Burr v. Beers, 24 N. Y. 178; Coster v. Mayor, etc., 43 N. Y. 899; Merriman v. Moore, 90 Pa. 8t. 78; Huyler v. Atwood, 26 N. J. Eq. 504; O'Neil v. Commissioners, 27 Md. 240; Crawford v. Edwards, 38 Mich. 354; Miller v. Thompson, 34 Mich. 10; Heim v. Vegel, 60 Mo. 529; Fitzgerald v. Barker, 70 Mo. 685; Cross v. Truesdale, 28 Ind. 44; Brice v. King, 1 Head, 🗯; Green v. Morrison, 5 Colo. 18.

INHABITANCY OF CORPORATIONS FOR THE PURPOSES OF JURISDIC-TION.

I. Old Theory Corporations Cannot Migrate, But Must Dwell in the Place of their Creation.—One of the disabilities ascribed by judicial casuistry to every corporation is that it can have no legal existence beyond the bounds of the State or sovereignty by which it is created, and that it cannot migrate, but must dwell in the place of its creation. Such have been the rapid advances made in the manner of organizing and manipulating corporations and corporate enterprises, that it is doubtful whether any proposition of law could be quoted which is now further from the actual truth and fact. It is a matter of every-day observation that business corporations do not dwell in the places of their creation, but in many cases never acquire a habitation there, and that they do habitually migrate and acquire settled and permanent habitations within the limits of States and countries other than those of their creation. Nav. it has become the regular modern practice, based upon a variety of motives,—the motive of escaping local taxation or of bringing the jurisdiction of all important legal controversies into the federal courts,—for the citizens of one State, desiring to incorporate a business in their own State, to organize their corporation in some other State. The State of West Virginia has become the breeding ground of corporations of this kind; and it is believed to be within bounds to say that thousands of business corporations have been organized in that State by men living in other States, for the purpose of exploiting business in other States, and without any purpose of carrying on any business whatever, or even of maintaining a corporate office, in the State of West Virginia. The spectacle of the greatest wholesale dry goods house in the world, which has always existed and still exists only in the city of New York, becoming a corporation under the laws of New Jersey, and the spectacle of a great railroad trust

¹ Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Ohio, etc., R. Co. v. Wheeler, 1 Black (U. S.), 286; Marshall v. Baltimore R. Co., 16 How. (U. S.) 314; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Insurance Co. v. Francis, 11 Wall. (U. S.) 210; Railway Co. v. Whitton, 13 Wall. (U. S.) 270; Muller v. Dows, 94 U. S. 444; Memphis R. Co. v. Alabama, 107 U. S. 581; Rece v. Newport News etc., Co., 32 W. Va. 164, 5 Rail. & Corp. L. J. 515, 517.

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procuring itself to be incorporated under a special charter granted by the legislature of Kentucky,² none of the real members of the corporation ever having lived or intended to live in Kentucky, and none of them ever having had any purpose of building or operating a railroad in Kentucky, or of owning a dollar's worth of corporate property in that State,—gives point to these observations.

II. Modern Doctrine that Corporations Can Migrate and Acquire New Domiciles for Jurisdictional Purposes. - Opposed to the ancient casuistry above stated, the modern rule recognizes what every well-formed person knows to be a fact, that business corporations can and constantly do migrate and acquire new domiciles, for the purposes of business, in States other than those under whose laws they are created. The modern rule goes further and recognizes the fact that many corporations never have more than a theoretical domicile in the States of their creation, but have their only actual or de facto domicile in some other State. Thus, the railroad corporation already referred to has its de facto domicile in the State of California, where its directors meet and where all its chief officers are. The tendency of modern courts, both in England and America, is to conform the law to this well understood fact, and to break loose from the ancient rule that a corporation cannot migrate, but must dwell in the place of its creation, by holding that it may have a special constructive residence in more places than one, so as to be charged with taxes and other dues, and so as to be subject to the local jurisdiction, wherever its officers and agents are actually present in the exercise of its franchises and in carrying on its business; and that its legal residence is not necessarily confined to the place of its principal office or business, but may be wherever its corporate business is done.8 Applied to a trading or other business corpora-

² See 29 Am. L. Rev. 899, where this remarkable charter is set out in full.

⁵ St. Louis v. Wiggins Ferry Co., 40 Mo. 580, 587; citing Glaise v. South Carolina R. Co., 1 Strobh. (S. C.) 170; Cromwell v. Charleston Ins. Co., 2 Rich. L. (S. C.) 512. The case of St. Louis v. Wiggins Ferry Co., 40 Mo. 580, is overruled, not on the above theory, but on the application of it, in St. Louis v. Ferry Co., 11 Wall. (U. S.) 428. See the observation of Lord St. Leonards, in support of this doctrine, in Carron Iron Co. v. Maclaran, 5 H. L. Cas. 416, 468; also National Bank v. Huntington, 129 Mass. 444, where his observations are quoted as a law.

tion, this doctrine is that such a corporation is personally present for the purposes of jurisdiction, wherever it has established a place of trade or business.⁴

III. State Legislation Domesticating Foreign Corporations for Jurisdictional Purposes.—Recognizing the fact that business corporations can and do migrate from the States of their creation into other States, and establish permanent business agencies there, and reside there in like manner as domestic corporations, and make and break contracts and commit torts there,—the American States have, with great unanimity, proceeded to domesticate foreign corporations, so to speak, by enacting that they shall, as the condition of doing business within the State, be subject to the laws of the State governing domestic corporations; requiring them to file copies of their charters, certificates of incorporation, or articles of association, by whatever name called, with the Secretary of State, before doing any business in the State;6 providing that they shall all keep a known place of business and maintain agents within the State upon whom process may be served in actions against them; that they may be sued by the

4 Hayden v. Androscoggin Mills, 1 Fed. Rep. 98; Newby v. Von Oppen, L. R. 7 Q. B. 293; National Bank v. Huntington, 129 Mass. 444; St. Clair v. Cox. 106 U. S. 350, 355; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Ex parte Schollenberger, 96 U. S. 369; Lord St. Leonards in Carron Iron Co. v. Maclaren, 5 H. L. Cas. 414, 459; Moulin v. Trenton Mut. Ins. Co., 24 N. J. L. 222; Libbey v. Hodgdon, 9 N. H. 394; Selma, etc., R. Co. v. Tyson, 48 Ga. 351; Farnsworth v. Terre Haute, etc., R. Co., 29 Mo. 75; Lawrence v. Ballou, 50 Cal. 258; Western Union Tel. Co. v. Pleasants, 46 Ala. 641; Rhodes v. Salem Turnp. Co., 96 Mass. 95.

⁵ Cal. Const. 1879, art. 12, § 15; Idaho Const. 1889, art. 11, § 10; Montana Const. 1889, art. 15, § 11; Ark. Const. 1874, art. 12, § 11; Rev. Stat. Ohio, § 3630e; 80 Ohio Laws, 180; Iowa Acts 18th Gen. Assem., cb. 128. See State v. Chicago, etc., R. Co., 80 Iowa, 586, 46 N. W. Rep. 741; Hamer v. Garfield Mining, etc., Co., 130, U. S. 291; Isle Royale Land Corporation v. Osmun, 76 Mich. 162, 48 N. W. Rep. 14.

6 See, for instance, Gen. Laws Tex. 1887, ch. 128, p. 116; Id. 1889, ch. 78, p. 87; Code Wash. § 2480.

7 Ala. Const. 1875, art. 14, § 4; Colo. Const. 1876, art. 15, § 10; Idaho Const. 1889, art. 11, § 10; Mont. Const. 1889, art. 16, § 11; Ark. Const. 1872, art. 12, § 11; Penn. Const. 1874, art. 16, § 5; Ala. Acts 1886, § 60, p. 102: Nev. Stats. 1889, ch. 44, p. 47; New England Mortgage Co. v. Ingram, 91 Ala. 387, 3 South. Rep. 140. These constitutional provisions, being prohibitory, are held to be self-enforcing: American Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Beard v. Union, etc., Publishing Co., 71 Ala. 60; Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695; Dudley v. Collier, 87 Ala. 431; Farrior v. New England Mortgage, etc., Co., 88 Ala. 275; Mullens v. American, etc.,

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service of process upon any officer or agent through whom they do business within the State; and; in some cases, that the service of process upon the agent by whom the contract was made on behalf of the corporation shall be a good service of process in an action to enforce that contract.⁸ The penalty or sanction annexed to them is generally a deprivation of the right of action on the part of the foreign corporation to enforce contracts which it has assumed to make within the State before complying with the constitutional or statutory provision.⁹

IV. Inhabitancy of Corporations for the Purposes of Federal Jurisdiction.—Every consideration of convenience and justice points to the conclusion that the jurisdiction of the federal courts, in actions against corporations, ought to proceed upon the principles thus manifested by the constitutional and statutory law of States. If a corporation organized under the laws of one State establishes a permanent place of business in another State, there are the best reasons of public policy and justice why it should be suable in the courts of the United States, within the State to which it thus migrates, as well as in the courts of the State of its creation, provided the other circumstances exist which give federal jurisdiction. however, to be regretted that, as the combined result of judicial casuistry and legislative bungling, this is not so. Under the federal process act of 1872, the statutes a State prescribing the manner of serving process are applicable in the courts of the United States sitting within the particular State, and for that purpose the federal court is deemed a court of the State; 10 provided that, outside of the State statute, the federal court has a jurisdiction under the constitution and laws of the United States, founded upon diverse citizenship and "inhabitancy," for it is not competent for the legislature of

Ins. Co., 88 Ala. 280; Craddock v. American, etc., Ins. Co., 88 Ala. 281; Christian v. American Freehold, etc., Co., 89 Ala. 198; New England Mortgage, etc., Co. v. Ingram, 91 Ala. 337.

* See Code of Iowa, § 2613; State Ins. Co. v. Granger, ** Iowa, 272. Compare Upton Man. Co. v. Stewart, 61 Iowa, 299.

6 I Iowa, 299.

6 Thomp. Corp. § 7950, et seq.

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a State to confer jurisdiction upon a court of the United States. 11 The meaning is that where the federal court has jurisdiction under the constitution and laws of the United States, then, under the Federal Process Act of 1872, providing that the mode ofserving process in the federal courts shall be the same as that of the State in which the court sits. "as near as may be," the State statute shall be followed in its essential features, but not in respect of those subordinate provisions which would unwisely encumber the administration of law in the federal tribunals, or tend to defeat the administration of justice therein.12 This leads us to consider the present state of the statute and adjudged law concerning the jurisdiction of courts of the United States, in actions against corporations, and the venue of such actions. For more than fifty years the doctrine of the Supreme Court of the United States has been. overruling its former decisions,18 that a corporation aggregate is a "citizen" of the State by or under whose laws it has been created, for the purposes of federal jurisdiction, founded upon diverse State citizenship, under the constitution and judiciary act;14 and that, for the purposes of such jurisdiction, it is conclusively presumed to be a citizen of the State under whose laws it is created;15 and, conversely, that it cannot be a citizen of a State other the State under whose laws it has been created. 16 It is not intended to discuss in this place the propriety of the rule of interpretation which arrived at this

¹¹ Goodhope Co. v. Railway Bark Fencing Co., 22 Fed. Rep. 635.

12 Hat-sweat Man. Co. v. Davis Sewing Machine Co., 81 Fed. Rep. 294, 296. See, to the same general effect, Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 299; also, Nudd v. Burrows, 91 U. S. 426, 441.

13 Bank v. Deveaux, 5 Cranch (U. S.), 61; Hope Ins. Co. v. Boardman, 5 Cranch (U. S.), 57.

14 Louisville, etc. R. Co. v. Letson, 2 How. (U. S.)
497; Rundle v. Delaware, etc. Canal Co., 14 How. (U. S.) 80; Marshall v. Baltimore, etc. R. Co., 16 How. (U. S.) 814. See, also, Nashua, etc. Corp. v. Boston, etc. Corp., 136 U. S. 356; Booth v. St. Louis Fire Engine Man. Co., 40 Fed. Rep. 1; Maltz v. American Express Co., 1 Flip. (U. S.) 611; Covington Drawbridge Co. v. Shepherd. 20 How. (U. S.) 227; Ohio, etc. R. Co. v. Wheeler, 1 Black (U. S.), 286; Western Union Tel. Co. v. Dickinson, 40 Ind. 414, 13 Am. Rep. 295; Herryford v. Ætna Ins. Co., 42 Mo. 148.

15 Steamship Co. v. Tugman, 106 U. S. 118; Fish v. Chicago, etc. R. Co., 53 Barb. (N. Y.) 472; Park Bank v. Nichols, 4 Biss. (U. S.) 315; Williams v. Missouri, etc. R. Co., 3 Dill. (U. S.) 267.

16 Southern Pac. Co. v. Denton, 146 U. S. 202; Williams v. Missouri, etc. R. Co., 3 Dill. (U. S.) 267.

remarkable conclusion. It is to be observed that corporations are not mentioned either in the federal constitution or in the judiciary act, or, so far as the writer is aware, in any of the amendments of the latter act. On the contrary, all of those statutes, so far as examined by the writer, have used words appropriate to natural persons only. For example, several statutes of the United States have successfully restrained the bringing of civil actions in courts of the United States to cases in which the person impleaded as defendant is an "inhabitant" of the district in which the action is brought. One of them, enacted in 1875, reads as follows: "No person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suits hall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process, or commencing such proceeding.17 These words must impress the reader as having been drawn for the purpose of designating natural persons only. If the word "inhabitant" can be applied to a corporation aggregate, it is certain that such a corporation cannot be appropriately designated by the personal pronoun "he." Nevertheless, the federal judiciary, having entered upon the very peculiar rule of construction above stated, had nothing to do but to carry it out as best they could. And they fell into inextricable confusion and contradiction in construing the word "inhabitant," but more especially in construing the word "found," as contained in the above and other like statutes.18 To obviate the confusion and uncertainty growing out of the use of the word "found" in the statute above quoted, congress, in the act of 1887, which was corrected

17 18 U. S. Stat., p. 470, ch. 187.

in its enrollment by a supplementary act in 1888, which act of 1887 amended the act of 1875, omitted the word "found" and recast the statute so as to make it read as follows: "But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded upon the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or defendant.19 In 1892 Mr. Justice Harlan, sitting at circuit under a special commission, decided, in one of those clear and strong opinions which have done so much to raise his reputation as a judge, that, under the act of 1887 above quoted, a railroad or telegraph company, chartered by a State or by the United States, is an "inhabitant" of any State in which it operates its lines and maintains offices for the transaction of its business.20 But this salutary doctrine was overruled by the Supreme Court of the United States, the latter court holding that the citizenship and inhabitancy of a corporation are identical, for the purposes of federal jurisdiction founded upon diverse State citizenship; so that a corporation can only be sued in a court of the United States, at law or in equity, in the State under whose laws it was created, where the action is brought by a citizen of a different State, and where the right of action depends upon the fact that the plaintiff and defendant are citizens of different States;21 though the court subse-

¹⁹ 25 U. S. Stat., p. 434, ch. 866; 24 U. S. Stat., p. 553, ch. 373.

²⁰ United States v. Southern Pac. R. Co., 49 Fed. Rep. 297.

21 Shaw v. Quincy Min. Co., 145 U. S. 444. See, also, Southern Pac. Co. v. Denton, 146 U. S. 202; Galveston, etc. R. Co. v. Gonzales, 151 U. S. 496. Compare Martin v. Baltimorc, etc. R. Co., 151 U. S. 678, and Mexican Nat. R. Co. v. Davidson, 157 U. S. 201. Several of the federal circuit courts had drifted into the conclusion that inhabitancy under the act of 1887 is substantially identical with citizenship, for the purposes of federal jurisdiction founded upon diverse citizenship: Booth v. St. Louis Fire Engine Man. Co., 40 Fed. Rep. 1, 6 Rail. & Corp. L. J. 484; Bansinger, etc. Cash Register Co. v. National Cash Register Co., 42 Fed. Rep. 81, 8 Rail. & Corp. L. J. 62; Filli v. Delaware, etc. R. Co., 37 Fed. Rep. 65. Other federal judges took the view which Mr. Justice Harlan took at circuit, that a corporation can, for the purposes of such jurisdiction,

Is The judiciary act of 1789 contained substantially the same provision. 1 U. S. Stat., p. 79, ch. 20. As to when a corporation was "found" within a State, within the meaning of this word, see Hayden v. Androscoggin Mills, 1 Fed. Rep. 93, Lowell, J.; Eaton v. St. Louis Shakspear, etc. Co., 7 Fed.Rep. 139; Exparte Schollenberger, 96 U. S. 369; Runkle v. Lamar Ins. Co., 2 Fed. Rep. 9; Williams v. Transportation Company, 14 Off. Gaz. (U. S.) 523; Wilson Banking Co. v. Hunter, 7 Reporter, 465. "Inhabitancy," in case of a corporation created by the concurrent legislation of two States, see Culbertson v. Wabash Nav. Co., 4 McLean (U. S.), 544.

quently found it impossible to apply this doctrine in cases of alien corporations, for that would send the domestic citizen to the country of the origin of the corporation to bring his action.²² The court must have felt that the inevitable logic of its rule of interpretation, where jurisdiction depends upon a diverse State citizenship, demanded the same conclusion where it depended upon diverse national citizenship; and so the federal circuit court held,²³ and the supreme court floundered out of the difficulty in which its untenable rule of interpretation had placed it, in the best way it could.

V. Conclusion. — It is submitted to the profession that the soundest considerations of public policy demand that corporations shall be held to answer in the national, as well as in the State courts, within whatever State they establish permanent agencies, without reference to the question under the laws of what State they have been created, and that this is especially so in cases of corporations which have not any residence except a fictitious one in the State of their creations, nor any agent there upon whom process can be served. The Supreme Court of the United States having, by an interpretation of very doubtful propriety, left this question in the predicament above stated, there is strong reason why congress should, at the present session, and without delay, pass an act, declaring that, for the purposes of federal jurisdiction and venue, a corporation may be sued within whatever State or federal district it has established a permanent agency for the purpose of transacting its business. SEYMOUR D. THOMPSON.

become an inhabitant of a State or federal district outside of the State of its creation: Miller v. Eastern Oregon Gold Mining Co., 45 Fed. Rap. 345; Holmes v. Oregon, etc. Co., 6 Sawy. (U. S.) 262, 5 Fed. Rep. 528. It seems clear that where the corporation is created by the State within which the federal court sits, then, for the purpose of venue, that is to say, of determining within what federal district in the State an action against it may be brought, it is to be deemed an inhabitant of that district within which it has estabished a permanent business office or agency: Zambrino v. Galveston, etc. R. Co., 38 Fed. Rep. 449; and compare Southern Pac. Co. v. Denton, 146 U. S. 202; Riddle v. New York R. Co., 39 Fed. Rep. 290. See, also, Miller v. Eastern Oregon Gold Min. Co., 45 Fed. Bep. 845.

** Re Hohorst, 150 U. S. 653; with which compare Hehorst v. Hamburg American Packing Co., 38 Fed. Ren. 272.

** Hohorst v. Hamburg American Packet Co., 38 Ped. Rep. 278.

INTERSTATE COMMERCE.

CITY OF HUNTINGTON V. MAHAN.

Supreme Court of Indiana.

One charged with peddling without a license in violation of a city ordinance where it appeared that a firm doing business from New York, through the States, had a general agent and distributing agents in the State, of whom defendant was one. The distributing agents sent their orders to the general agent who forwarded them to New York, and received the goods from there. He repacked and sent them to the distributing agents who delivered them to their customers. Held, that defendant was engaged in interstate commerce, and was not subject to the ordinance as a peddler.

HACKNEY, J.: The appellee was charged and found guilty, before the appellant's mayor, of violating an ordinance of the city prohibiting peddling within said city without a license as prescribed by said ordinance. On appeal to the circuit court there was a special answer by the appellee, a demurrer to which was overruled, and a special reply by the appellant, a demurrer to which was sustained, and upon a trial by the court the appellee was acquitted. The questions arising upon the rulings as to the special answer and special reply more fairly and fully arise upon the motion for a new trial, which assigned as causes therefor that the finding was contrary to law and was contrary to the evidence. Without conflict the evidence established the following facts: During and prior to September and October, 1894, P. F. Collier & Co. were a firm of book publishers located in, and conducting their business throughout, various States from the City of New York. In said months said firm had an agent, P. J. Flanady, located in the city of Indianapolis, and had other agents traversing the various parts of this State, soliciting purchasers and taking orders for the books so published by said firm, and acting solely as the salaried agents of such firm. The Indianapolis agency, after receiving the order for such books as the canvassing agent might secure, would combine numbers of such orders and forward them to P. F. Collier & Co., at New York City, which firm, in response to such orders, would ship to the Indianapolis agency the books so ordered. When the books so ordered and shipped were received at Indianapolis they were repacked in parcels to suit the orders from the various localities in Indiana, and were shipped to such localities for distribution by salaried agents, acting for P. F. Collier & Co., in such localities. The appellee, while acting as such distributing agent at the city of Huntington, on the 5th day of October, 1894, and while distributing to various purchasers such books of the publications of said firm as had been ordered by citizens of said city through one Gamble, another agent of said firm, during the months of September, 1894, was arrested for the violation of said ordinance. The books being delivered by the appelle had been received by him through orders and shipments

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as above described, and had not prior thereto come into storage or become a part of the stock in trade in any business conducted wholly within the State. The theory upon which the appellee was discharged by the lower court, and that upon which the judgment of that court is here supported, is that the appellee was engaged in interstate commerce, the regulation of which is reserved by the federal constitution to the congress of the United States, and which is not the subject of regulation or restriction by State or municipal authority. In the recent case of City of South Bend v. Martin, decided by this court, the question here presented was fully considered and many of the federal and State decisions were reviewed. The rule there recognized was that if the goods, prior to their sale, had come into this State, and had become here permanently fixed, and mingled with the mass of property within this State, and as such were subjected to sale by present exposure and delivery, their sale was not a transaction of interstate commerce; while, if they had not, at the time of their sale, come into this State, had not become mingled with the mass of property within this State, were not subject to inspection and delivery at the time of the sale, the soliciting of orders, and the subsequent shipment and delivery from another State, were transactions of interstate commerce. Upon this recognized rule there can be no doubt, under facts here presented, that this case falls within the limits where State and municipal authority has no control. In addition to the numerous cases cited in City of South Bend v. Martin, supra, see In re Spain, 47 Fed. Rep. 208; In re Nichols, 48 Fed. Rep. 164; In re Tyerman, 48 Fed. Rep. 167; McLoughlin v. City of South Bend, 126 Ind. 471; Martin v. Town of Rosedale, 130 Ind. 109.

The right of congress to regulate interstate commerce "is coextensive with the subject on which it acts, and cannot be stopped at the external bounddary of the State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces so that they become mingled with the common mass of property within the territory entered." v. Titusville. 153 U.S. 289; Leisey v. Hardin, 135 U. S. 100; Gibbons v. Ogdon, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419. The right to deliver goods sold, when not within the State, has the same immunity from State or municipal interference by way of taxation as the sale itself has. In re Spain, supra. We conclude, therefore, that the record discloses no error, and the judgment of the court is affirmed.

NOTE.—In accordance with the consensus of authority, one who goes from house to house with articles of commerce, offering them for sale and delivering them as sold, is engaged in peddling; and that an ordinance prohibiting peddling without a license is not an interference with interstate commerce, when it is sought to apply it to a person who takes about with him goods sent to him to sell as agent by a manufacturer in another State and delivers them at the time the sales are made; and that it is immaterial that the

sales are made on the installment plan, and that the title remains in the manufacturer until the full price is pald. City of South Bend v. Martin (Ind. S. C.), 41 N. E. Rep. 315. One who canvasses from house to house, leaving goods at a stipulated weekly payment, the title to pass to the party renting the goods when the whole amount of the rental is paid, is a peddler, within an ordinance requiring peddlers to have a license. So held by the Michigan Supreme Court in People v. Sawyer, 64 N. W. Rep. 333. The Supreme Court of Errors of Connecticut holds that one making regular periodical trips through the country, calling on retail dealers only, taking orders and filling them from the wagon if he can, otherwise booking them for subsequent delivery, is not a peddler, within the meaning of the law. Pub. Acts Conn. 1893, ch. 121, p. 271. See State v. Fetterer, 32 Atl. Rep. 394.

A peddler is a small dealer at retail, carrying his merchandise with him, traveling from house to house, or from town to town, either on foot or on horseback, or in a vehicle drawn by one or more animals, exposing his goods for sale and selling them. Randolph v. Yellowstone Kit, 83 Ala. 474. The same court further holds that "the distinctive feature does not consist in the mode of transportation, though one of the statutory modes is essential to constitute a peddler, but in the fact that a peddler goes from house to house, or place te place, carrying his articles of merchandise with him, and currently sells and delivers." Ballou v. State, 87 Ala. 144.

The dominant idea involved in such an occupation seems to be that the individual carries his stock in trade, consisting of small wares, on foot or in a vehicle about the country, offering them for sale and then and there selling them." Stamford v. Fisher, 140 N. Y. 187. The four elements required to constitute a peddier are: First, that he should have no fixed place of dealing, but should travel around from place to place; second, that he should carry with him the wares that he offers for sale, not merely samples thereof; third, that he should sell them at the time when he offers them, not simply enter into an executory contract for future sale; and fourth, that he should deliver them then and there, not merely contract to deliver them in the future. Should any one of these elements be found constantly absent from the regular dealings of the vendor, he will not be considered a peddler, whatever else he may be. Therefore, one who merely solicits orders for future delivery, or sells by sample, whether a dealer or simply the agent of a dealer, cannot be considered a peddler.

On the other hand, if a vendor travels from place to place, selling his goods and delivering them on the spot, he is a peddler; and where the sales take place wholly within the limits of the State, he cannot claim that he is engaged in interstate commerce. Commonwealth v. Gardner, 138 Pa. St. 284.

In a case where the evidence showed that the defendants, who were butchers and kept a meatshop, sent out a delivery wagon in charge of an employee with meat to be delivered as previously ordered by their customers, but at the same time sent out other meat with knives for cutting and scales for weighing it, and by custom drove from place to place soliciting business, not only from the wagon, but by going from house to house and inviting the inmates to come to the street, and selling to such as desired to buy from him, cutting up and weighing it out from the wagon, these acts constituted peddling by the employers. City of Duluth v. Krump, 46 Minn. 435.

A proprietary medicine dealer, having a permanent manufactory and residence in one county, upon which he pays taxes, but who, during certain seasons of the year, attends public gatherings for the purpose of advertising and introducing his remedies, and publicly recommends them as a cure for certain diseases, is held to be an itinerant peddler or vendor. Snyder v. Closson, 84 Iowa, 184; State v. Gouss, 85 Iowa, 21.

Indianapolis, Ind. R. D. FISHER.

INSURANCE—POLICY — CONDITION — LIMITA-TION—CONSTRUCTION.

EGAN V. OAKLAND HOME INS. CO.

Supreme Court of Oregon, December 23, 1895.

Under a fire policy providing "the loss shall not become due and payable until 60 days after proof of the loss, including an award by appraisers, when required. No suit or action on this policy for the recovery of any claim shall be sustained until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 6 months next after the fire shall have occurred," the 6 months commence to run from the time of the fire, and not from the time right to sue accrues.

Bran, C. J.: The alleged liability of the defendant rests upon a fire insurance policy issued by it covering the property of plaintiff's assignor, and the only question presented by the appeal is the proper construction of the following provisions thereof: "The loss shall not become due and payable until 60 days after satisfactory proof of the loss herein required has been received by this company, including an award by appraisers when appraisal has been required. * * * No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 6 months next after the fire shall have occurred.". The fire occurred on August 17, 1893, and this action was not commenced until March 15, 1894, only 2 days short of 7 months thereafter. There is no claim made that the delay was caused by the action or nonaction of the defendant company, or that it occurred by reason of any dispute or proceedings by arbitration concerning the amount of the loss, or that a reasonable time did not remain after the loss became due and payable in which to bring the action; but the simple question here presented is whether the time as limited by the policy commenced to run at the date of the fire, or at the time the loss was ascertained and became due and payable. It is admitted that the clause of the policy limiting the time in which an action may be commenced thereon is valid and binding, but the contention for plaintiff is that, when construed in connection with the other provisions in the policy, and especially the one providing that the loss shall not become due and payable until 60 days after proof thereof has been furnished to the company, it shows an intention to give him 6 months after the right to sue accrued in which to bring the action.

At the outset it is important to observe that, under the wording of the clause in question, the

6 months begin to run from "the time the fire shall have occurred," and not from the time "the loss or damage shall have occurred," or "after the loss," or "after the loss or damage," as in most of the cases cited and relied upon by plaintiff. The latter phrases have been construed by some of the courts to mean that the limitation shall be computed from the time the amount of the loss is ascertained and payable, and the assured's right to bring an action accrues, and not from the time of the happening of the loss. Steen v. Insurance Co., 89 N. Y. 315; Hay v. Insurance Co., 77 N. Y. 235-242; Insurance Co. v. Jones, 54 Ark. 376, 15 S. W. Rep. 1034; Barber v. Insurance Co., 16 W. Va. 658; Murdock v. Insurance Co., 33 W. Va. 407, 10 S. E. Rep. 777; Chandler v. Insurance Co., 21 Minn. 85; Spare v. Insurance Co., 17 Fed. Rep. 568; Vette v. Insurance Co., 30 Fed. Rep. 668; Insurance Co. v. Fairbank, 32 Neb. 750, 49 N. W. Rep. 711; Ellis v. Insurance Co., 64 Iowa, 507, 20 N. W. Rep. 782; Miller v. Insurance Co., 70 Iowa, 707, 29 N. W. Rep. 411. But other courts of equal weight and respectability, have construed such phrases to mean that the assured's right of action must be computed from the date of the happening of the loss, and not from the time the insurer is required to pay. Travelers' Ins. Co. v. California Îns. Co., 1 N. D. 151, 45 N. W. Rep. 703; Fullam v. Insurance Co., 7 Gray, 61; Johnson v. Insurance Co., 91 Ill. 92; Chambers v. Insurance Co., 51 Conn. 17; Glass v. Walker, 66 Mo. 32; Bradley v. Insurance Co., 28 Mo. App. 7; Insurance Co. v. Wells, 83 Va. 736, 3 S. E. Rep. 349; Blanks v. Insurance Co., 36 La. Ann. 599; Lentz v. Insurance Co., 96 Mich. 445, 55 N. W. Rep. 993; Garido v. Insurance Co. (Cal.), 8 Pac. Rep. 512. Other cases, bearing more or less directly on the question, could be cited on either side of the proposition, but reference is made to a sufficient number to show that it can hardly be said that the weight of authority is with either contention. The courts which hold that the limitation commences to run at the time the loss is ascertained and payable, and not from the date of the happening of the loss, do not agree as to the reasons for so deciding, but they seem generally to base their decisions upon the ground that the limitation clause, when taken in connection with the stipulation in the policy giving the insurer a certain time after proof of loss in which to pay, is inconsistent, ambiguous, and uncertain, and therefore should be construed more strongly in favor of the insured. But in the case before us there is, in our opinion, no room for construction. The stipulation is plain and unambiguous, and susceptible of but one meaning, and unless we are to disregard entirely the plain and obvious meaning of the language used, and we must hold that the phrase "next after the fire shall have occurred," means from the date of the fire, and not 60 days, or some other time, thereafter. It is undoubtedly true that an insurance policy, like other contracts, should be so construed as to effectuate the intention of the parties, and that if any of its terms or conditions are ambiguous, they should be construed most strongly against the insurer; but the courts have no right by construction to disregard the plain provision of a contract as made by the parties, or to hold that it means one thing when it says another. Some of the courts which construe the phrase "after the loss" to mean after the loss is ascertained, and the right to sue exists, proceed on the assumption that there is no material difference between such a phrase and "after the fire," and have construed it in the same way. Steel v. Insurance Co., 2 C. C. A. 463, 51 Fed. Rep. 715; Friezen v. Insurance Co., 30 Fed. Rep. 352; Case v. Insurance Co., 83 Cal. 473, B Pac. Rep. 534; Hong Sling v. Insurance Co., 8 Utah, 135, 30 Pac. Rep. 307. And the following cases, although construing life insurance policies, may be said to hold to the same effect: McConnell v. Association, 79 Iowa, 757, 43 N. W. Rep. 188; Matt v. Association, 81 Iowa, 135, 46 N. W. Rep. 857; Allibone v. Casualty Co. (Tex. Civ. App.), 32 S. W. Rep. 569. But we cannot assent to the doctrine of these cases. It seems to us that if "after the loss" means 60 or any other number of days after the happening of the loss, there is a material difference in the two phrases. As so construed, the one fixes, as the period at which the limitation shall commence, the time the loss is ascertained and payable, and the other, in distinct and unequivocal language, the time of the fire, which is certainly a different event. In one of the leading cases holding the doctrine contended for by the plaintiff (Steen v. Insurance Co., 89 N. Y. 315), Danforth, J., says: "No doubt the appellant could have stipulated that the time of the fire should be looked to as the event from the happening of which the limitation should run. but it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in Schroeder v. Insurance Co., 2 Phila. 287, one of the cases cited by the appellant." And in the subsequent case of King v. Insurance Co., 47 Hun, 1, the Supreme Court of New York held that, under a clause in an insurance policy providing that no action or suit shall be maintained unless "commenced within 12 months next after the fire shall have occurred," the limitation commenced to run from the date on which the fire occurred, and not from the expiration of the 60 days given the company in which to make payment after the proofs of loss, and distinguished the case before it from the Steen Case. And Mr. Richards, in his work on Insurance (page 193), in considering the effect of a clause in the standard New York policy requiring suit or action to be commenced "within 12 months next after the fire," says: "The limit of l year for bringing suit is valid, and must be observed, and under the wording of this clause the 12 months begin to run from the time of the fire, and not from the time of service of proofs of loss, which, under the former wording of the policy, was held to be the effect of it." This construction is, in our opinion, in accordance with common sense, the plain meaning of the language used, and is abundantly supported by authority. Hart v. Insurance Co., 86 Wis. 77, 56 N. W. Rep. 332; Insurance Co. v. Meesman, 2 Wash. 459, 27 Pac. Rep. 77; Insurance Co. v. Little, 20 Ill. App. 431; Hocking v. Insurance Co., 130 Pa. St. 170, 18 Atl. Rep. 614; Schroeder v. Insurance Co., 2 Phila. 286; King v. Insurance Co., 47 Hun, 1; McElroy v. Insurance Co., 48 Kan. 200, 29 Pac. Rep. 488; Insurance Co. v. Stoffels, 48 Kan. 205, 29 Pac. Rep. 479; McFarland v. Association (Wyo.), 38 Pac. Rep. 347; Steel v. Insurance Co., 47 Fed. Rep. 863.

The case principally relied upon by plaintiff as

supporting his position is Steel v. Insurance Co., supra, decided by the circuit court of appeals of the ninth circuit, McKenna and Gilbert, circuit justices, and Hawley, district judge, sitting. The action was originally commenced in the Circuit Court of the United States for the district of Oregon on a policy of insurance limiting the time for bringing the action to 12 months "next after the date of the fire from which such loss shall occur," and on appeal the decree of Judge Deady was reversed,-McKenna, circuit justice, dissenting; the court holding that there was no material difference between "12 months next after the fire" and "12 months after the loss," and that the limitation did not commence to run until after the loss was ascertained and became payable. On appeal to the supreme court this decision was affirmed by an equally divided court, no opinions being delivered. 14 Sup. Ct. Rep. 1153, 154 U.S. 518. It can hardly be said, therefore, that the question is a settled one in the federal courts. But we are disposed to give to the circuit court of appeals all due respect, and would be inclined to yield to its judgment if in our opinion the question was less free from doubt. The argument in support of the view adopted by the majority is, briefly, that because, by the terms of the policy, the company could not be sued until certain conditions were complied with, which would necessarily consume a part of the time limited, and, furthermore, the loss not being payable until 60 days after the proofs thereof, it might happen, if the limitation clause should be construed according to its language, that the action would be barred before the right to sue actually accrued under other clauses in the policy, and therefore the parties cannot have meant what they expressly said. We cannot yield our assent to this line of reasoning. As said by the Supreme Court of Wisconsin, in the case of Hart v. Insurance Co., supra: "It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words, which can have but one meaning, are not subject to construction. 'Twelve months next after the fire' has one certain meaning, and but one. It can have no other. It may well be that the insurer may, by his acts, waive the limitation, or estop

himself from insisting on it, as held in the cases of Killips v. Insurance Co., 28 Wis. 472; Blanks v. Insurance Co., supra, and Johnson v. Insurance Co., supra; but the invocation of this principle does no violence to the contract of the parties." If, acting in good faith and with reasonable diligence, the conditions precedent to a right of action cannot be completed by the insured so as to leave a reasonable time thereafter in which to sue, and this fact is made to appear by the pleadings and proof, the courts should declare the limitation inoperative or void, and not disregard the plain wording of the contract, or incorporate into it a provision which the parties themselves did not see fit to insert. In our opinion, therefore, the court below committed no error in holding that the limitation commenced to run from the time the fire occurred, and not when the loss became due and payable, and the judgment is affirmed.

NOTE.-In no branch of the law has there been so much "judicial legislation," as in insurance cases. The hardship to the olicy-holder, or a prejudice against the companies in general, they have been declared by one court (Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96) not to be "favorites of the law," have led to much that cannot well be explained on any other theory. The writer had an illustrative experience in arguing a case before a supreme court, which required some "judicial legislation" to hold the company liable. Counsel against the company had contended that a particular phrase did not mean what it was plainly intended to mean. The court readily assented to the writer's proposition, that a contract, meaning what the company intended this to mean, would be valid. The argument had assumed a colloquial phase, and the request was made to each of the judges for a phrase that would better express what was intended. Each in turn attempted to write such a phrase, and each admitted that it could not be made more clear and definite. Nevertheless the lower court was affirmed. The "poor widow woman," as counsel tautologically called the plaintiff, was more persuasive than the court's own admission against the correctness of the judgment. The Supreme Court of Oregon, in Egan v. Oakland Home Ins. Co., has made a very satisfactory opinion in its reasoning and conclusion. The phrase under construction, and like phrases, have often been before the courts. There is much conflict in the authorities as to the time when the limitation begins to run; some holding that the limitation begins to run from the date of the fire, injury or death, and others that it does not begin to run until after the right of action has accrued,—that is, until all preliminaries to the payment of the loss, as the making of proofs of loss, arbitration, etc., have been disposed of. Most of the cases bearing upon the question of extending the time limited for commencing suit, holding the limitation to run from a later date than that specified in the policy, are cases of fire insurance, which limit the time to a certain number of months after the loss or after the fire; and require proofs of loss to be furnished, or other conditions precedent to the right of action to be performed, for which time is allowed, or which necessarily consume time. The federal courts are inclined to the position that the limitation runs only from the time the cause of action accrues (cases cited in opinion, supra), although the policy reads a certain number of

months after the loss, or after the fire; but in the State courts this is reversed, and, while a respectable number hold that a limitation of a certain time for beginning action, after the loss or after the fire, shall not run from the date of the loss or of the fire, but from the time the cause of action accrues, a considerably larger number of cases are found where the decisions are directly to the contrary of this, and a number which are somewhat equivocal and claimed by both parties; and some make a distinction between the meaning of the phrases "after the loss" and "after the fire."

Commencement of Action .- In the absence of statutory provision a suit is generally considered commenced, within the limitation clause in the policy, when the complaint is filed in the clerk's office and the summons issued; and the fact that the summons is returned, and a new writ issued after the expiration of the limitation, has been held not material. Virginia, F. & M. Ins. Co. v. Vaughn, 88 Va. 882; Everett v. Niagara Ins. Co., 142 Pa. St. 322; Peoria, F. & M. Ins. Co. v. Hall, 12 Mich. 202. In the absence of evidence a writ is supposed to issue on the day of its date, in computing the time in which to sue. Merchants' Mutual Ins. Co. v. Lacroix, 35 Tex. 249. An amendment, where the cause of action remains the same, is not a new action, and, therefore, the limitation will not apply. Thomas v. Fame Ins. Co., 108 Ill. 91; U. S. Life Ins. Co. v. Ludwig, 13 Ins. L. J. 488; Bentley v. Standard Fire Ins. Co. (W. Va.), 23 S. W. Rep. 584. The limitation does not apply to new parties on a creditor's bill brought within the time. Pennell v. Lamar Ins. Co., 73 Ill. 303. Where the insurer is not accessible to cervice within a reasonable time before the expiration of the limitation, it has been held not to apply. Peoria, M. & F. Ins. Co. v. Paul. 12 Mich. 202. A presentation of a claim, and demand for payment, however, cannot be considered as a prosecution of a suit. Harris v. Phænix Ins. Co., 85 Conn. 310. The fact that a prior suit has been brought, and for some reason has been dismissed, or been lost, does not delay the period of limitation, notwithstanding such a provision in the general statute of limitation. McIntyre v. Michigan State Ins. Co., 52 Mich. 188; Brown v. Roger Williams Ins. Co., 7 R. I. 301; Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386; McFarland v. Ætna Ins. Co., 6 W. Va. 437. Nor is it material that a prior suit was brought in a foreign jurisdiction, or in a wrong jurisdiction. Keystone Mutual Benefit Ass'n v. Norris, 115 Pa. St. 446. Contra: Madison Ins. Co. v. Fellowes, 1 Dis. 217. An attachment execution served on the company within the time is no excuse for a delay in bringing the action. Schroeder v. Keystone Ins. Co., 2 Phils. 286. Also see Hocking v. Howard Ins. Co., 130 Ps. St. 170; McElroy v. Continental Ins. Co., 48 Kan. 200.

Within—Months after the Loss.—Where the policy provides that the loss shall be payable "sixty days after due notice and proof of the same," and limits the time for bringing action to "six months next after the loss shall occur," the West Virginia Supreme Court holds that in such case the six months' limitation runs from the time when the cause of action accrues, and not before, and that this was "the intent of the parties." Barber v. Ins. Co., 16 W. Va. 658. In the later case of Murdock v. Franklin Ins. Co., 38 W. Va. 407, the court, after quoting from Barber v. Ins. Co., concludes, "so that case is authority for the position (1) that the limitation does not begin until the cause of action accrues; and (2), that it does not begin from the actual loss—thus departing from the etter of the policy." The same rule seems to be

firmly established in Iowa. Eggleston v. Ins. Co., 65 Iowa, 308; Ellis v. Ins. Co., 64 Iowa, 507; Quinn v. Ins. Co., 71 Iowa, 615; Miller v. Ins. Co., 70 Iowa, 704. Two reasons for this line of decisions are given in the different cases in Iowa. One reason is the assumptions made in the West Virginia cases, that such was the intention of the parties. Ellis v. Ins. Co., supra. The other reason is, that there is a rule of construction of limitations, both by statutes and by contract, that the limitation runs only from the time when the right of action accrues. Such is also the ruling in Nebraska. Fireman's Fund Ins. Co. v. Buckstaff, 56 N. W. Rep. 697; German Ins. Co. v. Fairbanks, 32 Neb. 750. New York takes the same view. Hay v. Ins. Co., 77 N. Y. 235; Mayor, etc., v. Hamilton Fire Ins. Co., 39 N. Y. 45; Steen v. Niagara Ins. Co., 89 N. Y. 815. Also Arkansas. Sun Ins. Co. v. Jones, 54 Ark. 376. And Wisconsin. Killips v. Putnam Ins. Co., 28 Wis. 472. Also, see Vette v. Clinton Fire Ins. Co., 30 Fed. Rep. 668. The great preponderance in number of decisions is against this view, but the courts taking this view are courts of eminence, and they are entitled to respect; and, if their position is sustained by convincing reasons, mere numbers should not be allowed to prevail against them. Their number is sufficient to make a very respectable array, but the weight of these decisions as authority is greatly reduced by the fact that they do not agree as to the basis or reason upon which they rest. All of the courts mentioned cite New York cases as sustaining them, so that it is important to determine just how far the New York cases do sustain them. Hay v. Star Ins. Co., supra, was a suit upon a policy of fire insurance requiring proofs of loss to be furnished, and making the loss payable sixty days after proof. and limiting the time for commencing action to twelve months after the loss. The court (one judge dissenting), says: "The loss should be deemed to occur when the company pays it, or may be lawfully called upon to pay it. The loss, then, and not until then, practically occurs to it. These words may, in some clauses, refer to the destruction of the property, but it does not necessarily follow that they do in this." It is to be remarked that of the States we have mentioned as citing New York cases as authority for their decisions, none but Arkansas adopt this reason for its decision. The West Virginia court characterizes its decision expressly as "departing from the letter of the policy." Cases holding that "after the loss" has reference to the time of the fire are Hekla Ins. Co. v. Schroeder, 9 Bradw. 472; Carroway v. Merchants' Ins. Co., 26 La. Ann. 298; Peoria Sugar Refining Co. v. Canada, F. & M. Ins. Co., 12 Ont. App. 418; Provincial Ins. Co. v. Ætna Ins. Co., 16 M. C. Q. B., 135; Peoria, M. & F. Ins. Co. v. Whitehill, 25 Ill. 466; Carroway v. Merchants' Mut. Ins. Co., 26 La. Ann. 298.

Within-Months after the Fire, etc.-While there may be some show of reason in holding that a provision in a policy requiring suit to be brought within a certain number of months "after the loss," means that the limitation begins to run from the time when the loss is payable, and not from the date of the fire, it would seem that such reasoning would not apply where the policy requires suit to be brought within a certain number of months "after the fire," yet very respectable courts have decided that there is no real distinction between the meaning of the clauses; that "after the loss" and "after the fire" mean identically the same thing; and that the limitation in the latter case does not begin to run until time for payment of the loss has accrued. This is the rule in the federal courts (cases cited in opinion, supra). But it may be

said that the cases in the federal courts are entitled to little weight, as the judges were divided on the question. In Case v. Sun Ins. Co., 83 Cal. 473, following the rulings of the federal court, the court seems to have arrived at the conclusion announced by reason of the fact that the company exacted full compliance with all of the conditions of the policy; and that, after complying, or attempting to comply with such conditions, the twelve months within which to bring the action had expired. The court, in the opinion, says that this case is distinguishable from cases in which the plaintiff had ample time, after his right of action accrued, to have commenced it within twelve months after the loss occurred; but further says, "We must concede, however, that" those cases are not "altogether in harmony with the cases which we follow in this case." Other cases so holding are Fireman's Fund Ins. Co. v. Buckstaff, 56 N. W. Rep. 696; German Ins. Co. v. Davis. 59 N. Y. 698. These decisions reach results more clearly in opposition, if such a thing be possible, to the meaning and intent of the parties, as expressed in the language used, than do the cases which hold that the words "after the loss occurs" mean "after the cause of action accrues." They have not in their favor even the argument of the New York courts, that the loss meant is the loss to the insurer by the accruing of a cause of action against him, and not the loss by fire of the property insured. It would seem incredible that, when the parties say six or twelve months next after the date of the fire they mean six or twelve months after some other date or event. In State Ins. Co. v. Stoffels, 48 Kan. 205 (cited by the court in the opinion, supra). the court, in construing this clause, says: "This language of the policy sued on differs from the language of those policies in which the limitation takes effect from the time when the 'action accrues,' or the 'loss accrues.' or which use some other more general and less definite language, which must be construed by the courts. The language of this policy needs no construction, and, in fact, admits of none.

Within-Months after the Death or Injury.-In Cooper v. U. S. Mutual Acc. Ass'n, 57 Hun, 407, 10 N. Y. Supp. 748, the policy required the action to be begun within "one year from the time of the alleged accidental injury." The court held that the plaintiff had twelve months to bring a suit after the right of action was complete. On appeal of this case to the Court of Appeals of New York, 132 N. Y. 834, that court arrived at the same conclusion, viz: that the action was not barred by the limitation, but by a different reasoning. It says: "It will be observed that provisions are made in the certificate for two different persons, who, upon the happening of the event specified, may have a right of action against the association. One provision is in favor of Cooper, who may recover during his life-time the amount provided for his disability resulting from the accidental injury received; the other is to his wife, which is for the injuries which she suffers by reason of his death, resulting from such accident. The accident received by Cooper did not injure the plaintiff or give her a right of action until death ensued. So far as she is concerned the infliction of the wound is but the beginning, and the death is the completion of the injury. Her suit must be "commenced within one year from the time of the alleged accidental injury;" in other words, within one year from the time of the injury to her, which was the death of her husband as the result of the accident." Also see Voorheis v. People's Mut. Ben. Soc., 91 Mich. 469. The Michigan case (91 Mich. 469, supra), was overruled by the later cases of Law v. New England Mut.



Acc. Ase'n, 94 Mich. 266, and Shackett v. People's Mut. Ben. Soc., 64 N. W. Rep. 875, where the court held that the action must be commenced within one year from the time of the alleged accidental injury. Also see Lowe v. U. S. Mutual Acc. Ass'n, 20 S. E. Rep. 169; Provident Fund Soc. v. Howell, 18 South. Rep. 311. In cases of life insurance the New York courts have adopted a different rule from that applied to are and accident insurance. In Sweetser v. Metropolitan Life Ins. Co., 59 N. Y. St. 249, where the policy required action to be brought within one year after "the death of the insured," the court held that the limitation began to run from the date of the death of the insured; and so in Elliott v. Mut. Ben. Life Ass'n, 27 N. Y. Supp. 696. The New York courts announcing these decisions do not attempt to distinguish these cases from the cases of fire and accident insurance, in which a different rule was announced. It must be said that in all, or nearly all, of the cases holding that "after the loss," "after the fire," "after the accidental mjury," or "after the death," mean after the right of action has matured, the courts might have arrived at the same conclusion without doing violence to the language of the contract, as some of them plainly admit they have done. The companies in those cases might have been held under the doctrine of estoppel or waiver. Thus, in Phenix Ins. Co. v. Steele (cited in the opinion, supra), the company had prolonged the negotiations for settlement beyond a reasonable time, as the court expressly found, and had thereby waived the limitation clause; and so, in Case v. Sun Ins. Co., supra, the negotiations for settlement continued for nearly two months after the expiration of the limitation period. If the company prolongs negotiations for settlement beyond the limitation period named in the policy, or within a very short time of its expiration, it certainly should be held to have waived such limitation, or be estopped to insist on it as a defense; and where it has waived it, or it is estopped to densist on it as a defense, the insured may bring his action within any time allowed by the general statute of limitations; but where the company had done nothing to induce the insured to delay his action and has not demanded proofs of loss, arbitration, examination of the insured, or other things provided by the policy, there can be no sufficient reason for not holding that the period of limitations runs from the date of the fire, accidental injury, or death. And so, if a company has been negotiating with an insured, looking to an amicable settlement of the claim, but has ceased such negotiations, four, five or more months before the expiration of the limitation period, there can be no sufficient reason for not making a like ruling in such cases. The courts should give full meaning to every provision of the contracts of insurance companies the same as they do to contracts of individuals; but it clearly appears that they have not done so in construing the limitation clause in policies of insurance. As said by the Supreme Court of Wyoming, McFarland V. Ass'n, 38 Pac. Rep. 347, cited in opinion, supra, "in no kind of contracts, except of contracts of insurance, have such constructions been given to similar language or such departure from the meaning of words been tolerated. No such construction of statutes has been made." JOHN A. FINCH.

Indianapolis, Ind.

4:

JETSAM AND FLOTSAM.

WHEN DOES A COLLECTING BANK BECOME A DEBTOR? Two recent cases sharply illustrate the divergence of judicial opinion regarding the liabilities of a bank that has collected paper for another. In one instance the collection was made before the insolvency of the collecting bank, and after the insolvency the latter was held a trustee for the amount collected. Winstandley v. Second Bank of Louisville, 41 N. E. Rep. 956 (Ind.). In the other case the collection was made after insolvency, but before assignment, and the collecting bank was a held a debtor. Sayles v. Cox. 32 S. W. Rep. 626 (Tenn.).

The Indiana court assumes that the collecting bank was a trustee, and devotes itself chiefly to the discussion of whether the trust fund can be traced into the bank assets. This assumption seems erroneous. The ordinary understanding and usage between banks and their customers, when notes are indorsed to a bank for collection is not that the bank is to keep separate the proceeds and remit them in specie, but that they are to be turned into the general funds of the bank, which then becomes liable for the amount either by a check to the customer, or a draft in his favor upon some third person. Such being the usual understanding, it is just to hold, in the language of the Massachusetts Supreme Court, that "one who collects commercial paper through the agency of banks must be held to impliedly contract that the business may be done according to their well known usages, so far as to permit the money collected to be mingled with the funds of the collecting bank." Freeman's Bank v. National Tube Co., 151 Mass. 413. As pointed out in Tinkham v. Heyworth, 31 Ill. 519, banks charge no fee for holding money collected, except the right to use it until it is demanded, and if they are not to be allowed to exercise this, they must be entitled to compensation as safety deposit companies for moneys collected-an idea not apt to enlist commercial favor. Certainly all arguments based upon commercial convenience and usage support the view that after collection the collecting bank should be considered a debtor, and if it becomes insolvent before the customer has been paid the latter must come in with the other general creditors. Nothing in this, of course, prevents a collecting bank from making itself a trustee by special understanding with its customer, as in Bank v. Weems, 69 Tex. 489.

The Tennessee case errs in the opposite direction. When the officers of a bank know it to be insolvent at the time they accept paper for collection, it is a fraud upon its customer for the bank to take the proceeds in exchange for its own liability, and after collection they should be treated as trust property for the customer's benefit. Somerville v. Beal, 49 Fed. Rep. 790; Jockusch v. Towsey, 51 Tex. 129.-Harvard Law Reviero.

BOOK REVIEWS.

WALKER ON PATENTS.

Since the first edition of this work in 1883 it has justly been regarded as the authoritative treatise on the subject of the patent laws of the United States. This is the third edition. Many improvements on the second edition have been made, and a great number of new and important cases have been added. The experience of the author for a great number of years as a practitioner in the line of patent causes is an assurance of the valuable character of this work. It is well prepared, exhaustive in subjects and citation of cases. It is a volume of seven hundred and fifty pages. Published by Baker, Voorhis & Co., New York.

BOOKS RECEIVED.

- The American and English Encyclopædia of Law.
 Compiled under the Editorial Supervision of
 Charles F. Williams, assisted by Davis S. Garland. Volume XXIX. Northport, Long Island,
 N. Y. Edward Thompson Company, Law Publishers. 1896.
- A Manual of Elementary Law, Being a Summary of the Well-settled Elementary Principles of American Law. By William P. Fishback, Dean of the Indiana Law School. Indianapolis and Kansas City. The Bowen-Merrill Company. 1896.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resert, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Fail or Commented upon in our Notes of Recent Decisions.

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1. ACCIDENT INSURANCE — "Intentional Injuries."—A policy insuring against injuries through "external, violent, and accidental means," except when resulting

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from "intentional injuries" and other specified causes, does not exempt the insurer from liability for injuries inflicted independently by third persons, where the other causes specified all involve acts in which the insured must participate by intent or consent.—BUTTOM V. AMERICAN MUT. ACC. ASS'N, Wis., 65 N. W. Rep. 861.

- 2. ACTION—Oil Well.—Where a pipe-line company receives oil from the person in possession of the well which furnishes such oil, another claimant of the oil cannot sue the company for the oil, or the value thereof, as this involves the question of title to the well.—GIPPIN V. SOUTHWEST PERNSILVANIA PIPE LINES, Penn., 33 Atl. Rep. 578.
- 3. ADMINISTRATION Allowance Homestead.—A widow living with and sole heir of her widowed mother at the time of the latter's death, is entitled to the homestead or allowance in lieu thereof, under Rev. St. tit. 37, ch. 18, providing that the homestead, or an allowance in lieu of it, shall, if there be no widow, be delivered to the guardian of the minor children and unmarried daughters, if any, living with the family.—KRUEGER v. WOLF, Tex., 33 S. W. Rep. 663.
- 4. ADVERSE POSSESSION—Parol Contract of Sale.—A vendee of land in possession under a parol contract of sale holds adversely to his vendor from the time that the contract is executed by the payment of the purchase money.—Ward v. Cochran, U. S. C. C. of App., 71 Fed. Rep. 127.
- 5. AGISTER'S LIEN Priority.—Where an agister leaves the stock he is feeding and caring for to be herded temporarily by another person, and they are driven off during his temporary absence by the owner or one having a special ownership in them, the agister will not be deemed to have lost his lien if, within a reasonable time, he demands a return of the stock.—WILLABD V. WHINFIELD, Kan., 43 Pac. Rep. 815.
- 6. APPEALABLE ORDER.—An order, to be final and reviewable on error or appeal, must dispose of the merits of the case, and leave nothing for the further judicial determination of the court.—BARTRAM V. SHERMAN, Neb., 65 N. W. Rep. 789.
- 7. ASSAULT—Damages Mental Suffering.—In an action for assault, compensation for mental suffering may be recovered, though there was no battery.—LEACH V. LEACH, Tex., 83 S. W. Rep. 703.
- 8. ASSIGNMENT Mistake of Law Fraudulent Conveyance.—A mistaken belief that certain mortgages were valid securities is a mistake of law, and an action to set aside a conveyance made under such belief cannot be maintained in the absence of an allegation that the grantor was ignorant of the facts invalidating such securities.—KYES V. MERRILL FURNITURE CO., Wis., 65 N. W. Rep. 785.
- 9. ASSIGNMENT FOR BENEFIT OF CREDITORS—Presentation of Claim.—One who, through his own fault and neglect, fails to present for allowance his claim against an assigned estate within the time allotted therefor by law, in conformity with the order of the county court, is forever barred, and will not thereafter be permitted to prorate with other creditors of the estate.—COMMERCIAL NAT. BANK OF OMAHA V. LIPP, Neb., & N. W. Rep. 777.
- 10. Assignment for Creditors Estoppel of Oreditor.—The fact that a subcontractor has requested the contractor's assignee for the benefit of creditors to complete the work in order that, under a previous agreement with the assignor, the amount due on the contract may offset his own liability to the insolvent, will estop him from asserting that the assignment is fraudulent as to creditors.—Groves v. Rice, N. Y., 42 N. E. Rep. 664.
- 11. Assignment for Creditors.— Necessity of Witness.—Under Act Neb. June 1, 1883, requiring a voluntary assignment for the benefit of creditors to be executed in the same manner as a conveyance of real estate, taken in connection with Const. 8t. Neb. 1891, ch.



47, § 4324, requiring a deed of real estate to be executed in the presence of at least one competent witness, who shall subscribe his name, an assignment which is not witnessed is invalid, and conveys no title, as against an attaching creditor.—SUMMERS v. WHITE, U. S. C. C. of App., 71 Fed. Rep. 106.

12. ATTACHMENT.—Persons suing out an attachment, and executing a bond to indemnify the sheriff for seizure of goods belonging to another than the attachment defendant, are liable to the owner for the trespass.—
BICE V. WOOD, Ark., 88 S. W. Rep. 686.

13. ATTACHMENT — Affidavit.—A junior attaching creditor, the affidavit for whose attachment, made by his agent, alleges as the source of deponent's information letters from his principal, has no standing to urge that a senior attachment be set aside on the ground that the affidavit therefor alleges deponent's source of information to be a cablegram from the foreign correspondent of deponent's firm.—LADENBURG V. COMMERCIAL BANK OF NEWFOUNDLAND, N. Y., 42 N. E. Rep. 867.

14. ATTACHMENT — Care of Attached Property.—It is the duty of an officer who selzes personal property on a writ of attachment to take such property into his actual possession, and to keep it under his control and have it forthooming to answer the judgment of the court, and for a neglect of this duty such officer and his sureties are liable to the party injured thereby.—WILLIAM DEERING & CO. v. WISHERD, Neb., 65 N. W. Bep. 788.

IS. ATTACHMENT—Insolvent Debtor.—As an insolvent cannot lawfuily send his property out of the State in the usual course of business, his property becomes subject to attachment where he shipped goods to other states to fill orders, the title remaining in the insolvent until delivery.—QUEEN CITY MANUF'G CO. V. BLALACE, Miss., 18 South. Rep. 800.

16. ATTACHMENT — Title to Goods—Bill of Lading.—Where claimant alleges title to a carload of grain, attached as the property of the shipper and consignee, by indorsement and transfer of the bill of lading prior to the attachment, plaintiff who joins issue, in effect asserting that the indorsement was subsequent to the levy, cannot give evidence of custom to overcome claimant's showing of title by such indorsement and transfer; any evidence of custom given by claimant having simply amounted to a statement of what his legal rights were by reason of the indorsement and transfer.—MERCANTILE BANKING CO. v. LANDA, Tex., \$3.8. W. Rep. 681.

17. Banks—General or Special Deposits — Overdraft.—Where a customer of a bank, who has overdrawn, and thus stands indebted in open account to the bank, makes a general deposit therein, the presumption of law is that such deposit was made and received towards the payment of such overdraft.—NICHOLS v. STATE, Neb., 65 N. W. Rep. 774.

18. Banks—Negligence of Payee in Collecting Check.—Where a letter containing a check drawn on a bank in a foreign city was sent to the plaintiff's former post-office address, and was sent from there, without unnecessary delay, to the place where he had removed, but said bank had suspended before the letter was received, plaintiff was not chargeable with negligence in failing to receive and forward the check.—LLOYD v. OSBORNE, Wis., 65 N. W. Rep. 859.

19. Bond—Concealment by Principal.—Gen. St. § 1889, provides that a right of action fraudulently concealed shall be deemed to accrue when discovered by him in whose favor it exists: Held, that where the principal in a fidelity bond concealed from the obligee a breach of the bond, limitations did not run in favor of the surety until discovery by the obligee of his right of action.—EISING V. ANDREWS, Conn., 33 Atl. Rep. 585.

20. CARRIERS — Ejection of Trespasser—Gross Negligence.—Care must be taken, in removing a trespasser from a moving railway train, not to expose him to serious injury, and whether such train is running too

fast, under the circumstances, to admit of the exercise of the right of ejection, is a question of fact, to be submitted to the jury under proper instructions.—UNION PAC. BY. CO. V. MITCHELL, Kau., 43 Pac. Rep. 244.

21. Carriers—Passengers—Liability of Receiver.—In an action against a railroad company for injuries received from a defective platform while alighting from a moving train, where the pleadings put in issue the question of contributory negligence, it is reversible error to instruct that plaintiff cannot recover if he leaped from the train in a reckless manner, without also submitting the issue of contributory negligence in leaping from the train at all.—Missouri, K. & T. Ry. Co. v. Wylle, Tex., 38 S. W. Rep. 771.

22. Carriers—Personal Injuries — Stipulations.—In an action for personal injuries received by a shipper while riding in a stock car with a horse shipped by him, evidence of a custom on the part of defendant's conductors in permitting the shippers of live stock to ride in the car with the stock is admissible to show a waiver by defendant of a stipulation in the shipment contract requiring plaintiff to ride in the caboose.— Missouri, K. & T. Ry. Co. of Texas v. Cook, Tex., 88 S. W. Rep. 669.

28. CHATTEL MORTGAGE—Attachment—Where property has been seized under a writ of attachment regularly issued and levied, the court acquires jurisdiction over the property, so far, at least, as to render the custody of its officers lawful; and jurisdiction to that extent is not lost, so long as the action remains pending, by failure to serve process in the main action upon the defendant.—Darnell v. Mack, Neb., 65 N. W. Red., 805.

24. CHATTEL MORTGAGE—Fraudulent Sale by Mortgages.—A sale by a mortgage of chattels worth much more than the mortgage debt, fraudulently made, to a vendee participating in the fraud, for the purpose of defeating creditors of the mortgagor, and depriving them of any benefit from the surplus over the mortgage debt, conveys no title, and such fraudulent vendee has no standing in court to assert a claim against a sheriff who has attached the goods at the suit of creditors of the mortgagor.—Collingsworth v. Bell, Kan., 43 Pac. Rep. 252.

25. CONFLICT OF LAWS — Action against Foreign Executor.—A grant of administration or letters testamentary in another State has no force outside that State, so as to subject the administrator or executor to a suit here for an account, unless he reside and have assets here.—ONEY V. FERGUSON, W. Va., 28 S. E. Rep. 710.

26. CONFLICT OF LAWS—Actions in other States.—Garnishee proceedings commenced in the State against a railroad company for wages due an employee are not abated by the commencement of an action, in another State, by the employee against the railroad for such wages.—WILLARD V. STURM, Iowa, 65 N. W. Rep. 848.

27. CONSTITUTIONAL LAW—Legislative Powers—Insurance.—Laws, 1891, ch. 195, empowering the insurance commissioner to adopt a printed form, in blank, of a policy of fire insurance, together with such conditions as may be indorsed thereon, which, as near as the same can be made applicable, shall conform to the type and form of policy adopted by another State, is unconstitutional, as a delegation of legislative power.—Dow-LING V. LANCASHIRE INS. CO., Wis., 65 N. W. Rep. 788.

28. CONSTITUTIONAL LAW — Municipal Corporation—Ordinance.—The legislature has authority to confer power upon a city to regulate the location or to prohibit the maintenance of slaughter-houses in the city limits.—Beiling v. City of Evansville, Ind., 42 N. E. Rep. 621.

29. CONSTITUTIONAL LAW—Water for Irrigation.—Act March 19, 1889, and Act March 29, 1893, amendatory thereof, authorizing the appropriation of the waters of all natural streams in the arid districts of the State for purposes of "irrigation, domestic and other beneficial purposes," to the exclusion of the use thereof by other riparian owners for any but domestic uses,



without providing any compensation to such other riparian owners, violates Const. art. 1, prohibiting the taking of private property (section 17) without compensation.—BARRETT V. METCALFB, Tex., 38 8. W. Rep. 765.

- 30. CONTEMPT—Constructive Contempt.—A complaint is insufficient as the foundation of proceedings for constructive contempt which falls to state the facts constituting the alleged offense, and showing that the act of the accused amounts to a fraud upon the court, or tends to hinder or embarrass it in the administration of justice.—Cooley v. State, Neb., 65 N. W. Rep. 799.
- 81. CONTRACT—Action—Domicile.—Where sureties on a bond agree therein that the obligor may, without their consent, vary the original contract, "as to working district assigned, and otherwise," his note, made as evidence of a liability incurred under the bond, made payable in a county other than the domicile of the sureties, becomes a portion of the original contract, and the sureties, being bound thereby, may be sued on the note in the county where it is payable.—Taylor v. Gribble, Tex., 33 S. W. Rep. 765.
- 82. CONTRACT Construction Bond.—A building contractors' bond is not without consideration merely because the bond was executed after the contract, and after the contractors had commenced work, the contract having been entered into upon the faith of the promise of the contractors to give the bond.—SMITH V. MOLLESON, N. Y., 42 N. E. Rep. 669.
- 88. CONTRACT—Damages Breach.—In a suit by a contractor against his contractee for damages for the latter's failure to permit him to perform the work contracted to be done, the contractor's measure of damages is the profit he would have made on the contract had he performed it.—KREAMER V. IRWIN, Neb., 65 N. W. Rep. 884.
- 84. CONTRACTS—Doubtful Words—Construction.—The words, "don't sell we to exchange any goods that don't sell credit, for same," are mercantile terms; and in construing a contract in which they appear, evidence of their meaning may be received under Code Civ. Proc. § 683, providing that, when terms have a technical or otherwise peculiar signification, evidence of such signification is admissible.—NEWELL v. NICHOLSON, Mont., 48 Pac. Rep. 180.
- 35. CONTRACT—Employment or Partnership.—A contract reciting that in consideration of a salary of a certain amount per annum paid by the party of the first part (a firm) to the party of the second part, and a further consideration of a certain share in the net profits of the business of the firm, the party of the second part agreed to devote his time to their business as engineer, is a contract of employment, not of partnership.—PORTER v. CURTIS, IOWA, 65 N. W. Rep. 824.
- 36. CONTRACT Implied Provisions.—Plaintiff, who contracted to do certain work on a barge by a certain time, on penalty of a certain amount per day, will not be liable for delay caused by defendant's failure to deliver the barge, in accordance with his implied contract, within a reasonable time, and place it in a reasonably suitable condition or situation, to enable plaintiff to perform his contract.—Manistee Iron Works Co. v. Shores Lumber Co., Wis., 65 N. W. Rep. 863.
- 87. CONTRACT—Reclamations Validity—Public Policy.—Under St. ch. 183, § 4805, providing that reclamations on sales of tobacco by sample from public warehouse must be made within six months after sale, if the article is exported to a foreign country, a contract allowing reclamation on such sales to be made within nine months after sale is void, as against public policy.—WRIGHT V. GARDENER, Ky., 38 S. W. Rep. 622.
- 38. CONTRACT—Sale of Business by Physician—Public Policy.—A contract whereby a physician, in consideration of the purchase of his practice in a certain city by another physician, agreed not to practice in such city, is not against public policy.—MCCURRY v. GIBSON, Ala., 18 South. Rep. 807.

- 39. CONTRACT—Stock Speculation—Recovery of Margins.—Where the seller of grain does not intend to deliver the property sold, but simply to settle the difference in price, the transaction is illegal, whether his brokers and the purchaser knew of his intention or not.—CONNOR V. BLACK, Mo., 33 S. W. Rep. 783.
- 40. CORPORATIONS—Evidence.—In an action against a corporation on a contract alleged to have been entered into by it, admissions by the corporation in its pleading that it entered into the contract are sufficient to sustain a finding to that effect, though a witness testifies that the corporation was not formed until after the execution of the contract.—TALBOTT & SONS V. PLANTER's OIL CO., Tex., 83 S. W. Rep. 745.
- 41. CORPORATIONS Foreign Contract—Jurisdiction. —In an action against a foreign corporation doing business in the State, by a citizen of a foreign State, for failure to fulfill its contract wholly to be performed in the foreign State, a statute of such foreign State prohibiting recovery under the facts shown, which is not in the record, cannot be urged on appeal as ground for reversal of a judgment for plaintiff.—Western Union Tel. Co. v. Russell, Tex., 33 S. W. Red. 706.
- 42. CORPORATION-Insolvent Corporation-Procedure to Distribute Assets.—Where the petition in a civil action purports to seek a distribution of the assets of an insolvent corporation among its creditors, the assets of the corporation are the subject of the action; and an answer, in the nature of a cross petition, which discloses assets of the concern, in addition to those disclosed by the petition, or shows a title in the party filing such answer to share in the distribution of such assets, sets forth matters connected with the subject of the action. In such case the answer, or cross petition, is not subject to a demurrer, although it fails to disclose a cause of action "in favor of a defendant and against a plaintiff between whom a several judgment might be had in an action."-PETER V. FARREL FOUN-DRY & MACFINE Co., Ohio, 42 N. E. Rep. 690.
- 43. CORPORATIONS—Representations of Trustee—Purchase Note.—Where one of the trustees of an elemosynary corporation with full knowledge of all the facts, purchases land from the corporation at an enhanced valuation, on representations of the trustees individually made, without fraud that buildings are to be easied and a school started, and makes a donation to help carry out the plans, he caunot, in an action on his purchase note, plead such donation as a counterclaim, though the representations have not been fulfilled.—KOLP V. SPECHT, Tex., 33 S. W. Rep. 714.
- 44. CORPORATION Resident Agent.—Service on a person as agent of a foreign corporation, who was not employed by said corporation, is not sufficient to acquire jurisdiction of said corporation.—Texas & P. Br. Co. v. Neal, Tex., 38 S. W. Rep. 693.
- 45. CORPORATIONS—Stock Subscription.—The mere mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed by him.—HARDS V. PLATTE VAL. IMP. Co., Neb., 65 N. W. Rep. 781.
- 46. COUNTY TREASURER—Compensation.—A county treasurer cannot legally receive or retain any other or greater compensation for official responsibility and services than the salary expressly allowed by law.—SPRATLEY V. BOARD OF COUNTY COMMES. OF LEAVESWORTH COUNTY, Kan., 48 Pac. Rep. 232.
- 47. COURTS—Amendment of Records.—A court of record has the inherent authority to amend its records so as to make them conform to the facts. This power extends as well to supplying omissions as to correcting mistakes. And in the exercise of the power the court is not confined to an examination of the judge's minutes or other written evidence; it may proceed upon any satisfactory evidence.—SCHOOL DIST. NO. 1 OF HARLAN COUNTY v. BISHOP, Neb., 65 N. W. Rep. 902.
- 48. COVENANTS—Breach of Warranty.—A grantor in a warranty deed is bound by his covenant of warranty.



and his grantee can rely upon it, even though he knew the title to the premises conveyed was defective.—BATTERTON V. SMITH, Kan., 48 Pac. Rep. 275.

- 49. COVENANTS—Splitting Cause of Action.—An action for breach of covenant of seisin is not a bar to an action for breach of covenant in the same deed against incumbrances; the actions not being founded on the same cause of action, and the rule prohibiting the splitting of a single cause of action having, therefore, no application.—Moore v. Johnston, Ala., 18 South. Rep. 825.
- 59. COVENANT TO PAY RENT—Action.—The administrators of the lessor may maintain an action on a covenant whereby one obligated himself to "become surety for the prompt and full payment of the rent and performance of the covenants as specified" in the lease.—WALSH V. PACKARD, Mass., 42 N. E. Rep. 577.
- 51. CRIMINAL EVIDENCE—Adultery.—On a trial for living in adultery, it was proper to admit evidence that defendant and his paramour and her two children embarked together on defendant's boat, after taking measures to avoid her husband, and that defendant refused to leave her on shore till the next morning, saying he could make her comfortable in the cabin of his boat.—Brown v. State, Ala., 18 South. Rep. 811.
- 53. CRIMINAL EVIDENCE—Homicide—Dying Declaration.—The ratification by deceased of his previous dying declaration is not admissible unless shown to have been made in expectation of death.—CARVER v. UMITED STATES, U. 8. S. C., 16 S. C. Rep. 388.
- 53. CRIMINAL EVIDENCE—Murder.—Where, in a prosecution for murder, evidence of a remark by accused is admitted in evidence to show malice, he may show the conversation accompanying it, and circumstances prompting the remark, though it involves the introduction of evidence which would otherwise be hearsay.—EMBERY V. STATE, Wis., 65 N. W. Rep. 848.
- 54. CRIMINAL LAW—Bail—Lunacy of Defendant.—One under indictment for murder, and at liberty on bail, was adjudged a lunatic in proceedings before a police judge, followed by his confinement in an asylum by the 8tate, and the remission by the governor of the forfeiture of his bail bond. It was also clearly shown by the testimony that he was in fact a lunatic: Held, that such facts constituted a complete defense to proceedings against the sureties on his ball bond.—Wood V. COMMONWBALTH, Ky., 38 S. W. Rep. 729.
- 55. CRIMINAL LAW—Elections—Procuring False Registration.—On a prosecution for procuring a certain person to falsely register as a voter in a precinct, others may testify that defendant also procured them to falsely register.—PROPLE v. STERNBERG, Cal., 48 Pac. Rep. 198.
- 56. CRIMINAL LAW—False Pretenses—Description of Money.—A description in an indictment of money as "345 in money, of the value of \$45," is sufficient; Rev. St. 1889, § 4111, providing that it shall be sufficient for an indictment making an averment as to money made or issued by a bank incorporated by law, or made or issued by virtue of any law of the United States, to describe it simply as money, without specifying any particular coin or note.—State v. Feazell, Mo., 88 S. W. Rep. 786.
- 57. CRIMINAL LAW—False Pretenses—Indictment.— Under Bill of Rights, art. 2, § 22, which entitles one charged with crime "to demand the nature and cause of the accusation," an indictment is bad which charges a defendant with obtaining property by falsely pretending to be the unqualified owner of certain horses exchanged therefor, when such horses were in fact incumbered by mortgage, but fails to describe the horses, or state the parties to the mortgage, or its date examount, or the county where recorded, or whether possession was delivered to the mortgage was recorded.—Stratz v. Stows, Mo., 58 S. W. Rép. 799.
- 38. CRIMINAL LAW-Forgery of Note.—In an indictment for torgery of a promissory note, the omission

- in setting it out according to its "purport and value" of a power of attorney to confess judgment, attached to the note, is not a variance material to the merits of the case, nor prejudicial to the defendant, and therefore not a ground of acquittal.—BURDGE v. STATE, Ohio, 42 N. E. Rep. 594.
- 59. CRIMINAL LAW-Fraud-Procuring Signature.—An indictment under Hill's Ann. Laws, § 1777, making it a penal offense to obtain by false pretense a signature to a writing, the false making of which would be forgery, which alleges that defendant, by falsely representing to W that he was authorized by a corporation to draw a draft on it to W's order to procure funds to be used for the corporation, obtained W's indorsement to such a draft, is sufficient without an allegation that the indorsement was for defendant's accommodation.—STATE V. HANSCOM, Oreg., 43 Pac. Rep. 167.
- 60. CRIMINAL LAW—Homicide—Change of Venue.—An affidavit for change of venue must state facts and circumstances from which the conclusion is deduced that a fair trial cannot be had, and not merely opinion that it cannot, and the court must be satisfied from those facts that he cannot or may not get such fair trial, and not from conclusions or opinions of the defendant or his witnesses.—STATE v. DOUGLASS, W. Va., 23 S. E. Rep. 724.
- 61. CRIMINAL LAW Homicide—Instructions.—It is prejudicial error for the court, in such a case, to group together in an instruction the important material facts put in evidence by the State as to the prisoner's sanity, and omit all mention of the evidence produced by the prisoner tending to traverse that of the State.—WILLIAMS V. STATE, Neb., 65 N. W. Rep. 783.
- 62. CRIMINAL LAW—Indictment for Rape.—An indictment under § 6816, Rev. St., for carnally knowing a female child under 14 years of age, need not aver that she is not the daughter or sister of the accused.—JONES V. STATE, Ohio, 42 N. E. Rep. 659.
- 63. CRIMINAL LAW—Lascivious Cohabitation.—Under Rev. St. 1889, § 3798, punishing a man and woman who lasciviously "abide and cohabit" with each other, to warrant a conviction the evidence must show that they lived together as man and wife; evidence of secret liaisons is insufficient.—STATE v. CHANDLER, Mo., \$3 S. W. Rep. 797.
- 64. CRIMINAL LAW Murder Indictment. Under Comp. Laws 1887, p. 505, § 21, making "willful, deliberate and premeditated killing" murder in the first degree, an indictment charging the killing to have been done by defendant "of his deliberate, premeditated malice aforethought," sufficiently charges that the killing was deliberate and premeditated.—STATE V. METCALF, Mont., 48 Pac. Rep. 182.
- 65. CRIMINAL LAW—Once in Jeopardy—Excusing Juror.—Where, in a capital case, a juror is excused by the court against defendant's objection, after evidence has been admitted, it is error to retain the other jurors without giving defendant the privilege asked for of reexamining them as to their then state of mind before being resworn to try the case with the new juror.—STATE v. VAUGHAN, Nev., 43 Pac. Rep. 198.
- 66. DAMAGES—Interstate Shipment.—Where cattle are injured by improper transportation, the measure of damages is the difference between their market value and what it would be but for the injuries.—TEXAS & P. RY. CO. V. AVERY, Tex., 33 S. W. Rep. 704.
- 67. DAMAGES FOR UNLAWFUL GARNISHMENT.—Plaintiff is entitled to recover, as actual damages for wrongful garnishment, the interest on the sum detained, and if the writ was issued for the purpose of harassing the debtor, exemplary damages.—WAUGH V. DABNEY, Tex., 83 S. W. Rep. 753.
- 68. DECEIT—Evidence.—In a suit upon a promissory note given as part payment for corporation stocks, the defense being that the defendants were induced to make such purchase by certain false representations of the plaintiff, testimony showing that prior to such



sale he made to other persons similar misstatements in the sale to them of a portion of the same series of stocks is irrelevant and immaterial.—Johnson v. Gulick, Neb., 65 N. W. Rep. 888.

- 69. DIVORCE—Contempt—Failure to Pay Alimony.—Where, in an action for divorce, the husband is ordered by the court to pay to the wife certain sums as suit money and temporary alimony, and is unable to pay the same, and he has not voluntarily created the disability for the purpose of avoiding such payment, he cannot be imprisoned until he obeys the order. But where he has the power to comply with the order, and fails to do so, he is guilty of a contempt of court, and may be imprisoned until he purges himself of the contempt by paying the money as ordered.—HURD v. HURD, Minn., 65 N. W. Rep. 728.
- 70. EASEMENTS.—A deed to a lot bounded on an alley recited, after the description of the premises, that the conveyance was "with the privilege of the main alley leading to the 'Palace Stables,' so called, as an easement for ingress and egress along the north line or alley line on the premises hereby deeded, for the distance of ninety-eight feet west from Franklin street, and no more, and for no other purpose:" Held, that the right of way was for ingress and egress necessary for any business which the grantee might conduct on the premises, and was not extinguished by a change in the use of the premises.—ARNOLD v. FEE, N. Y., 42 N. E. Rep. 588.
- 71. EJECTMENT—Disputed Division Line.—Where adjoining owners adopt a division line, and each takes possession of his respective tract as of right, and one of them subsequently, claiming another line as correct, brings ejectment for the land included between the two lines, and defendant sets up adverse possession as a defense, it is error to instruct that adverse possession cannot be based on a possession having its inception in license.—PEARSON v. DRYDEN, Oreg., 48 Pac. Rep. 166.
- 72. ELECTIONS—Board of Canvassers—Mandamus.—Where it appears that an unauthorized alteration has been made in the return of the vote after the return has been delivered to the county cierk, the canvassers should disregard the alteration, and make the count according to the original and true return.—STATE V. MCFADDEN, Neb., 65 N. W. Rep. 800.
- 7?. ELECTION AND VOTERS—Ballot—Marking Name of Candidate.—The provision of section 20, Act 1891 (Australian Ballot Law), for the expressing of the voter's intention by a mark 'pposite the name of the candidate of his choice, is mandatory, and the manner thus prescribed is exclusive of all others. And such is the rule whether the names of candidates be printed on the ballot or written thereon by the voter.—MARTIN v. MILES, Neb., 65 N. W. Rep. 880.
- 74. EQUITY Avoidance of Contract Duress. A threat to bring a civil suit for a balance of an overdue account, a part of which is conceded to be justly owing, does not constitute such duress as will avoid a promise made by the debtor under the threat.—ATKINSON v. ALLEN, U. S. C. C. of App., 71 Fed. Rep. 58.
- 75. EQUITY—Receiver of National Bank.—Equity has jurisdiction of a suit by the receiver of an insolvent national bank against all its shareholders to recover dividends unlawfully paid to them out of the capital at times when the bank had earned no net profits, and was in fact insolvent, it being in effect a suit to execute a trust, to undo a fraud, and to prevent a multiplicity of suits.—HAYDEN V. THOMPSON, U. S. C. C. of App., 71 Fed. Rep. 60.
- 76. ESTOPPEL Acquiescence. That a property owner permitted a natural gas company, without objection, to lay gas pipes across other lands and highways on each side of where his land abuts on a highway, does not estop him to deny the right of the company to lay the pipes in front of his land, though it is necessary to so lay the pipes in order to connect the company's pipe line with its wells.—Consumers' Gas Trust Co. v. Huntsinger, Ind., 42 N. E. Rep. 640.

- 77. EVIDENCE Abstracts of Title Omissions.—Laws 1891, p. 136, providing that, under certain conditions, "all land titles or land abstract books shall hereafter be competent (prima facie) evidence of the truth of the data or memorandum therein contained," gave to such an abstract only the force of a certified copy of a deed; and, where it falls to show an acknowledgment of a deed, such omission cannot be supplied by the testimony of a witness to the effect that mention of acknowledgments was purposely omitted from the abstract, and that only missing or irregular ones were noted in the remark column.—ROBINS V. GINOCCHIO, Tex., 83 S. W. Rep. 747.
- 78. EVIDENCE—Expert Testimony.—In an action to recover for services rendered by an attorney, the evidence of experts as to the value of the services rendered is advisory, and the jury are the proper judges of the value of such services.—COSGROVE V. LEONARD, Mo., 83 S. W. Rep. 777.
- 79. EVIDENCE Privileged Communications.—Information voluntarily intrusted to an attorney at law, where the relation of attorney and client does not exist, is not a privileged communication, under the provisions of the Code of Civil Procedure.—Home Fire Ins. Co. v. Berg, Neb., 65 N. W. Rep. 780.
- 80. EVIDENCE—Res Gestæ.—The statement of a person fatally injured in a railroad collision, made from 80 to 60 minutes after the accident, as to the manner in which it occurred, is simply the narration of a past occurrence, and not admissible as part of the res gestæ.—STEINHOFEL V. CHICAGO, M. & ST. P. RY. CO., Wis., 65 N. W. Rep. 852.
- 81. EXECUTION—Claims by Third Persons.—Where an execution against two defendants was levied on the goods of one of them, which were claimed by another person, the fact that, in forming the issue on a trial of the right to the goods, plaintiff alleged that they were the property of "defendants," will not preclude him from subjecting them to the execution as the property of the defendant against whom the execution was levied.—RAMEY v. W. O. PEOPLES GROCERY CO., Ala., 18 South. Rep. 586.
- 82. EXECUTION—Exemptions.—The words "trade or profession," include the business of an insurance agent, so as to entitle him to the exemption therein provided for.—Betz v. Maier, Tex., 33 S. W. Rep. 710.
- 83. EXECUTION—Sale—Distribution of Proceeds—Discharge of Mortgage.—The land of defendant in execution was subject to a mortgage recorded before the entry of the judgment, and to mechanics' liens filed after such entry: Held, that as the purchaser at the execution sale was entitled to rely on the record to determine whether the mortgage was prior to the mechanics' liens, and the date of the liens being therefore determined by the date of their fling, the lien of the mortgage was not divested, and hence it was not entitled to share in the proceeds of the execution sale.—HILLIARD V. TUSTIN, Penn., 33 Atl. Rep. 574.
- 84. FALSE IMPRISONMENT—Arrest.—An affidavit that affiant's store was burgiarized, and certain goods taken therefrom, that affiant believes that the store was burgiarized by 8 and V and another from the fact that said parties were about that time, after 1 a. m., "prowling" around and near the premises,—sufficiently tends to show the guilt of 8 and V to give the magistrate jurisdiction to issue a warrant, and therefore 8 and V. being arrested, have no action against affiant for false imprisonment.—Swart v. Rickard, N. Y., 42 N. E. Rep. 665.
- 85. FEDERAL COURTS.—A judgment of the federal circuit court in an action of ejectment will not be held void, in a collateral inquiry, for failure to recite service of process on or appearance of defendant, nor because no summons appeared in the transcript of the record, though said transcript was certified to be a true copy of the record remaining in the clerk's office, and constituted a complete transcript.—McConwell V. Day, Ark., 33 S. W. Rep. 781.

- 86. FEDERAL COURT—Error from State Court—Federal Question.—An issue in a State court between a railroad company and a construction company, which contracted to build a road for it, as to whether the former company, which had agreed to procure the right of way, properly secured it over public land in the mode provided by the act of congress, does not involve the validity of the act, nor a right claimed under it, so as to authorize a review of the decision by the supreme court.—MISSOURI PAC. RY. CO. v. FITZGERALD, U. S. S. C., 16 S. C. Rep. 389.
- 87. FEDERAL COURTS-Jurisdiction-Diverse Citizenship.-In a suit to foreclose a mortgage against the mortgagees and the purchaser of the equity of redemption, the second mortgagee was, on his request, made a party, and he filed a cross complaint asking for a foreclosure of his mortgage, and to this the mortgagors fled an answer. The only question litigated was whether this second mortgage was based on a legal consideration: Held, that it was error to remove the case to the federal court upon the application of the owner of the equity of redemption, a resident of another State, since neither the complaint nor the cross complaint showed more than a single cause of action, and the fact that different defendants had different defenses did not create separable controversies .-ROBBINS V. ELLENBOGEN, U. S. C. C. of App., 71 Fed. Rep. 4.
- 88. FEDERAL COURTS—Jurisdiction—Property in Custody of State Court.—A bill calling upon the federal court to dispossess administrators of a decedent of all control over the property committed to their charge, and to assume the administration and distribution of the property, and praying the appointment of a receiver, and a transfer to the court of all title, deeds, securities, and papers of every kind belonging to decedent, and an injunction against all interference by the administrators with said estate, is demurrable as seeking to interfere with property in the custody of the State probate court.—Lant v. Mantley, U. S. C. C. (Mich.), 71 Fed. Rep. 7.
- 89. FEDERAL OFFENSE—Bail Bond—Validity.—When a United States commissioner, having jurisdiction to decide whether there was probable cause to believe that one brought before him has committed an offense, orders the accused to give bail, the bail bond taken in pursuance of such order is not void, though the information charges no offense.—HARDY V. UNITED STATES, U.S. C. C. of App., 71 Fed. Rep. 158.
- 90. FEDERAL OFFENSE—Wrongful Use of Mails.—An indictment, under Rev. St. § 5480, for using the mails for promoting "a scheme and artifice to defraud," must show that there was a motive of gain on the part of the defendant, since the general language of the statute must be limited to such schemes and artifices as are cjusdem generic with those specifically named, and these latter are of the kind which are gainful to the wrong-doer.—United States v. Beach, U. S. D. C. (Colo.), 71 Fed. Rep. 160.
- 91. FRAUDULENT CONVEYANCES—Judgments.—Under 4 Rev. 8t. p. 2592, § 1, providing that a judgment suffered with intent to defraud creditors shall be void, such fraudulent intent on the part of the debtor alone does not render the judgment void.—Galle v. Tode, N. Y., 42 N. E. Rep. 678.
- 92. Fraudulent Representations.—Relief may be had against one for fraudulent representations, he not believing his representations true, though he did not actually know they were false.—Hunter v. French Lasgue Safety Cure Co. of Sioux City, Iowa, 65 N. W. Rep. 826.
- 38. GIPT BY LIFE TENANT Growing Crops.—Crops planted by a life tenant and growing on the land at his death are subject to his gift thereof made during his lifetime.—SHAPFER V. STEVENS, Ind., 42 N. E. Rep. 224
- M. GIPTS INTER VIVOS Delivery.—Delivery of a mortgage by a mortgagee to her husband, to be delivered to complainants on her death, followed by due

- delivery to complainants, is a sufficient delivery of the gift.—Hagerman v. Wigent, Mich., 65 N. W. Rep. 756,
- 95. HIGHWAYS Unopened Street.—Where land is platted as a town site by authority of the State, and a street is thereon designated and dedicated to the public use, such street is within Rev. St. § 1886, requiring every corporation constructing a railroad to restore every street and highway across which such railroad may be constructed to its former condition.—CITY OF RACINE v. CHICAGO & N. W. RY. CO., Wis., 65 N. W. Rep. 857.
- 96. HOMESTEAD Abandonment.—The fact that the owner and occupier of a farm moves from it to a city to educate his children, with the intention to return to the farm in about three years, does not constitute an abandonment of the farm as a homestead.—C. AUI,T-MAN & CO. V. ALLEN, Tex., 83 S. W. Rep. 679.
- 97. Homestead Conveyance or Incumbrance.—A husband has the right to make contracts for the purpose of acquiring a homestead, and, where valid liens against any interest he may have acquired in the property grow out of such contracts, his conveyance or incumbrance thereof in settlement of such liens, though not joined in by the wife, will be valid, if made in good faith.—INVESTORS' MORTG. SEC. Co. v. LOYD, Tex., 33 S. W. Rep. 750.
- 98. HUSBAND AND WIFE.—In Kansas a married woman can hold her own separate property, can purchase property from her husband, and can be by him made a preferred creditor; but where she claims to have purchased property from, or to have been a preferred creditor of, the husband, who is financially embarrassed, the court should require clear and convincing proof of the transaction, and the good faith and adequate consideration thereof.—Van Zandt v. Shuiler, Kan., 43 Pac. Rep. 296.
- 99. HUSBAND AND WIFE Community Property.— Land purchased by the husband during the life-time of his wife, and paid for out of community property, becomes community property.—SHORT v. SHORT, Tex., 38 S. W. Rep. 682.
- 100. HUSBAND AND WIFE—Fraudulent Conveyance.—
 A husband has the right to transfer property to his
 wife in payment of a debt due to her, in preference to
 paying the claims of his other creditors.—FIRST NAT.
 BANK OF PUEBLO V. KAVANACH, Colo., 43 Pac. Rep. 217.
- 101. HUSBAND'S MORTGAGE TO WIFE.—A husband executed a mortgage to his wife on tract A, conditioned that he would satisfy a mortgage, in which his wife had joined, on tract B and thereby save her inchoate interest in said tract B. Afterwards the wife joined in a quitclaim deed to the mortgage of tract B, but at the time she did so her husband was insolvent, and unable to satisfy said mortgage on tract B: Held, that the wife was entitled to foreclose the mortgage to her, for the value of her inchoate interest in tract B, though the mortgage on tract B had not been foreclosed, and she had executed said quitclaim.—MILBURN V. MILBURN, Ind., 42 N. E. Rep. 611.
- 102. Insane Persons Guardians Actions.—Independent of statute, an action cannot be maintained by one as next friend of an insane person.—TIFFANY v. WORTHINGTON, IOWA, 65 N. W. Rep. 817.
- 108. INSAME PERSON Party to Action.—An insane ward under guardianship is not a proper or necessary party to an action to foreclose a mortgage on the lands of said ward, and therefore the failure to serve summons on the ward, or the fact that the ward did not authorize the appearance of attorneys, is not ground, under Rev. St. 1894, § 399 (Rev. St. 1881, § 896), to set aside a judgment on the ground of the excusable neglect of the ward.—Jones v. Crowell, Ind., 42 N. E. Rev. 612.
- 104. Insurance—Conditions—Waiver.—A clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity is for the benefit of the company, and may be waived by the insurer.—McEvor v. Nebraska & I. Ins. Co., Neb., 65 N. W. Rep. 888.

- 105. Insurance—Conditions of Policy.—Where an insurance company has knowledge of facts which show that a condition of the policy has been broken, the act of its adjuster, sent to ascertain the amount of the loss, in requiring the assured, at some trouble and cost, to supplement his proofs of loss by furnishing a "carpenter's estimate" of the damage, estops the company from declaring such breach to be a forfeiture of the policy.—DICK v. EQUITABLE FIRE & MARINE INS. Co., Wis., 65 N. W. Rep. 746.
- 106. INSURANCE Powers of Agent.—A provision in the application or in the policy making him the agent of the insured and not of the company cannot change his legal status as agent of the company, or the law of agency, if he is in fact the agent of the latter.—COLES V. JEFFERSON INS. CO., W. Va., 23 S. E. Rep. 732.
- 107. INSURANCE—Proofs of Loss Waiver.—A special agent and adjuster of a fire insurance company may waive proofs of loss though the policy provides that he cannot do so.—Dwelling House Ins. Co. v. Dow-Dall, Ill., 42 N. E. Rep. 606.
- 108. INSURANCE Renewal of Policy Estoppel.—When the agents of an insurance company, who are duly authorized to solicit and make contracts of insurance, deliberately represent to the assured that a given policy issued by the company has been renewed, and subsequently receive and appropriate money which they have good reason to believe is paid to cover the cost of such extended insurance, the company will be estopped, after a loss has occurred, to allege that the policy was not renewed.—INTERNATIONAL TRUST CO. V. NORWICH UNION FIRE INS. Soc., U. S. C. C. of App., 71 Fed. Rep. 81.
- 109. Intoxicating Liquors—Illegal Sale.—A druggist who has complied with the statutory provision to entitle him to sell liquor for medicinal purposes cannot, on proof of one illegal sale of liquor as a beverage, be convicted of keeping a place for the illegal sale of liquors. The prosecution should be for the unlawful sale.—Maynard v. Eaton Circuit Judge, Mich., 65 N. W. Bep. 760.
- 110. INTOXICATING LIQUOR License.—Laws 1892, ch. 401, as amended by Laws 1893, ch. 480, § 43, provides that no person who shall not have been licensed prior to the passage of this act shall hereafter be licensed to sell liquors in any building for which a license does not exist at the time of the passage of the act which shall be within a certain distance of a church or school building: Held, that a person was not entitled to be licensed to sell liquors in a building within the prohibited distance because at the time of the passage of the act he was licensed to sell liquors in another part of the city.—PEOPLE V. MURBAY, N. Y., 42 N. E. Rep. 584.
- 111. JUDGMENT—Collateral Attack.—A judgment rendered in a federal court cannot be collaterally attacked because the jurisdictional averment as to the citizenship of plaintiff was insufficient.—RICEV. ADLER-GOLDMAN COMMISSION CO., U. S. C. C. of App., 71 Fed. Rep. 151.
- 112. JUDGMENT—Effect on Lien.—A court upon setting aside a mere money judgment, has no power to continue in existence the statutory judgment lien of the judgment set aside, that it may attach to such judgment as subsequently may be rendered in the same cause.—FARMERS' LOAN & TRUST CO. v. KILLINGER, Neb., 65 N. W. Rep. 790.
- 11s. JUDGMENT Foreign Judgment.—A judgment in an action brought in a foreign State to set aside a deed to lands in Iowa did not settle the title to said lands as to defendants living in Iowa who did not appear in said action, where said judgment did not purport to act upon the land, though it ordered a defendant who did appear to execute a deed to said lands to the plaintiff in that action, and enjoined the other defendants from prosecuting an action in Iowa affecting the title to said land, or from conveying or incumbering the same, and it appeared that prior to said action

- plaintiff therein had conveyed the lands to his wife.— BLACKMAN V. WRIGHT, IOWA, 65 N. W. Rep. 848.
- 114. JUDGMEET—Injunction.—That the defendant who had in charge the defense to an action was unable to attend the trial, on account of his having missed the train, and afterwards forgot about the action until the time for appeal had elapsed, on account of his mind being occupied with the protection of property from forest fires which were raging with great violence at the time, is not ground for restraining the enforcement of the default judgment.—Nye v. Sochor, Wis., & N. W. Rep. 834.
- 115. JUDGMENT Lien on Homestead.—A duly filed and registered judgment against a homesteader becomes a lien on the land occupied as a homestead on its being abandoned as such.—GLASSCOCK V. STRINGER, Tex., 33 S. W. Rep. 677.
- 116. JUDGMENT OBTAINED BY FRAUD.—Where a judgment has been obtained by fraud and deceit against a party, and he has not been guilty of negligence on his part, but has been misled and deceived by false and fraudulent representations of the adverse party and others confederating with him, for the purpose of obtaining an undue advantage over him, and preventing him from having a fair trial on the merits of his case, where he has a meritorious defense to the action against him, but has been prevented by the false and fraudulent representations of the party from making such defense, he may have such judgment stayed by an injunction, and set aside, and a new trial awarded him.—Kimble v. Short, Kan., 43 Pac. Rep. 317.
- 117. LANDLORD AND TENANT—Dangerous Premises.—Where there is no agreement to repair the demised premises by the landlord, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy; and the landlord is not liable to him or to any person entering under his title or upon the premises by his invitation for injuries sustained by reason of their unsafe condition.—Harpel v. Fall, Minn., 65 N. W. Rep. 918.
- 118. LIFE INSURANCE—Rights of Creditors.—A decedent'® creditors are not entitled to subject to the payment of their claims the proceeds of policies on his life, payable to his wife, in the absence of a showing that he was insolvent when the premiums were paid, and that he was at the time indebted to said creditors.

 —Jones v. Patty, Miss., 18 South. Rep. 794.
- 119. LIMITATIONS—Accounting—Equity.—The defense of limitations may be raised by a general demurrer to a bill in equity, where the bill shows that limitations apply and does not state facts to defeat their operation.—MEYER V. SAUL, Md., 38 Atl. Rep. 539.
- 120. Limitations—Domestic Judgment.—A right of action upon a domestic judgment, whereon no execution has issued, is barred by the five-years statute of limitations, unless the case falls within some exception.—SCHUYLER CO NTY BANK OF LANCASTER, MO. V. BRADBURY, Kan., 43 Pac. Rep. 254.
- 121. LIMITATIONS—Enforcement of Dower.—The statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years from the death of her husband, when her right to sue accrues.—SMITH V. WEHRLE, W. Va., 28 S. E. Rep. 712.
- 122. Limitations—Mutual Indebtedness—Attempted Settlement.—The fact that mutual statements of indebtedness between two persons were prepared and exhibited for the purpose of settlement, one of which included a note, will not estop the owner of the mote, in an action thereon, to plead limitations to the defendant's account, when it is sought to be used as a set off.—Campbell v. Park, Tex., 33 S. W. Rep. 754.
- 128. Limitation of Actions—Acknowledgment of Debt.—Evidence that, when plaintiff asked defendant "about the settlement of his books," defendant replied, "that ought to have been settled long ago, and you shall have your money within ten days," does not

show an acknowledgment sufficient to remove the bar of the statute.—WARD v. JACK, Penn., 88 Atl. Rep. 577.

124. Mandamus—Removal of County Seat.—On an application for a mandamus to compel the removal of a county seat in pursuance of the declared result of a canvass of the vote on the question of relocation, the court cannot go behind the returns and investigate issues of fraud and illegality in the manner of conducting the election.—State v. Roper, Neb., 65 N. W. Rep.

125. MANDAMUS TO SCHOOL BOARD.—A writ of mandamus will not issue where it is not within the power of the respondents lawfully to perform the act sought to be enforced, or where the writ would otherwise be unavailing.—FARRIS V. STATE, Neb., 65 N. W. Rep. 890.

126. MARINE INSURANCE—Negligent Navigation.—A steamer, while running at her ordinary speed of ten miles per hour, in heavy snow squalls, in the general direction of the land, which her officers had reason to believe was close aboard on the port side, it being dark, with a heavy sea, and the wind following her, ran aground, and remained fast. She had shortly before starboarded her helm so as to swing thirteen points, the soundings having shown that she was too close in shore: Held, that the stranding of the steamer was the result of her excessive speed, so as to prevent recovery on a marine insurance policy excepting losses caused by want of ordinary skill and care in navigation.—Flint & P. M. R. Co. v. Marine Ins. Co., U. S. C. C. (Mich.), 71 Fed. Rep. 210.

127. MARRIAGE—Antenuptial Agreement.—An agreement by a woman, in contemplation of marriage, not to claim any statutory allowance during the settlement of the husband's estate in case he dies first, is not against public policy.—APPEAL OF STAUB, Conn., 88 Atl. Rep. 615.

128. MARRIED WOMAN—Mortgage to Secure Husband's Debs.—Under the act of March 15, 1894, providing that a married woman's estate shall not be subjected to any liability of another, including her husband, unless it shall have been set apart for that purpose by deed of mortgage, and that her estate shall be liable for such debts contracted after marriage, except as in said act provided, a married woman can bind her separate estate by mortgage to secure her husband's debt.—MILLEE V. SANDERS, Ky., 38 S. W. Rep. 621.

129. MARRIED WOMAN—Right to Sue—Nuisance.—A married woman may sue alone for damages sustained by placing cars in front of premises which she occupied as a homestead, where she alleged that she owned no other property, and though said premises belonged to her and her husband, her husband had abandoned her for five years, and refused to join in the suit, and that she was obliged to support herself and children.—Houston & T. C. R. Co. v. LACKEY, Tex., 33 S. W. Rep. 788

180. MASTER AND SERVANT—Assumption of Risk.—Where a foreman and his assistants have equal knowledge of the danger accompanying an act about to be done, even if the foreman requests its performance, and injury ensues to the assistant, the employer cannot be made liable. Notwithstanding the request, the assistant can comply or not, as he chooses, and if he does comply, he takes his chances of the perils surrounding the situation.—SKIDMORE v. WEST VIRGINIA & P. R. CO., W. Va., 23 S. E. Rep. 713.

181. MASTER AND SERVANT—Contract of Hiring.—A contract of employment by which the employee agrees that, if his employer shall at any time "feel satisfied that he is incompetent to perform the duties which he has contracted to perform in good faith," the employer may discharge him, does not authorize his discharge unless the employer is "in good faith satisfied" of his incompetency.—SMITH v. ROBSON, N. Y., 42 N. E. Rep. 57.

122. MASTER AND SERVANT—Fellow-servants.—Under Gen. Laws 1891, ch. 24, § 2, declaring all persons fellow-servants who are engaged in the common service of a railway company, and are working together at the

same time and place to a common purpose, of same grade, a hostler, whose duty it is to bring the engines into the roundhouse and take them out when necessary, and a boiler washer, whose duty it is to clean the boilers of the engines so as to fit them for further service—both being under the orders of the roundhouse foreman, and without authority over each other—are, as a matter of law, fellow-servants.—Missouri, K. & T. Ry. Co. of Texas v. Whitaker, Tex., 38 S. W. Rep. 716.

138. MASTER AND SERVANT—Injury—Defective Telephone Pole.—When, in the course of the erection of a telegraph pole by a telegraph company, an occasion arises for the casual and sporadic use of a telephone pole belonging to another company, to remove an obstructing wire, the telegraph company is not at fault because it directs an employee to climb such telephone pole without making a previous inspection to ascertain whether it is safe.—DIXON v. WESTERN UNION TEL. Co., U. S. C. C. (Ind.), 71 Fed. Rep. 148.

184. MASTER AND SERVANT—Injuries—Law of the Place.—Where defendant, in an action for injuries brought in Texas, is in such State, the case will be determined according to the rules of common law as interpreted by the highest courts of such State, though the injuries occurred in, and both plaintiff and defendant are residents of, another State.—Missouri, K. & T. RY. CO. V. THOMPSON, Tex., 83 S. W. Rep. 718.

185. MASTER AND SERVANT—Negligence.—The master is liable for the acts of a vice-principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, while for all such acts as relate to the common employment, and are on a level with the acts of a fellow-laborer, except such as are done by the vice-principal against the reasonable objection of the injured servant, the master is not responsible.—DEEP MINING & DRAIMAGE CO. V. FITZGERALD, Colo., 48 Pac. Rep. 211.

186. MASTER AND SERVANT—Negligence.—Under Code, § 2590, subd. 5, making the master liable for injury to a servant caused by the negligence of one in the master's employ having charge or control of an engine, the master's liability is not affected by his care in selecting his employees.—CULVER V. ALABAMA MIDLAND RY. Co., Ala., 18 South. Rep. 827.

187. MASTER AND SERVANT—Negligence—Contract Releasing Master.—A railroad employee who, upon becoming a member of a voluntary relief association, composed of employees, and to whose funds the railroad company is bound to contribute in case of deficiency, signs, without fraud or undue influence, a contract that in case of injury he shall elect either to take the benefits provided by the association or have his action against the company, cannot avoid the effect thereof on the ground that he signed the agreement without reading it or understanding its purport, and that he was at a disadvantage in dealing with the company.—VICKERS v. CHICAGO, B. & Q. B. Co., U. S. C.C. (Ill.), 71 Fed. Rep. 189.

188. MASTER AND SERVANT—Negligence—Failure to Prescribe Rules.—Deceased was under a car on a side track used exclusively for storing cars needing repair. He and his fellow-workmen had pushed other cars, standing between it and the switch, nearer the switch. It was necessary to move such cars to make such repairs. An engine properly on the lead track struck the car nearest the switch because it was too near, driving it and the other cars against the one on which deceased was at work, killing him. Defendant had no rules for the protection of repairers at work on such cars: Held, that whether defendant was negligent in failing to have reasonable rules to protect its employees repairing cars on such side track was for the jury.—Cumpston v. Texas & P. Ry. Co., Tex., 33 S. W. Rep. 787.

189. MASTER AND SERVANT — Pleading.—A complaint in an action by a servant against his master for injuries received while steaming colored paper so that it might be folded into proper shape, a method not

ordinarily used by defendant, by reason of the volatilization of poison in the paper, which fails to allege that defendant knew, or facts showing that he ought to have known, of the presence of the poison in the paper, is demurrable, though it alleges that defendant negligently placed plaintiff at such work, and that plaintiff's injuries were due to defendant's negligence.— O'KEEPE V. NATIONAL FOLDING BOX & PAPER CO., Conn., 33 Atl. Rep. S87.

- 140. MASTER AND SERVANT—Railroad Aid Association.—Where a railroad relief association, composed of associated companies and their employees, is in charge of the companies, who guaranty the obligations, supply the facilities for the business, pay the operating expenses, take charge of and are responsible for the funds, make up deficits in the benefit fund, and supply surgical attendance for injuries received in their service, an employee's agreement, in his voluntary application for membership, that acceptance of benefits from the association for an injury shall release the railroad company from any claim for damages therefor, is not invalid as being against public policy, or for want of consideration or mutuality.—OTIS V. PENNSTL-VANIA CO., U. S. C. C. (Ind.), 71 Fed. Rep. 186.
- 141. MASTER AND SERVANT Vice-principal Fellow-servant.—Held following Lindvall v. Wood, 41 Minn. 212, 42 N. W. Rep. 1020, that the decisive test whether, in any given case, an employee is to be regarded as a vice-principal or a fellow-servant, is not his title or rank, but the nature of the services which he performs. If he is authorized to perform duties which are the absolute duties of the master, he is, to the extent of a discharge of those duties, a vice-principal.—Carlson v. Northwestern Tel. Exch. Co., Minn., 65 N. W. Rep. 914
- 142. MECHANIC'S LIEN—Interpleader.—That the owner of land on which a building is to be erected had knowledge that the contractor had sublet a portion of the work, and that material purchased by the subcontractor was delivered on the premises with his knowledge and consent, does not show that the material was furnished the subcontractor "by consent of the owner of the land" (Gen. St. § 3018), so as to entitle the material-man to a mechanic's lien therefor.—ALDERMAN V. HARTFORD & N. Y. TRANSP. Co., Conn., 88 Atl. Rep. 589.
- 143. MECHANIC'S LIENS—Building Destroyed.—Under Rev. 8t, 1894, § 7255, giving mechanics' liens on buildings or structures and on the interests of the owners of the land on which they stand for work and material furnished and used in them, and section 7256, making "the entire land" on which they stand subject to the lien, on destruction of a building by fire before completion the lien may be enforced against the land on which it stood.—Bratton v. Ralph, Ind., 42 N. E. Rep. 644.
- 144. MECHANIC'S LIEN Mortgage-Priority.-Under Sayles' Civ. St. art. 3171, as amended in 1889, providing that any mortgage on land at the time of the inception of a mechanic's lien shall not be affected thereby, and Rev. St. art. 8179, providing that all liens shall be upon an equal footing without reference to the date of filing, the beginning of the erection of any building constitutes the inception of all subsequent liens, and a mortgage intervening after the first lien has attached will not defeat the equality of subsequent liens with the first, though it was stipulated by the parties to the mortgage that said mortgage should be paramount to all other liens, and the mortgagors covenanted to keep the premises free from all other incumbrances. ORIENTAL HOTEL CO. V. GRIFFITHS, Tex., 88 8. W. Rep. 652.
- 145. MECHANICS' LIENS—Priority.—Where a mortgage loan upon real estate was negotiated before the commencement of a building thereon, but the papers were not executed, delivered, or recorded, and the loan was not closed up, nor any money paid thereon, until after the excavation for the building was begun, the mechanics' liens for labor and material, duly preserved,

- are prior and paramount to the lien of the mortgage.

 —NIXON V. CYDON LODGE NO. 5 KRIGHTS OF PITHIAS
 OF SALIMA, Kan., 43 Pac. Rep. 286.
- 146. MECHANIC'S LIEN Rights of Subcontractor.—
 The contract under which the subcontractor furnished material and performed labor, on account of which he filed the lien sought to be foreclosed in this case, held not such a written contract as is contemplated by the provisions of section 3, ch. 54, Comp. St. in regard to mechanics' liens, wherein it states: "When any labor has been done or materials furnished as provided on a written contract, the same, or a copy thereof shall be filed with the account herein required."—SPECHT V. STEVENS, Neb., 65 N. W. Rep. 879.
- 147. MECHANIC'S LIEN—Statement.—Under the provision of the mechanic's lien law that claimant make a just and true statement of the demand due him, his lien will not be defeated, though he claims too much in his statement, it being the result of an honest mistake, and not an effort on his part to place a lien on the premises for a greater amount than he honestly believed his due.—Scheibner v. Cohnen, Mich., 65 N. W. Red. 769.
- 148. MECHANICS' LIENS Time of Filing.—Plaintiff made a contract to furnish and place in defendants' houses furnaces of a certain kind, number, and size, together with the proper connections therefor. He fully performed this contract, except that the furnaces did not heat the houses so as to fulfill a warranty made as a part of the contract. He subsequently made a new agreement, whereby, in satisfaction of all damages for breach of the warranty, he agreed to substitute other furnaces in place of those already furnished, and this he did. He filed no lien statement until within 90 days thereafter. In an action to foreclose a mechanic's lien for the contract price, held, such lien statement was filed in time.—Scheible v. Schickler, Minn., 65 N. W. Rep. 920.
- 149. MISTAKE—Signature of Paper—Ignorance of Contents.—One can avoid the consequences of his failure to read a paper before signing it only by clear proof that his failure to do so was induced by fraud or excusable mistake.—LUMLEY v. WABASH RY. Co., U. S. C. C. (Mich.), 71 Fed. Rep. 21.
- 150. MORTGAGES—Action to Foreclose.—A person who has purchased and acquired title to mortgaged premises and assumed the payment of a portion of the mortgage debt is a proper and necessary party in an action to foreclose the mortgage, and a personal judgment for the liability assumed may be rendered against him therein.—MUDGE v. HULL, Kan., 43 Pac. Rep. 242.
- 151. MORTGAGE Alteration Discharge.—Where a surety gives a mortgage to secure performance of a contract and also payment of a note in nowise connected with the contract, an alteration of the contract, discharging the mortgage as to it, will not discharge it as to the note.—Parke & Lacy Oo. v. White River Lumber Co., Cal., 43 Pac. Rep. 202.
- 152. MORTGAGE Note Construction.—A mortgage given to secure the payment of a note must be construed together with the note as a part of one transaction or contract, the same as if they were a part of the same instrument.—Cabbell v. Knote, Kan., 48 Pac. Rep. 309.
- 153. MORTGAGES—Payment—Discharge.—A mortgage which has been paid and satisfied cannot be kept alive by a parol agreement for reissuance, and for an assignment from the original mortgagee to a third person as security for a new loan to the mortgagor, as against a subsequent mortgagee without notice of the agreement.—Boggert v. Striker, N. Y., 42 N. E. Rep. 562.
- 154. MORTGAGE Seizure of Property.—A mortgages out of possession, who has the property seized by writ of sequestration, is liable for the value thereof,—it being destroyed after seizure,—to the owner, who is entitled to possession, subject only to a foreclosure of the mortgage.—NIAGARA STAMPING & TOOL CO. V. OLIVER, Tex., 33 5. W. Rep. 689.

155. MUNICIPAL CORPORATIONS—Abolishing Office by Resolution.—The charter of San Antonio gives the city council power to create by ordinance any office, or employ any agent, etc., and provides that "the style of the ordinance shall be" a prescribed form, "but may be omitted when published in form of book or pamphlet:" Held, that such city council cannot, by resolution, abolish an office created by ordinance.—CITY OF SAN ANTONIO V. MICKLEJOHN, Tex., 38 S. W. Rep. 735.

156. MUNICIPAL CORPORATIONS — Charter Powers—Street Improvements.—A provision in a new city charter repealing an old one that "all contracts" for street improvements "now outstanding" shall be paid for and the assessment therefor levied under its provisions, does not authorize an assessment under the new charter for paving laid and paid for under the old one.—City of Dallas v. Dallas Consolidated Traction Rt. Co., Tex., 33 S. W. Rep. 757.

157. MUNICIPAL CORPORATION — City Ordinance—Appeal by City.—In a city prosecution, appealed to the district court, where the defendant is discharged, an appeal does not lie in behalf of the city or in the name of the State.—City of Lyons v. Wellman, Kan., 48 Pac. Bed. 267.

158. MUNICIPAL CORPORATION — License Ordinance—Validity.—Act May 23, 1889, art. 5, § 3, cl. 4, authorizing a city to levy and collect a license tax on various mercantile occupations, empowers the city to classify any of those occupations, for the purpose of the imposition of license taxes, according to annual sales.—WENNER V. CITY OF WILLIAMSPORT, Penn., 83 Atl. Rep. 544.

189. MUNICIPAL CORPORATIONS—Power and Duty as to Streets.—Municipal corporations are invested with the power and charged with the duty of keeping the streets and highways under their control free from nuisance (Rev. St. §§ 1878, 2840), and a liability arises from the omission to perform that duty, for damages resulting from such nuisance afterinotice to the municipal authorities of its existence; and though the person who caused the nuisance may be also liable, and responsible over to the corporation for whatever damages it is compelled to pay in consequence of it, that does not affect the liability of the municipality to the party injured.—CITY OF ZAMESVILLE V. FANNAN, Ohio, 42 N. E. Rep. 703.

160. NATIONAL BANKS—Liability of Stockholder—Estoppel.—Defendant purchased bank stock with his own means, held it for a year, and collected and appropriated all dividends thereon, and, when notified by the bank that the stock stood in his name on the books, gave no notice that he held it in trust for another person, but permitted the bank to deal with him as the beneficial owner, and did not tender the stock to or demand reimbursement from any other person: Held, that he was estopped to claim, after the insolvency of the bank, that he held the stock merely as trustee for another.—HORTON v. MERCER, U. S. C. C. of App., 71 Fed. Rep. 153.

161. NEGLIGENCE—Comparative Negligence.—Where an injury results to one of two parties from a collision due to the negligence of both in an equal degree, there can be no recovery therefor.—LOCKWOOD v. BELLE CITY ST. RY. CO., WIS., 65 N. W. Rep. 866.

162. NEGLIGENCE—Contributory Negligence—Instructions.—An instruction on the burden of proof on the issue of contributory negligence cannot be complained of for not setting forth the facts necessary, under the pleadings and evidence, to constitute such negligence, where there is no evidence of contributory negligence.—SHERWOOD V. GRAND AVE. RY. CO., Mo., 33 S. W. Rep. 774

163. NEGLIGENCE—Evidence.—In an action for personal injuries, evidence that plaintiff had been guilty of negligence on previous occasions is not admissible to show that he was similarly negligent at the time of the accident.—Baker v. Irish, Penn., 38 Atl. Rep. 168.

M. NEGOTIABLE INSTRUMENT—Action on Note—Tender of Amount Due.—In an action on a note, plaintiff averred that it had made a valid sale of securities pledged for the note, and had credited the proceeds on the note, and prayed a judgment for the amount of the note, less such credit. Defendant pleaded that the alleged sale was unlawful, and that, as plaintiff had wrongfully appropriated the securities pledged, defendant was entitled to a credit for their full value: Held, that defendant was not bound to tender the amount due on his note, as a condition precedent to making such defense.—RUSH v. FIRST NAT. BANK OF KANSAS CITY, U. S. C. C. of App., 71 Fed. Rep. 108.

165. NEGOTIABLE INSTRUMENT — Discount of Note—Pledge.—Where, for a debt actually due to him, A held the note of the debtor, which he discounted, indorsed and delivered to B at a rate of discount greater than the rate of interest allowed by law, held, the transaction is not necessarily a loan in which the note was delivered as collateral security, but whether or not it is such a loan is a question of fact, to be determined from all the facts and circumstances in the case.—BECKER'S INVESTMENT AGENCY v. REA, Minn., 65 N. W. Rep. 293.

166. NEGOTIABLE INSTRUMENT—Joint Action on Note.

—Where a promissory note is assigned to two parties, whose interests are not equal in said note, said parties may bring a joint action to recover upon said note.—
STAUFFER V. DOTY, Kan., 48 Pac. Rep. 291.

167. NEGOTIABLE INSTRUMENT — Promissory Note—Bona Fide Purchaser.—Plaintiff bank is indorsee before maturity of the negotiable promissory notes in suit: Held, conceding that they were received by it in the due course of business for a valuable consideration, still, on the evidence, the trial court was justified in finding that plaintiff had notice that they were given for a gambling debt; that its failure to inquire as to the consideration of the notes amounted to bad faith; and, that it was not an innocent purchaser.—Merchants' Nat. Bank of Grand Forks v. Sullivan, Minn., 65 N. W. Rep. 924.

168. NEGOTIABLE INSTRUMENT — Promissory Note—Guaranty.—One who guaranties payment of the interest on a note is not bound to pay interest which may accrue after the note matures.—RECTOR V. MCCARTHY, Ark., 33 S. W. Rep. 683.

169. OFFICER—Absence from Office.—Const. § 267, providing that no person shall hold an office of profit "without personally devoting his time to the performance of the duties thereof," must be given a reasonable construction, and does not prohibit the superintendent of a State institution from leaving the same on his own private business, when he can do so without detriment to its interests or neglect of any official duty.—FAIRLY v. WESTERN UNION TEL. Co., Miss., 17 South. Rep. 796.

170. Partition of Personalty.—A complaint for partition of a stock of goods, alleging that plaintiff and defendants were cotenants thereof, and had agreed that the same should be divided, and one-half turned over to plaintiff, and that defendant has taken possession of the whole, and refuses to deliver up plaintiff's share and denies plaintiff's title to any of the goods, is good on demurrer, without allegations of a request for a division or of the insolvency of defendant.—Robinson N. Dickey, Ind., 42 N. E. Rep. 679.

171. PARTNERSHIP—Accounting—Evidence.—In an action for an accounting between partners, where there was no showing as to the amount of sales, or as to prices obtained for goods sold, evidence of the amount of yearly purchases was not admissible to show whether there was a gain or a loss in the business.—Taggart v. Bundick, Kan., 43 Pac. Rep. 243.

172. PARTNERSHIP—Construction of Agreement.—An agreement whereby a corporation appointed a certain person as its agent in connection with the general business, in consideration of which the corporation was to pay said person one-half of the net profits, and the parties were to share the losses equally, and the corporation was to furnish the material and labor, did not constitute a partnership inter se, there being noth-

ing to indicate that said person was to own any share in said materials, or that he was obliged to make any cash investment.— Camtow Bridge Co. v. City of Eaton Rapids, Mich., 65 N. W. Rep. 761.

173. PARTMERSHIP PROPERTY — Partner Trustee of Legal Title.—Where a partner holding the legal title to land in trust for himself and copartner selis to one who has notice of the trust, and such vendee, after reselling, sues his vendee for the purchase price, such partner may, without making his partner a party to the suit, intervene to recover his interest in the land or purchase price due.—CAVINESS V. BLACK, Tex., 33 S. W. Rep. 712.

174. PLEADING—Descriptio Personæ.—Where the petition or complaint states a cause of action in favor of the plaintiff, personally superadded words, such as "agent," "executor," or "trustee," will be regarded as descriptio personæ merely.—THOMAS v. CARSON, Neb., 65 N. W. Rep. 899.

175. PLEADING—Non est Factum—Estoppel.—A reply stating that defendant, whose name was forged to the note in suit, after the maturity of the note, on being asked about its payment, admitted his liability thereon, and that he would stand good for it; that plaintif refrained from suing the other maker, who had forged defendant's name, and who at the time was worth sufficient property out of which plaintiff could have secured payment of the note, that plaintiff had extended the time of payment, and that the other grantor was insolvent—does not sufficiently plead an estoppel, where it is not alleged that the note was shown to defendant, or that he admitted he executed it.—LEWIS v. HODAPP, Ind., 42 N. E. Rep. 649.

176. PLEDGEE OF NOTES—Duties and Liabilities.—A person having notes in his possession as collateral security for a debt is bound, so far as the general owner of the notes is concerned, to use reasonable diligence to protect the security so held, and see that it is not outlawed.—NORTHWESTERN NAT. BANK OF ABERDEEN V. J. THOMPSONS & SONS MANUF'G CO., U. S. C. C. of App., 71 Fed. Rep. 118.

177. POWER OF ATTORNEY—Contracts.—A power authorizing an attorney to contract for grading a railway between stated points, and providing that the subscriptions of those granting the power shall be held in trust by a bank to enable it to guaranty payments to contractors for such grading, authorizes the making of separate contracts covering portions of the railroad.—MILLER V. SULLIVAN, Tex., 33 S. W. Rep. 655.

178. PRINCIPAL AND AGENT—Admission—Evidence.—In an action on a contract entered into by defendant through an agent, admissions by the agent as to the terms of the contract, not part of the res gests, but made after the execution of the contract, are not admissible in evidence against defendant.—WASH V. CARY, Ky., 38 S. W. Rep. 728.

179. Public Lands — Estoppel. — Where a railroad company for many years falls to object to the purchase of land from a county as swamp land, and permits the purchaser to make improvements thereon, it is estopped, though the land is subsequently confirmed to it by the secretary of the interior, to deny the title of the purchaser.—BOURNE v. RAGAN, IOWA, 65 N. W. Red. 896.

180. RAILROAD COMPANIES — Accident at Crossing—Contributory Negligence.—One voluntarily exposing himself to danger at a railroad crossing is guilty of contributory negligence, though the exposure was made to save his cattle from injury.—MORRIS V. LAKE SHORE & M. S. RY. CO., N. Y., 42 N. E. Rep. 579.

181. RAILEOAD COMPANIES — Crossings.—A railroad company will be liable for injuries received by one while necessarily driving a snowplow over a crossing, caused by the plow striking against a rail, if the accident is due to failure to keep the crossing in a reasonably safe condition for ordinary uses.—JEFFREY V. DETROIT, L. & N. R. Co., Mich., 65 N. W. Rep. 755.

182. RAILROAD COMPANIES—Crossing—Duty of Traveler.—Where the view of a traveler on a highway approaching a railroad crossing is so obstructed that he cannot see an approaching train until within a few feet of the track, greater care should be exercised by him than if no such obstruction existed; and in such a case he should make a vigilant use of his senses to determine whether there is a present danger in crossing; and the question of whether he should also stop before attempting to cross is a matter for the determination of the jury. An instruction, under those circumstances, that he is not bound to stop when he approaches a railroad, is error.—CHICAGO, R. I. & P. RY. Co. v. WILLIAMS, Kan., 43 Pac. Rep. 246.

188. RAILROAD COMPANIES—Crossings—Negligence.—
If there is only one employee operating such street car, it is his duty to stop the car, and go ahead, and ascertain if the way is clear and free from danger, and if he may cross ever with his car without signaling to any one; but if there are two or more employees operating such car, such signal is required before crossing.—CINCINNATI ST. RY. CO. V. MURRAY'S ADMX., Ohio, 42 N. E. Rep. 596.

184. RAILEOAD COMPANIES—Due Process of Law.—The provisions of chapter 11, Laws 1895, which require railroad companies, as an absolute finality, and without the right of judicial investigation by due process of law, to carry freights over longer lines for the same rates as required by any railroad company for hauling the same freight between the same points by a shorter line, no matter how great the disparity in the length of such hauls may be, are in conflict with the provisions of the fourteenth amendment of the constitution of the United States that no State shall "deprive any person of life, liberty or property without due process of law."—STATE V. SIGUX CITY, O. & W. R. Co., Neb., 65 N. W. Rep. 766.

185. RAILEOAD COMPANIES — Fire—Negligence.—The construction of a railroad near one's premises does not require one to forbear the ordinary use of his land, nor to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad company. One is only required to take such precautions as a person of reasonable prudence would take to protect his property.—UNION PAC. RY. CO. V. RAY, Neb., 65 N. W. Rep. 778.

186. RAILROAD COMPANIES—Fires Set by Locomotive.
—Where it is shown that a locomotive sets a fire, the burden is on the railroad company to show that it was equipped with approved appliances to prevent setting fires.—EDWARDS V. CAMPBELL, Tex., 83 S. W. Rep. 761.

187. RAILROAD COMPANIES — Injury — Contributory Negligence.—Plaintif, a boy of average intelligence, 12 years old, was playing with others, after dark, on a turntable in defendant's railway yards, and, after having helped to set the table in motion, in attempting to get off, stepped between the table and the side of the pit, and was injured. He was familiar with the table and its subroundings: Held, that the danger of injury in stepping where plaintiff did was obvious, and he was hence guilty of contributory negligence precluding a recovery.—CARSON v. CHICAGO, R. I. & P. Br. CO., Iowa, 65 N. W. Rep. 881.

158. RAILROAD COMPANIES—Injury to Infant on Track.—An infant two years old, which strays upon a railroad track, and is injured by a passing train, cannot be charged with contributory negligence; and although it be a trespasser, it is yet the duty of the employees of the company to avoid injury to it if they see it in time to do so.—JOHNSTON V. ATCHISON, T. & S. F. B. CO., Kan., 43 Pac. Rep. 228.

189. BAILROAD COMPANIES—Injury to Bailroad Employee.—In the entire absence of testimony tending to show that any code of rules or system of signals for the giving of notice or warning of the approach of detached cars in railroad yards would be feasible or useful, a jury is not justified in finding that a railroad company is negligent in failing to prescribe the same.

-ATCHISON, T. & S. F. R. CO. V. CARRUTHERS, Kan., 48 Pac. Rep. 230.

190. RAILROAD COMPANIES—Injury to Trespasser,—A trespasser injured by a collision with defendant's train, at night, with the hand car on which he was riding, cannot object to the absence of a headlight on the engine.—Eastern Kentucky Ry. Co. v. Powell, Ky., 28 S. W. Rep. 629.

191. RAILROAD COMPANIES — Street Railway — Collisions.—That a horse which is being driven on a street becomes frightened at an approaching street car does not render the company liable for injuries received by the driver.—BISHOP v. BELLE CITY ST. RY. Co., Wis., & N. W. Rep. 783.

192. RAILROAD CROSSING—Signals—Contributory Negligence.—An instruction, in an action for the killing of plaintiff's husband by defendant's train, that the burden of proving contributory negligence of deceased rests on defendant, and, unless defendant has proven it by a preponderance of evidence, the jury cannot find for defendant on that ground, is not erroneous for failure to refer to evidence offered on plaintiff's part tending to show contributory negligence; the instruction being correct as far as it goes, and it being for defendant, if he wished reference made to evidence offered by plaintiff showing contributory negligence to ask for an instruction thereon.—LANE v. MISSOURI PAC. RY. CO., Mo., 23 S. W. Rep. 646.

192. RAILWAY MORTGAGE—Foreclosure Proceedings—Intervention.—When, in the course of a proceeding to foreclose a railroad mortgage, it develops that differences of opinion existed between committees representing different bondholders, so that probably no order for sale can be made which will command the consent of the parties in interest, it is proper to allow such committees to be made parties.—FARMERS' LOAN & TRUST CO. V. CAPE FEAR & Y. V. RY. CO., U. S. C. C. (N. Car.), 71 Fed. Rep. 38.

194. RAILWAY MORTGAGE—Preference of Claims—Receivership.—In a suit to foreclose a mortgage on the property and net earnings of a railroad company, a receiver was appointed, to whom the company voluntarily paid over earnings' received before his appointment: Held, that a holder of a judgment, on account of personal injuries rendered before the bringing of the foreclosure suit, could not claim such earnings as against the receiver, he having failed to proceed against them before their payment to the receiver, or to obtain an injunction against such payment.—FARM-RES' LOAN & TRUST CO. v. DETROIT B. C. & A. R. CO., U. S. C. C. (Mich.), 71 Fed. Rep. 29.

195. REAL ESTATE BROKERS—Commission.—While a real estate broker is usually entitled to his commissions when he has produced one ready, willing and able to purchase at the terms proposed by the principal, or when he has produced one with whom a contract of sale is actually made, still, if the person produced is able to purchase only by resort to an unlawful device, the broker has not earned his commission.—ZITLE V. SCHLESINGER, Neb., 65 N. W. Rep. 892.

198. RECEIVER—Trustee for Creditors.—Where an assignment or conveyance is made by an insolvent firm to a trustee of the assets of the firm for the payment of the claims of creditors, and it is made to appear in a proper suit in equity that there is danger of the loss or misappropriation of the same, or of a material part thereof, such court may appoint a special receiver of such property, and cause the same to be administered by the receiver under its directions.—Washer v. Corn, W. Va., 28 S. E. Rep. 785.

197. RECORD OF INSTRUMENT—Negligence of Recorder.
—When the holder of an instrument leaves it with the recorder to be recorded, it is to be regarded as recorded from that time, though it is not then actually recorded, or is recorded in the wrong book.—FARABEE V. MCERRETHAM, Penn., 33 Atl. Rep. 583.

Micorp—Unrecorded Deed—Lien of Attachment, -Vider Mills' Ann. St. § 446, providing that until a

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deed is recorded no rights can be acquired under it as against subsequent "bona fide" purchasers and "incumbrancers" without notice thereof by mortgage, judgment or "otherwise," a grantee of land, who fails to record his deed till after the land has been duly attached by a creditor of the grantor, who has no notice of the deed, takes the land subject to the attachment lien.—Jerome v. Carbonate Nat. Bank of Leadville, Colo., 48 Pac. Rep. 215.

199. REFERENCE ON CONSOLIDATION OF ACTIONS.—Defendant, by moving that a case be consolidated with another which has been referred to a referee, thereby consents that the case, when consolidated, shall be referred to the referee.—EAU CLAIRE FUEL & SUPPLY CO. V. LAYCOCK, Wis., 65 N. W. Rep. 732.

200. REPLEVIN—Possession—Infants.—Where an infant executed notes for chattels sold to him by the payee, and to secure the same gave a mortgage on the chattels sold and on others, and the infant afterwards repudiated the transaction, plaintiff cannot recover the goods sold under an assignment of the mortgage or an indorsement of the notes.—HYDE v. COURTWRIGHT, Ind., 42 N. E. Rep. 647.

201. SALE—Conditional Sale—Bona Fide Purchaser.—A contract for the sale of personal property, upon condition that the title is to remain in the vendor until the purchase price is paid, is valid as between the parties, and valid as against third parties dealing with the property without notice, unless such third parties are purchasers, or judgment or attaching creditors of the conditional vendee.—CAMPBELL PRINTING PRESS & MFG. Co. v. DYER, Neb., 65 N. W. Rep. 904.

202. SCIRE FACIAS—Mechanic's Lien.—In scire facias on a mechanic's lien the sufficiency of the lien on its face cannot be attacked under a plea of non-assumpsit, set-off and payment with leave.—KLINEFELTER v. BAUM, Penn., 38 Atl. Rep. 582.

203. SEDUCTION—Evidence — Previous Unchastity.—
Evidence of a hackdriver that, prior to the alleged seduction by defendant, he had driven the woman, in company with a different man, around the town, without stopping anywhere, and with the hack curtains closed, was admissible to show prior unchastity.—
STEWART V. SMITH, Wis., 65 N. W. Rep. 736.

204. SEDUCTION — Good Repute.—Under the statute declaring it an offense for one, under promise of marriage, to seduce an unmarried female "of good repute" under 18 years of age, a conviction may be had notwithstanding the female had had intercourse with others, she being at the time of intercourse under promise of marriage "of good reputation" as to chastity.—STATE V. SHARP, Mo., 83 S. W. Rep. 795.

205. SLANDER — Communications to Officers.—Where a communication to an officer imputing the commission of a crime by a person is made in a public place before others than the officer, the question whether it was made with actual malice, so as to prevent it from being privileged, is for the jury.—GARN v. LOCKARD, Mich., 65 N. W. Rep. 764.

206. SPECIFIC PERFORMANCE—Rescission of Contract.
—Equity will not specifically enforce a contract to give a minority stockholder the right to control the stock of another and vote it at the stockholders' meeting, where the sole purpose is to secure control of the corporation by the use of such stock.—Gage v. Fisher, N. Dak., 65 N. W. Rep. 809.

207. STATE OFFICERS—Powers.—It is within the province of the proper officers of the State, in entering into an agreement, on behalf of the State, with a contractor, for the erection or repair of its buildings, or additions thereto, to require the insertion of a condition in the contract and the bond executed to secure its faithful performance, whereby the contractor agrees to pay for all labor performed or material furnished him in completing such contract; and the right to exact such a condition exists independent of statutory provision conferring it, nor does the absence of statutory provision authorizing it render such a condi-

tion in a contract illegal or void.—Kauffmann v. Cooper, Neb., 65 N. W. Rep. 796.

208. SUNDAY LABOR — Barbering.—Act March 19, 1895, making it a misdemeanor to carry on the business of barbering on Sunday, violates Const. art. 4, § 53, prohibiting a special law where a general law can be made applicable.—STATE V. GRANNEMAN, Mo., 88 S. W. Rep. 784.

209. TAYATION — Redemption from Tax Sale.—A suit by an infant, after reaching majority, to redeem from a tax sale, is not an "action for the recovery of any lands or for the possession thereof," so as to require plaintiff to file the affidavit, required by such act, stating that he has tendered to the purchaser, who is in possession of the land, the amount of taxes paid and value of improvements.—BURGETT v. MCCRAY, Ark., 38 S. W. Rep. 639.

210. TELEGRAPH COMPANIES — Delay—Damages.—Under Rev. St. 1894, § 5518, making telegraph companies liable for special damages caused by negligence in transmitting messages, a complaint which alleges that, by defendant's negligence in failing to promptly deliver a message summoning plaintiff to the bedside of his sick brother, plaintiff was prevented from being present at his brother's burial, whereby he suffered great mental anguish, etc., states a cause of action.—WESTERN UNION TEL. CO. v. CAIN, Ind., 42 N. E. Rep. 655.

211. TELEGRAPH COMPANI—Non-delivery of Message.—Under Mill & V. Code, § 1542, providing that a telegraph company shall be liable to the party aggrieved for unreasonable delay in delivering a message, the company is liable for breach of statutory duty to the person who, upon the face of the message, appears to be the beneficiary, though no contractual relation existed.—Western Union Tel. Co. v. Mellon, Tenn., 83 S. W. Rep. 725.

212. TRESPASS — Herding Sheep.—A complaint for trespass on uninclosed land in a portion of the State to which the fence law applies, which alleges that defendant unlawfully herded sheep on the land, whereby plaintiff was disturbed in his possession, does not state a cause of action.—WALKER v. BLOOMINGCAMP, Oreg., 48 Pac. Rep. 175.

213. TRIAL — Limiting Number of Witnesses.—The limitation of the number of witnesses on a certain question is within the discretion of the trial court, though not made until the witness whose evidence was excluded was called.—LARSON v. CITY OF EAU CLAIRE, Wis., 65 N. W. Rep. 751.

214. TROVER — Possession.—Where potatoes were raised on shares by two persons, one of whom left them in possession of his wife and the other with permission to the wife to use as many as she needed for herself and family, the wife could not join in her own name with such other as plaintiff in trover against an attaching officer.—Janauscher v. Eddy, Mich., 65 N. W. Rep. 752.

215. TRUST—Resulting Trust—Presumption of Gift.—Where land is purchased and paid for by one person, and the conveyance is taken to another, the law will raise by implication a trust for the benefit of the former. But if the person in whose name the conveyance is taken is the wife of the person who pays the purchase money, the prima facte presumption is that a gift was intended, and in such case no resulting trust will arise.—DECE V. TABLEE, W. Va., 28 S. E. Rep. 721.

216. TRUST FUNDS—Deposit.—Trust funds do not lose their character as such by being deposited in bank by the frustee to his own account. So long as such funds can be traced and distinguished in the hands of the trustee or his assigns, they remain subject to the trust.—CADY V. SOUTH OMAGA NAT. BANK, Neb., 65 N. W. Red., 906.

217. USURY—Recovery From National Bank.—Money paid as usurious interest to a national bank cannot be set off in a suit brought by the bank more than two years after such payment to recover the principal sum.

-Lanham v. First Nat. Bank of Crett, Neb., 85 N. W. Rep. 786.

218. VENDOR AND PURCHASER—Ejectment against Purchaser.—An action of ejectment was brought by a third party against the vendee for the recovery of possession of the land, and for damages for the detention of the same. The vendee notified the vendor of the pendency of such action, and he undertook the defense of the same: Held, in a subsequent action against him by the vendee, he was bound by the result of the ejectment suit.—FLECKTON v. SPICER, Minn., 65 N. W. Rep. 926.

219. WATERS—Accretion—Formation of Island.—The owner of land on the Missouri river does not own to the center of the main channel of said river, but only to the water's edge.—Perkins v. Adams, Mo., 33 S. W. Red. 778.

220. WATERS—Riparian Rights — Accretion.—Where land of a riparian owner on a navigable stream is gradually and imperceptibly washed away, and the place where it was remains for many years the bed of the river, such owner does not acquire title by accretion to new land subsequently formed within his original boundaries, unless its formation began at highwater mark.—WALLACE V. DRIVER, Ark., 33 S. W. Rep. 641.

221. WATERS—Spring in Roadbed—Right to Water.—A plank-road company, having condemned a right of way over a farm, made a cut therein 10 feet deep, and in so doing a spring of water was opened 8 or 4 feet above the roadway: Held, that the title to the water was absolute in the owner of the farm, and that he could use it as he saw fit, provided he did not injure the company's road.—UPPER TEN MILE PLANK ROAD CO. v. BRADEN, Penn., 83 Atl. Rep. 562.

222. WATERS AND WATER COURSES—Springs.—Water so percolating through the soil or coming to the surface in a spring belongs to the owner of the soil in such a sense and to such an extent that he is entitled to the exclusive right to use and dispose of the same.—METCALF V. NELSON, S. Dak., 65 N. W. Rep. 911.

228. WAY—Bight of—Prescription.—In order to obtain a prescriptive right of way, while the use must be of substantially the same road all the time, the fact that the track, by reason of washing or other causes, by consent of the users of it, changes a few feet, sometimes to one side of the space appropriated, and sometime to the other, does not destroy the right.—Kuatz v. Hoke, Penn., 38 Atl. Rep. 549.

224. WILL—Devise—Vesting of Estate.—The rule that estates will be held to vest at the earliest possible period in the absence of a manifest intention of testator to the contrary applies to the vesting of an estate in fee.—FOWLER V. DURME, Ind., 42 N. E. Rep. 623.

225. WILLS—Form of Will.—The fact that a will is written on several separate sheets of paper, or that there are blank spaces left between paragraphs, will not invalidate it, and where a will so appears when presented for probate, with the sheets fastened together, the presumption is that it was in the same condition when executed.—Barnewall v. Murrell, Ala., 18 South. Rep. 381.

236. WITNESS — Transactions With Decedent.—The fact that one of the parties to an action cannot testify in regard to a conversation which he had with a deceased person does not preclude third persons who heard the conversation from giving testimony as to the same in behalf of the other party. Such witnesses may be required to give the entire conversation, or so much thereof as has a bearing upon the issue in the case.—FRY V. FRY, Kan., 43 Pac. Rep. 236.

227. WRITS—Service by Publication—Amendment.—Where an affidavit made to procure notice by publication under section 74 of the Code of Civil Procedure is merely defective, the defect in the affidavit may be cured by amendment after publication notice has been published.—WEAVER V. LOCKWOOD, Kan., 48 Pac. Rep. 311.



Central Law Journal.

ST. LOUIS, MO., MARCH 20, 1896.

One of the first opinions delivered by Mr. Justice Peckham, of the Supreme Court of the United States, embraces a new application of the doctrine of eminent domain, and embodies a liberal policy of recognizing implied powers in the United States under the constitution. The case is U.S. v. Gettysburg Electric Ry. Co., 16 S. C. Rep. 427, and it involved the question of the condemnation of the land which is known as the battlefield of Gettysburg. The real question before the court was whether the use to which it was desired to put the land described in the condemnation petition by the United States was that kind of a public use for which the government of the United States was authorized to condemn land. The court broadly held that the United States had authority to do so, if it appeared, as it did, that the land was necessary and appropriate in the execution of the powers granted to the United States by the constitution. Mr. Justice Peckham holds that the act providing for condemnation was constitutional on the ground that the battle was a great lesson in military science, that the government desires to perpetuate the lesson and that it may legitimately do so under the power it has to maintain armies and to teach them military science.

The modern development of the law applicable to married women is well illustrated by the recent decision of Harmon v. Old Colony R. R. Co., by the Supreme Court of Massachusetts, wherein it is held that as the statutes of that State empower a married woman to use her time for the purpose of earning money on her separate account the impairment of her capacity for labor may be considered as an element of damage in an action by her for personal injuries. The case will be found in full with annotation on page 247 of this issue.

The attitude of the Supreme Court of Missouri on the subject of unchastity as a ground for impeachment of a witness, as announced in the recent case of State v. Sibley, 33 S.

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W. Rep. 167, is the subject of adverse criticism by the New York Law Journal. early Massachusetts case laid down the doctrine that the credibility of a female witness may properly be impeached by showing her to be a common prostitute, the court saying that such a woman "must necessarily have greatly corrupted if not totally lost the moral principle, and, of course, her respect for truth and her regard for the sacredness of an oath." Commonwealth v. Murphy, 14 Mass. 387. Though not considered to be good law, it was recognized by the Missouri courts, in two or three cases (State v. Grant, 79 Mo. 133; State v. Clausen, 30 Mo. App. 455; State v. Coffey, 44 Mo. App. 455), the holding being that a female witness may be impeached by proof of general reputation for unchastity. Later the rule was extended to include male witnesses as well as females. State v. Rider, 95 Mo. 486; State v. Shroyer, 104 Mo. 441. The court now, however, in the Sibley case endeavors to retrace its steps and while upholding the rule as to female witnesses repudiates its application to male witnesses.

Some of the reasons advanced by the court for its conclusions are certainly not lacking in boldness. They say that "it is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man's predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other. Thus in Bank v. Stryker, 3 Wheeler, Cr. Cas., 332, it is said: 'Adultery has been committed openly by distinguished and otherwise honorable members (of the bar) as well in Great Britain as in our own country, yet the offending party has not been supposed to destroy the force of the obligation which they feel from the oath of office.' Dr. Johnson said, in discussing the difference of turpitude between lewdness in a man and in a woman, 'that he would not receive back a daughter because her husband, in the mere wantonness of appetite, had gone into the servant girl.' And so

Macaulay said, respecting the weakness of Lord Byron for sexual pleasure, that it was an infirmity he shared with many great and noble men—Lord Somers, Charles James Fox, and others."

Three of the members of the court dissent from the majority claiming, with reason as we think, that if unchastity is to be treated as a special ground for impeachment it should apply to both sexes. It is, however, quite clear to us that the rule adopted by the Supreme Court of Missouri is unwise and unwarranted both as to males and females. As the exchange before referred to says "the usual rule is to limit direct impeachment to questions as to general reputation for vera-Some of the States permit the general moral character of a witness to be proved for the purpose of testing his credibility. State v. Egan, 59 Iowa, 636; Walton v. State, 88 Ind. 9. This in our judgment is as far as the privilege should be extended. We cannot perceive any good reason for making a special exception of the vice of unchastity, and admitting proof of reputation for moral weakness in this particular, where evidence as to addiction to other specific sins is incompetent."

NOTES OF RECENT DECISIONS.

CORPORATIONS-ULTRA VIRES-PURCHASE of Stock-Insolvency.-The Supreme Court of South Dakota decides on rehearing in the case of Adams & Westlake Co. v. Deyette, 65 N. W. Rep. 471, that the assets of a corporation for profit being a trust fund for its creditors, and its officers, in anticipation of insolvency, being unauthorized to diminish its capital, and release its stockholders from liability, in a manner that will inevitably defeat the rights of bona fide creditors, a judgment confessed in favor of persons who loaned to its directors money for the purpose of, and with actual knowledge that the funds advanced were to be used in the purchase of shares in itself, is void as to such creditors, because (a), when insolvency occurs, a corporation has no authority to prefer creditors. (b) A corporation, as such has no power to

créate a debt by borrowing money with which to purchase its own stock. Kellam, J., dissented.

CHARITABLE CORPORATION—LIABILITY FOR NEGLIGENCE OF SERVANTS.—In Hearne v. Waterbury Hospital, 33 Atl. Rep. 595, the Supreme Court of Connecticut decided that a hospital incorporated under special act to furnish medical treatment and care for the sick. without capital stock, and from which its members derive no profit, is a charitable corporation, and is not liable for injuries to a patient, due to the negligent treatment by the physicians and nurses employed by it, where it has exercised due care in their selection. The court cites and discusses the leading English and American cases on the subject. The English cases from the earliest times to date are Hall v. Smith, 2 Bing. 156; Duncan v. Findlatin, 6 Clark & F. 894; Parnaby v. Canal Co., 11 Adol. & E. 223; Halliday v. St. Leonard's, 11 C. B. (N. S.) 192; Hartnall v. Commissioners, 33 Law J. Q. B. 39; Coe v. Wise, 5 Best & S. 440; Trustees, etc. v. Gibbs, L. R. 1 H. L. 93; Foreman v. Mayor, L. R. 6 Q. B. 214; Reg. v. Williams, 9 App. Cas. 418; Gilbert v. Trinity House, 17 Q. B. Div. 795. The American cases are City of Richmond v. Long's Admr's, 17 Gratt. 375; Maxmilian v. Mayor, 62 N. Y. 160; McDonald v. Hospital, 120 Mass. 432; Donelly v. Association, 146 Mass. 163; Glavin v. Hospital, 12 R. I. 411; Fire Ins. Patrol v. Boyd, 120 Pa. St. 624; Williams v. Industrial School (Ky.), 24 S. W. Rep. 1065; Downs v. Harper (Mich.), 60 N. W. Rep. 42; Railway Co. v. Artist (C. C. A.), 60 Fed. Rep. 365.

CHATTEL MORTGAGE — SUBSTITUTION OF MORTGAGED ARTICLES — VALIDITY.—It is decided by the Supreme Court of Tennessee in Rodes v. Haynes, 33 S. W. Rep. 564, that a substitution for one of several articles of personalty covered by a mortgage of another article of the same kind is, in the absence of registration, invalid as against creditors of, or purchasers from, the mortgagor. Many authorities, as appears from the opinion of the court, were cited as holding that accessions to mortgaged property pass with it, and finished articles are held in their finished state, although mortgaged in their unfinished condition, and that the young of animals pass



with the dams, and that improvements are accessions, and pass with the original property. But none of these cases were regarded by the court as authority in this case, when one separate piece of property is substituted for another of the same kind. "Unquestionably such a substitution would be good between the parties, but does it apply, unless registered, as against creditors or purchasers from the mortgagor? There is quite a conflict of authority upon the question. We are cited by counsel to the cases of Marx v. Davis, 56 Miss. 745; Davis v. Marx, 55 Miss. 376; Berghoff v. McDonald, 87 Ind. 550, as holding that such substitution can be properly made, and is valid. In accord with these we have found the cases of Abbott v. Goodwin, 20 Me. 408; Allen v. Goodnow, 71 Me. 420; Holly v. Brown, 14 Conn. 255; Fowler v. Hoffman, 31 Mich. 215. But the weight and current of authority is to the contrary. Rose v. Bevan, 10 Md. 466; Pulcifer v. Page, 54 Am. Dec. p. 595, note; Moody v. Wright, 46 Am. Dec. 716, note, where the cases are collated. Also 3 Am. & Eng. Enc. Law, 187. We think reason and sound public policy are in favor of the latter doctrine; and to hold that substituted property can, as to third persons, be held under a deed of trust which in no way refers to it in lieu of that embraced by its terms, would open wide a door for fraud and deceit, and can be supported on no good ground."

Breach of Marriage Promise—Consideration.—That a promise of marriage on consideration of sexual intercourse is void, is illustrated by the case of Burke v. Shaver, 23 S. E. Rep. 749, decided by the Supreme Court of Virginia. The following is from the opinion of the court:

A contract for marriage is the mutual agreement of a man and woman to marry each other, or become husband and wife, in the future, and must satisfy the legal requirements as to parties, consideration, etc., as other contracts must. Wharton, in his work on the Law of Contracts (volume 1, § 373), states the law thus: "An agreement is void when the consideration is future illicit cohabitation, no matter what other consideration may unite, or how skillfully the illegal object might be clothed. . . A promise of marriage on consideration of sexual intercourse also is void." Chancellor Kent in his Commentaries (volume 2,18th ed., p. 467), in discussing what constitutes a valuable consideration of a contract, says: "The consideration must not only be valuable, but it must be a iswful consideration, and not repugnant to law, or and policy, or good morals, 'Ex turpi contractu ac-

tio non oritur.' And no person, even so far back as the feudal ages, was permitted by law to stipulate for iniquity. The reports in every period of English jurisprudence and our American reports equally abound with cases of contracts held illegal on account of the illegality of the consideration, and they contain cer-tain striking illustrations of the general rule that contracts are illegal when founded on a consideration contra bonos mores, or against principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law. If the contract grows immediately out of or is connected with an illegal or immoral act, a court of justice will not enforce it." In the case of Saxon v. Wood (Ind. App.), 30 N. E. Rep. 797, where the complaint alleged "that defendant, who was a suitor of plaintiff, an unmarried woman, solicited her to have sexual intercourse with him, and on her refusal agreed that if she would yield to his wishes, and thereby become pregnant, he would at once marry her; that in consideration to such agreement, to which she consented, plaintiff vielded to defendant's solicitations and did have sexual intercourse with the defendant, from which pregnancy resulted, and from which a child was born to plaintiff, and the defendant, on her request to fulfill his agreement, refused to marry her," it was held that the action would not lie, the contract being based on an immoral consideration. Judge Black, in delivering the opinion of the appellate court of Indiana, in that case cites with approval what has above been quoted from Kent's Commentaries, and a number of other authorities on the same line. In the case of Hanks v. Naglee (decided by the Supreme Court of California), 54 Cal. 51, which was an action for a breach of promise of marriage similar in many respects to the case at bar, the plaintiff testified, in effect, that defendant promised to marry her if she would surrender her person to him, and that she thereupon consented. The court held that the promise was void on account of the immorality of the consideration, the court saying, in its opinion, that "upon well-settled principles the plaintiff should not have recovered on a contract of this character, as being a contract for illicit cohabitation, it is tainted with im morality,"-citing Story, Cont., § 458, and Steinfeld v Levy, 16 Abb. N. S. 26. In the latter case, which was decided by the Supreme Court of New York, Chief Justice Neilson, in discussing the nature of the contract sued on, says: "It is hardly necessary to say that a contract thus grossly immoral would not support the action. The learned presiding judge (of the court below) seems to have had in view the rule that where a contract is founded on two considerations, one of which is merely void, but not vicious, and the other good, the contract is binding to the extent of the good consideration. He ruled that if, in fact, mutual concurrent provisions to marry were a part of the consideration, the plaintiff could recover. It does not seem to have occurred to him that such a rule would tend to legalize contracts for prostitution, or that the principle in view is never applied to a contract tainted with immorality. Courts of justice will not aid the illicit or corrupt arrangement, or sift one part of it to save the other part." The learned counsel for de-fendant in error cites this case as authority for his contention that instructions 1 and 2 were not applicable to the case at bar, because there was a promise of marriage, independent of the promise made in consideration of sexual intercourse; but the case of Steinfeld v. Levy sustains the doctrine laid down in Hanks v. Naglee and the other authorities above cited. Moreover, we shall see, later on that the evidence does not

show a promise in the case at bar, by the plaintiff in error, to marry the defendant in error, independent of the promise to marry her if she would have sexual intercourse with him, and became pregnant. The cases of Kurtz v. Frank, 40 Am. Rep. 275, and Clark v. Pendelton, 20 Conn. 495, are also cited by counsel for defendant in error, but they do not apply to the case at bar. In the first of these cases the man promised to marry the woman in September or October, if they could agree and get along, and be true to each other, and that if she became pregnant from their intercourse he would marry her immediately. She became pregnant in July, but he then refused to marry her. The court held, upon the particular facts in that case, that the illicit intercourse did not so enter into the consideration as to render the agreement void; that an action for the breach accrued at once. The real point decided was that the plaintiff could maintain her action upon the defendant's refusal to marry her after pregnancy after waiting until the time fixed upon the marriage by the original agreement.

ELECTRIC STREET RAILWAYS—LIABILITY FOR NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—BICYCLE.—The Supreme Court of California holds in Everett v. Los Angeles Consol. Electric Ry. Co., 43 Pac. Rep. 207, that it is contributory negligence per se to ride on a bicycle between the tracks of an electric street railway without watching for the approach of cars from behind. The court says in part:

It can scarcely be made a question in the case-indeed, we do not understand it to be seriously controverted-but that the conduct of the deceased under the circumstances narrated constituted negligence on his part in the highest degree, and such as, standing alone, would necessarily preclude a recovery for his death. In walking or riding along a line of railway where cars or trains are passing, or likely to pass, at short intervals, one, while in a position to be endangered by such vehicles must pay attention to his surroundings, and employ his natural faculties, and exert due diligence to avoid such danger. He must listen and look to ascertain whether danger is threatened by his situation, and a failure so to do constitutes negligence per se. This principle is settled by a practically unbroken line of decisions in this and other States. One or two of the latest expressions upon the subject by this court, in cases where the rule is fully discussed and authorities cited, may be given as aptly stating and applying the doctrine. In Kenna v. Railroad Co., 101 Cal. 26, 35 Pac. Rep. 332, it is said: is a fixed rule that it is the duty of any one when attempting to cross a railroad track upon a highway to be vigilant, to look and to listen before attempting to cross, and a failure to do so is regarded as such negligence on his part as to preclude a recovery. Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. Rep. 518. With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow. 'It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter,""—citing a large number of cases. In Holmes v. Railway Co., 97 Cal. 161, 31 Pac. Rep. 834, where the person for whose death it was sought to re-

cover was killed while walking along the railroad track near a station, while waiting for the train which ran him down, and when it appeared that deceased did not look out for the approach of the train, which he could have seen in time to get out of the way, the court say: "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person so situated, with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses, in order to avoid the danger incident to such situation, is negligence per se. The following are a few of many cases which might be cited to sustain this proposition: Harlan v. Railway Co., 64 Mo. 480; Id. on rehearing, 65 Mo. 22; Railroad Co. v. Depew, 40 Ohio St. 121; Kelley v. Railroad Co., 75 Mo. 138; Glascock v. Railroad Co., 73 Cal. 187, 14 Pac. Rep. 518." Nor is there any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railway operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public street, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use. In Haight v. Railroad Co., 7 Lans. 11, speaking of this rule, the court say: "It is said by counsel for plaintiff that, while this may be the rule in regard to steam railways, it cannot be applied to street railways." In Carson v. Railway Co., 147 Pa. St. 219, 23 Atl. Rep. 369, it was held that failure to look for approaching cars on the part of one about to drive across the tracks of an electric street railway company is such contributory negligence as will prevent his recovery for injuries received by colliding with a car. The court say: "If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly non-suited." In Ward v. Railway Co. (Sup.), 17 N. Y. Supp. 427, it appeared that plaintiff's intestate was fatally injured while attempting to drive across a street-railway track. There was evidence that, at any time before reaching the track, deceased, by a glance, could have informed himself of the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence. In Creamer v. Railroad Co., 156 Mass. 320, 31 N. E. Rep. 391, the supreme court of that State held that where a person stepped from a horse car at the junction of two streets, and immediately started to cross the track of an electric road, without looking or listening, and was run over by the electric car running at the rate of 15 miles an hour, there could be no recovery, because the deceased was not exercising due care. We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street-car track upon which the motive power is electricity or the cable. See, also, Bailey v. Railway Co., 42 Pac. Rep. 914. When the evidence discloses a failure to take such reason-



able precautions for one's own safety, it constitutes negligence in law, and is not a question to be submitted to the jury.

LIBEL—EDITOR OF NEWSPAPER—PERSONAL LIABILITY.—One of the points decided by the Supreme Court of Wisconsin in Smith v. Utley, 65 N. W. Rep. 744, is that the managing editor of a newspaper published by a corporation is equally liable with the proprietor and publisher for the consequences, in a civil action, of the publication of a libelous article, and this, whether he knows of the publication or not, since it is his business to know, and mere want of knowledge constitutes no defense. The court said in part:

The second question presented is, does the evidence sufficiently connect the defendant Utley with the publication to render him liable in damages, or to make it the duty of the court to submit the question to the jury? The owner of the paper was a corporation. Defendant Utley was its president and active man. ager. He was the principal editor. To be sure, he testified that he did not authorize or know of the publication. He said: "I do most of the editorial work. I do everything. I am the political editor; the principal editor. I believe my name appears on the paper as editor." There is other evidence tending to show that, in addition to being the chief executive officer of the corporation, he was the managing editor of the paper, and actively engaged in his duties at the time the libelous article was published. If such are the facts, he does not stand in the position of a person who is sought to be charged merely because of being a stockholder or officer of the corporation, or come within the cases where it is held that mere proof of ownership of stock or official position is not sufficient to show active agency in the production and publication of the libel, so as to render such owner or officer individually responsible, as in Mecabe v. Jones, 10 Daly, 222; Belo v. Fuller, 84 Tex. 450, 9 S. W. Rep. 616; Simonsen v. Herold, 61 Wis. 626, 21 N. W. Rep. 799; but comes within the exception mentioned in Belo v. Fuller, supra, as follows: "That persons are stockholders and officers of the publishing corporation will not make them responsible for libelous publications appearing in the paper, unless it is shown that they in some way created and assisted and advised its publication or circulation, or unless their duties as officers of the concern were of such character as charges them with the performance of functions concerning the publication and circulation of the paper; such duties being of such nature that the law would imply that such officer knew, or should have known, of the publication of the libelous matter." It is laid down by all the text writers that the proprietor, publisher, editor, author and printer are severally and jointly liable. 13 Am. & Eng. Ency. Law, 372; Fras. Lib. 7-9 and notes; Odger Sland. & L. 150; Newell Defam. 239; Townsh. Sland. & L. 115, note 1. This Mability attaches to the editor upon the theory that the matter is constructively under his supervision, and neither the editor nor proprietor is allowed to plead in defense that he is ignorant of the publication. Merrill, Newsp. Lib. 53. While evidence that the defendant did not actually or constructively participate the publication may be introduced, neither the editor, publisher nor proprietor can defend on the ground merely that he did not know about the libel until after it was published. Id. 259. Publisher and managing editor are treated alike by the standard text writers. This appears to be so elementary that the question has rarely, in recent years, been presented to the courts for consideration. In Watts v. Fraser, a case decided in 1837 in the court of king's bench, and reported in 7 Adol. & E. 223, both the editor and printer were held liable, though, as said in Fras. Lib. p. 10, they had no knowledge whatever of the publication. It is said in Townsh. Sland. & L. § 235, that the publisher is liable on proof of publication, but when the editor is sued he can be held liable only on proof that he personally aided or procured the publication of the article This is in conflict with the note at section 115 and the case cited to support the text. Reg. v. Ramsay, 15 Cox Cr. Cas. 281, was decided under a statute which changed the rule in criminal cases. It was there held that by Campbell's libel act (6 & 7 Vict. ch. 96, § 7) the law as it had theretofore existed, that the editor was liable both civilly and criminally for what appeared in the paper, though published without his knowledge, had been so changed as to render want of knowledge or consent a defense in trials on indictment. This case was decided in 1883, and shows that in civil actions in England the law remains as formerly; the managing editor is liable without proof of knowledge of or consent to the publication of the libel. To the same effect is Nevin v. Spieckermann (decided in the Supreme Court of Pennsylvania in 1886), 4 Atl. Rep. 497, where it is held that the general manager of a newspaper published by a corporation, the one who looks after the editorial work, is liable; also Weil v. Nevin (Sup. Ct. Pa.), 1 Mona. 65, where an attempt was made to extend the rule to the assistant editor, and it was held that, "though the general editor may be bound to know of what goes into the paper of which he is the supervisor, not so the assistant editor, for his work is limited."

From the foregoing we reach this conclusion: The law is well settled that the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences, in a civil action, for the publication of a libelous article; and this is so whether he knows of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense. To be sure, there is evidence in this case tending to show that the defendant was only editor in a particular department, and had no control over the department in which the articles complained of appeared; but on the whole case it is quite clear that the question should have been submitted to the jury under proper instructions to the effect that, if he was the general or managing editor of the paper, he is responsible for the consequences of the libelous publication, whether he knew of it or not.

RIGHTS OF HOLDERS OF CHECKS AGAINST BANKS.

It is a much mooted question whether the holder of a check of a depositor in a bank, who has funds there to meet it, can sue the bank in case the latter should refuse to pay the check. On the one hand it is held, that

the relation between the bank and its depositor is merely that of debtor and creditor,1 that the drawing of a check is not an assignment of so much money, which can only occur in case the check is drawn against a particular fraud,2 and that a check is drawn against any funds of the depositor, which may be in the hands of the bank when the check is presented; 8 that a check is merely an order which may be countermanded and payment forbidden by the drawer at any time before it has been actually cashed.4 There are however a number of authorities which hold, that the drawing of a check by a depositor in a bank is a transfer or assignment of a portion of such deposit sufficient to pay such check.⁵ Of course where such ruling prevails the holder of the check can sue a bank, which refuses to pay the check of a depositor when it has funds of the depositor sufficient to meet it.6 In such cases the transfer of the check carries the right to sue to each successive holder of it.7 As to the right of the depositor to order the bank not to pay his check, these courts are not in harmony. It is admitted, that the agreement of the bank with its depositor is to pay his check when presented, if the funds in its possession are sufficient to meet it. If the drawing of the check transfers the fund, it would seem that logically the depositor could not countermand its payment.8 It has however been held, that the drawer can countermand

¹ Bank of Maysville v. Windisch, etc. Co., 50 Ohio St. 151; Florence M. Co. v. Brown, 124 U. S. 385; O'Connor v. Mechanic's Bank, 124 N. Y. 324.

² Loyd v. McCaffrey, 46 Pa. St. 410; O'Connor v. Mechanic's Bank, 124 N. Y. 324; Dana v. Third N. Bank, 13 Allen, 445.

³ Bank of Maysville v. Windisch, etc. Co., supra; Bank of Republic v. Millard, 10 Wall. 152; Carr v. National S. Bank, 107 Mass. 45; Case v. Henderson, 28 La. Ann. 49; Moses v. Franklin Bank, 34 Md. 574.

⁴ Elorence M. Co. v. Brown, 124 U. S. 385; O'Connor v. Mechanic's Bank, 124 N. Y. 324.

⁵ Union Nat. Bank v. Oceana C. Bank, 80 Ill. 212; Merchant's Nat. Bank v. Ritzinger, 20 Ill. App. 27; Bank of America v. Indiana B. Co., 114 Ill. 483; Brown v. Leckie, 43 Ill. 497; Munn v. Burch, 25 Ill. 35; McGrade v. German S. Inst., 4 Mo. App. 380.

6 Weinstock v. Bellwood, 12 Bush, 139; Senter v. Continental Bank, 7 Mo. App. 532; McGrade v. German S. Inst., 4 Mo. App. 330; State Sav. Assn. v. Boatmen's Bank, 11 Mo. App. 292; Merchant's Nat. Bank v. Ritzinger, 20 Ill. App. 27; Bank of America v. Indiana B. Co., 114 Ill. 483; Forner v. Smith, 31 Neb. 107.

⁷ Merchant's Nat. Bank v. Ritzinger, 20 Ill. App. 27; Bank of America v. Indiana B. Co., supra.

8 Bank of America v. Indiana B. Co., 114 Ill. 483; Union Nat. Bank v. Oceana C. Bank, 80 Ill. 212. the payment of his check, because prior to its presentation there is no obligation from the bank to the check holder, that the presentation creates the obligation to pay and is an absolute appropriation by the debtor.9 We do not see that such ruling was necessary. As between the drawer and payee the check might be an absolute transfer, yet the bank would be excused if it had paid out the funds after the issue but before the presentation of the check. I may assign an account to B, yet my debtor will be protected, if he pays the debt to me before he has knowledge of such assignment. In accordance with this view it had been held, that after the bank has been notified of the drawing of the check it cannot allow the funds thus appropriated to be withdrawn by the depositor.10 In a case where the drawing of a check was considered to be a transfer of the funds, it was held that the banker could not set-off against the check a debt due him from the payee. The reasoning was that the check was not presumed to be taken as an absolute payment and the holder of it became the agent of the drawer to collect the money.11 It was held, that a check drawn before, but presented after, the service of a garnishment on a bank took precedence over the garnishment.¹² Drafts and bills of exchange, which are very different in their phraseology from checks are not considered by any court to operate as assignments or transfers of funds, carrying a right to the holder to sue the drawee in case of dishonor.18

Is there a Privity between the Holder of a Check and the Bank?—It is often held, that there is a privity between the holder of a check and the bank, whereby the former in case the check is needlessly dishonored may bring suit in his own name against the bank. It must be admitted the weight of authority is against such privity, though many reasons are urged in favor of it. In Munn v. Burch, 25 Ill. 35, the court says: "The banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of the checks, in such sums as these

9 McGrade v. German S. Inst., 4 Mo. App. 330.

10 Forner v. Smith, 31 Neb. 107; Munn v. Burch, 25 Ill. 35.

¹¹ Brown v. Leckie, 43 Ill. 497.

Bank of America v. Indiana B. Co., 114 Ill. 483.
 McGrade v. German Sav. Inst., 4 Mo. App. 390;

Roberts v. Corbin, 26 Iowa, 315.

14 Forner v. Smith, 31 Neb. 107.

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checks may call for, and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check, shall, upon presentation thereby become the owner and entitled to receive the amount called for by the check, provided the drawer shall at that time have the amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person, to anybody and to everybody? Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker on the one side, and the receiving of the check for value and presenting it on the other. It is a familiar principle of daily illustration, that a promise made to the public, that the performance of a particular act shall entitle the person performing the act to a particular right, is a valid assumpsit to such person. The promise on the ore hand, and the performance on the other, create a privity between the parties as intimate and as obligatory as if the promise had originally been made to the particular person." The same views are held in Iowa, South Carolina, Missouri and Nebraska.15 Where this view was maintained it was asserted, that the depositor could countermand the payment of the check, because prior to presentation of the check there is no obligation from the banker to the holder of the check, since the former agrees to pay checks in the order of presentation and not in the order of their dates. 16 This reasoning appears to the writer to be a non sequitur. If the banker's contract, of which the public can avail itself, is to pay on presentation, where does the depositor derive the power to abrogate such contract. After the check gets in the hands of an innocent holder he alone under the terms of the implied contract can make it obligatory. It is true the banker's contract is only to pay in case he has in his hands funds belonging to the depositor. A countermanding of payment is not a withdrawal of the funds, and it would be a perversion of the meaning of words to call it an appropriation of such funds. The

McGrade v. German S. Inst., 4 Mo. App. 330; Roberts v. Corbin, 26 Iowa, 315; Forner v. Smith, 31 Neb.
197; Fogarties v. State Bank, 12 Rich. L. 518; State Sav. Asen. v. Boatmen's Bank, 11 Mo. App. 292.

McGrade v. German Sav. Inst., 4 Mo. App. 880.

theory of a privity of contract between the banker and the check holder has been strongly combated. It is said to be an anomaly, that a right of action should exist in two distinct persons upon one promise for the same thing.17 Yet such actions do exist at law, and we might add that the question at issue is merely a contract between A and B for C's benefit wherein most courts recognize a right of action in case of its violation by the contracting party or by C. It is also said that the holder takes the check on the credit of the drawer in the belief he has funds to meet it.18 Is not the belief, that the banker, if in funds, will pay the check, also one of the reasons for accepting the check? It is also said, that if there was a privity of contract between the banker and the holder of the check when the check was given, then the banker would be required to pay the check upon presentation, though the drawer before its presentation had countermanded it and although other checks subsequently drawn had exhausted the funds.19 Such a view ignores the contract, which is to pay the check upon presentation if then in funds. The banker's implied contract with the check holder has been compared to that of a person who offers a reward for the return of lost or stolen goods.20 Another court declares that the two cases are not similar, because in the latter case the party, who returns the goods, makes himself the other party to the contract, and the party from whom the consideration moves;21 whereas in the former case the depositor is the other party to the contract and from him the consideration moves. We apprehend, that if A agreed with B that in case B would publish his offer, that he would offer a reward for the return of certain property or for the doing of any other act, that the party performing the act requested would have a right of action against A in case of non-performance on his part of his offer. Though we admit that the decided weight of authority is against the proposition, that there is any right of action on the part of the holder of a check against a banker who may refuse to pay check when he has in his possession sufficient funds of his depositor to meet such

¹⁷ Bank of Republic v. Millard, 10 Wall. 152.

¹⁸ Bank of Republic v. Millard, supra.

¹⁹ Bank of Republic v. Millard, supra.

²⁰ Forgarties v. State Bank, 12 Rich. L. 518.
21 Carr v. National S. Bank, 107 Mass. 45.

12⁴1 32415 check; yet we consider the weight of reason to be with the opposite view whenever it is admitted that provisions of a contract between A and B for C's benefit may be enforced by C.

Right of Set-Off in Case of Insolvency.— Originally at law no set-off was allowed. Though this right was afterwards allowed, yet it is essentially an equitable principle, and courts of equity allowed set-offs before there was any statute on the subject and often apply the right to cases not within the statutes.22 A bank cannot set-off against a bona fide holder of a check a claim against a depositor which has not yet matured, though the depositor may be insolvent,28 and though before the presentation of the check he had made an assignment for the benefit of creditors.24 Such right of set-off is allowed as against an attaching creditor of the insolvent depositor.25 If the insolvent is himself the plaintiff the right of set-off is not questioned and it has been allowed though the debt matured after the institution of the suit;26 whether a bank can apply the deposit of a depositor who dies insolvent, to the satisfaction of his note, which matured after his death, is a proposition on which the courts do not agree.27

Set-off in Cases of Assignments for the Benefit of Creditors.—On the question of the right of a bank to set-off against the assignee for the benefit of creditors of a depositor a debt due it from such depositor, then due or accruing, the decisions of many courts are directly antagonistic. It is said, that this conflict of decisions but furnishes one of the many illustrations of that diversity of judgment which is inherent in the minds of men, and which often out of substantially similar raw materials and general conditions has

²² Nashville T. Co. v. Fourth N. Bank, 7 Pickle, 386; Schuler v. Israel, 120 U. S. 506; Richardson v. Doty, 44 Neb. 73.

²² Merchants' Nat. Bank v. Robinson (Ky., May 1895), 28 L. R. A. 760; Nashville T. Co. v. Fourth N. Bank, supra; McGrade v. German S. Inst., 4 Mo. App. 330; Zelle v. German S. Inst., 4 Mo. App.; 401; Commercial N. Bank v. Proctor, 98 Ill. 558; State Sav. Assoc. v. Boatmen's Bank, 11 Mo. App. 292; Skunk v. Merchants' N. Bank, 19 Chic. L. N. 83.

- 24 Roberts v. Corbin, 26 Iowa, 315.
- 25 Schuler v. Israel, 120 U.S. 506.
- 26 Richardson v. Doty, 44 Neb. 73.
- ²⁷ Pro: Ford v. Thornton, 3 Leigh, 695; Camden N. Bank v. Green, 45 N. J. Eq. 546; McGrade v. German S. Inst., 4 Mo. App. 330. *Contra*: Appeal of Farmers' Nat. Bank, 48 Pa. St. 57.

founded and built up dissimilar systems of jurisprudence.28 As stated before the right of set-off is an equitable right, and it is allowed in favor of those considered to have the superior equity. Some courts consider, that the assignment fixes the status of all parties relative to the assets of the insolvent, which must be distributed according to the rights of the parties as then existing.29 It is said, that after the assignment the superior equities are with the general body of the creditors. 30 When this view is held, no right of set-off is allowed as to a claim, which had not matured at the time of the assignment, and as an additional reason for such refusal, it is stated, that to allow the right of set-off in such case would effect a change in the contract and compel the insolvent to pay his debt before his contract required him to do so.³¹ Where a partnership assignee holding a note of A then due, while A held their acceptance, which was not due it was held that A could not set-off the acceptance against the note, unless A could show that the acceptance was based on the note, or that he at the time trusted to the acceptance as a means of discharging his note.32 Other courts take the view, that the assignment fixes the status of the parties only in the sense that no new claims can be acquired, 33 and that such assignee is not a purchaser for value, but it is a mere volunteer and stands in the shoes of his assignor.⁸⁴ They of course allow A in a suit by the assignee of an insolvent on a debt, which matured after the assignment to set-off a debt which had matured in A's favor before the assignment." While they admit that the laws call for an equal distribution of the assets of an insolvent among his creditors they claim that his assets, relative to one with whom he has debits and credits, are the balance after de-

80 Fera v. Wickham, supra.

81 Richards v. Tourette, 119 N. Y. 54.

22 Lockwood v. Beckwith, 6 Mich. 168.

28 Nashville T. Co. v. Fourth N. Bank, supra.

³⁴ Kentucky T. Co. v. Merchants' N. Bank, 90 Ky. 225; Roberts v. Corbin, 26 Iowa, 315; Nashville T. Co. v. Fourth N. Bank, supra.

35 Yardley v. Clothier, 49 Fed. Rep. 337; Chipman v. Ninth N. Bank, 120 Pa. St. 86.



²⁸ Nashville T. Co. v. Fourth N. Bank, 7 Pickle, 336. 29 Huse v. Ames, 104 Mo. 91; Chipman v. Ninth Nat. Bank, 120 Pa. St. 86; Fuller v. Steiglitz, 27 Ohio St. 355; Spaulding v. Backus, 122 Mass. 558; Fera v. Wickham, 136 N. Y. 223; Oatman v. Bavarian Bk., 77 Wis. 501 (under State statute).

ducting his debits;36 as a consequence as against a claim of the assignee due at the time of the assignment they allow such debtor to set-off a claim due him from the insolvent which had not matured at the time of the assignment.37 In case the latter has not matured at the time of trial it is deemed proper to discount it, in the case of a debt until its maturity, 88 or to value it, in the case of a life insurance policy by the usual tables of expectation of life. 39 The fact that the debt due to the insolvent has not matured is deemed immaterial as to the right of set-off because the other party by asking for a set off is merely expediting the payment of his debt, which can work no injustice to his creditor, while on the other hand the insolvent, or his assignee, can urge no right to hold such a claim as an investment.40 The deduction is, that it is immaterial as to the right of set-off who holds the unmatured debt at the time of the assignment.41 It seems to the writer, that it is in accordance with equity to allow the right of set-off in the various cases mentioned, and bankrupt laws are framed in accordance with this view. There are some cases, where it would be inequitable to allow low set-off and in such cases the courts have refused to do so. We refer to savings banks which have no capital save the money of the depositors. In such cases each depositor is entitled to his proportionate share of the profits, and in equity he should bear his proportionate share of the loss. He should pay his debts to the bank and receive finally his proportion of the assets remaining for distribution. His relation to the bank and its assets is that of a stockholder in a monetary institution.42 S. S. MERRILL.

²⁶ Ford v. Thornton, 3 Leigh, 695; Camden Nat. Bank v. Green, 45 N. J. Eq. 546; Nashville T. Co. v. Fourth N. Bank, supra.

37 Kentucky T. Co. v. Merchants' N. Bank, 90 Ky. 225; Van Wagoner v. Patterson, 23 N. J. L. 283; Skunk v. Merchants' N. Bk., 19 Chic. L. N. 83.

38 Nashville T. Co. v. Fourth N. Bank, supra.

* Carr v. Hamilton, 129 U. S. 252.

* Nashville T. Co. v. Fourth N. Bank, supra; Richards v. Tourette, 119 N. Y. 54; Chapman v. Ninth N. Bank, 120 Pa. St. 86.

1 Nashville T. Co. v. Fourth Nat. Bank, supra.

⁴² Hannon v. Williams, 34 N. J. Eq. 255; Osborn v. Byrne, 43 Conn. 155; Stockton v. Mechanics' Bank, 32 N. J. Eq. 163.

MARRIED WOMAN — PERSONAL INJURIES-DAMAGES—CAPACITY FOR LABOR.

HARMON V. OLD COLONY R. R. CO.

also 2 V.L. R.

Supreme Judicial Court of Massachusetts, Jan. 1, 1896.

In action by married woman for personal injuries the impairment of her capacity for labor may be considered as an element of the damage recoverable by her in her own right.

ALLEN, J.: The general question arising in this case is whether, in an action brought by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor can be considered as an element of the damages. By St. 1846, ch. 209, § 1, it was enacted that "in all cases where married women shall hereafter by their own labor earn wages, payment may be made to them for the same." This was followed by St. 1855, ch. 304, § 7: "Any married woman may carry on any trade or business and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, labor, services and earnings; and her property acquired by her trade, business and service and the proceeds thereof may be taken on any execution against her." By St. 1857, ch. 249, § 6, it was provided that a husband should not be bound by his wife's contracts in respect to her separate property or to her trade. The rights of married women in respect to their labor are thus defined in Gen. St. ch. 108, sec. 1: "The property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade, business, labor or services carried on or performed on her sole and separate account * * * shall notwithstanding her marriage, be and remain her sole and separate property and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts." Section 3: "A married woman may bargain, sell and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business and perform any labor or services on her sole and separate account and sue and be sued in all matters having relation to her separate property, business, trade, services, labor and earnings in the same manner as if she were sole." Section 5: "The contracts made by a married woman in respect to her separate property, trade, business, labor or services shall not be binding on her husband, nor render him or his property liable therefor; but she and her separate property shall be liable for such contracts in the same manner as if she were sole." Section 6: "Payment may be made to a married woman for wages earned by her labor," etc. By St. 1862,

ch. 198, amended by St. 1881, ch. 64, § 1, a married woman doing business on her separate account must record a certificate in the town or city clerk's office setting forth various particulars, or her husband may file such certificate. In case of failure to do so, her property will not be protected against his creditors, and he will be liable on her contracts. By St. 1874, ch. 184, § 1, "a married weman may * * * make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, and all work and labor performed by her for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account." And by section 3 "a married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife." This enumeration of statutes shows the growth of the legislation on this particular subject, and the foregoing provisions are now embodied in a somewhat compressed form in Pub. St. ch. 147.

By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirements as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits they are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society, companionship, and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right, in these respects, is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her a right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account. By the common law the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her services is abridged, though his obligation to support her remains.

It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which, perhaps, may require her absence for 10 years, thus amounting to a desertion which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent, To a certain limited extent-as, for example, in fixing the domicile, and in being responsible, under ordinary circumstances, for its orderly management-the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case. The radical nature of the change effected by the legislation of this State in the legal condition of married women is illustrated in numerous decisions, of which Jordan v. Railroad Co., 138 Mass. 425, most nearly resembles the present case. But see, also, Parker v. Simonds, 1 Allen. 258; Ames v. Foster, 3 Allen, 541; Plumer v. Lord, 5 Allen, 460; Chapman v. Foster, 6 Allen, 136; Stewart v. Jenkins, Id. 300; Chapman v. Briggs, 11 Allen, 546; Burke v. Cole, 97 Mass. 113; Snow v. Sheldon, 126 Mass. 332; Read v. Stewart, 129 Mass. 407; Bank v. Windram, 133 Mass. 175; Butler v. Ives, 139 Mass. 202. 29 N. E. Rep. 654; Binney v. Bank, 150 Mass. 574, 23 N. E. Rep. 380. Exceptions sustained.

NOTE.—The principal case is a very important one. There are few authorities upon the question which it decides, although many of the States now have statutes permitting married women to sue in cases in which they could not have sued alone at common law. Except where otherwise provided by statute the general rule is that two actions may be instituted for a tort or wrongful injury to a married woman: one by the husband alone for the loss of service, society, and expenses in nursing and taking care of her, and one by the husband and wife for the injury to the wife's person. Smith v. City of St. Joseph, 55 Mo. 456, 17 Am. Rep. 660; McKinney v. Western Stage Co., 4 Iowa, 420; Newbirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483; Barnes v. Hurd, 11 Mass. 59; Heim v. McCaughan, 32 Miss. 17; Lewis v. Babcock, 18 Johns. (N. Y.) 443; 2 Saund. Pl. & Ev. 568. In the first case the damages would be recovered by the husband alone and would not include anything for the mere injury to the wife's person, while in the latter case the damages would accrue to the wife and not to the husband, and would not include loss of services, injury to her earning capacity or the like. Ohio & Miss. R. Co. v. Corby, 107

Ind. 32; Baltimore R. R. Co. v. Kemp, 61 Md. 74; Whitney v. Hitchcock, 4 Denio (N. Y.), 461; Bartley v. Richtmyer, 4 N. Y. 38; Creign v. Brooklyn, etc. R. Co., 75 N. Y. 192; Cowden v. Wright, 24 Wend. (N. Y.) 429; King v. Thompson, 87 Pa. St. 365; Klein v. Jewett, 26 N. J. Eq. 474; Klingman v. Holmes, 54 Mo. 304; Fuller v. Naugatuck R. Co., 21 Conn. 557; Belyea v. Minneapolis R. R. Co. (Minn.), 63 N. W. Rep. 627; Schouler on Husband and Wife, 141, and authorities above cited. But some of the modern statutes and "married woman acts" have changed this rule. How far they have done so in particular instances is not yet well settled. Under some of the statutes the husband, in an action by himself and wife for injury to the latter may also join thereto a claim in his own right and recover for the loss of her services occasioned by the injury. McDonald v. Chicago, etc., R. Co., 26 Iowa, 124, 96 Am. Dec. 114. Under others, as shown in the principal case, the wife may sue alone in a proper case and recover damages which would formerly have gone to her husband. The object of the "married woman acts" is stated and their general nature and effect explained and considered in a leading article in 38 Cent. L. J. 287. They usually provide, among other things that married women may sue alone in certain cases; that they may make contracts and carry on business or labor for themselves, and that their earnings shall be their own sole and separate property. If such a statute gives a married woman a right to her own services, and makes her earnings her separate property it would seem clear, as held in the principal case, that loss of earning capacity is a proper element of damages in an action by herself. It was so held in Massachusetts in Jordan v. Middlesex R. Co., 138 Mass. 425. So, in Missouri, in Smith v. Chicago, etc. R. Co., 23 S. W. Rep. 784, it was held that loss of earnings is a proper element of damages in a suit by herself. In Wisconsin, in the case of Fife v. City of Oshkosh, 89 Wis. 540, · 62 N. W. Rep. 541, it was held that a married woman was entitled to recover for the loss of time occasioned by a personal injury to her. So in Texas in Gulf, etc. R. Co. v. Greenlee, 62 Tex. 344, and in Georgia, in Atlanta St. R. Co. v. Jacobs, 88 Ga. 647, 15 S. E. Rep. 825, and Metropolitan St. Ry. Co. v. Johnson, 16 S. E. Rep. 49. In New York it has been held under such a statute that the services of the wife in the household still belong to her husband, and that he, and not she, is entitled to recover therefor, but that when she works for another her services and earnings belong to herself and she can recover for the loss of the same while disabled by a personal injury. Brooks v. Schneren, 54 N. Y. 343; see Blaechinska v. Howard Mission, 130 N. Y. 497, and cases there cited. So it is held in Iowa that a married woman cannot recover damages for being rendered less capable of performing her duties as a housewife. Hall v. Incorporated Town of Manson (Ia.), 58 N. W. Rep. 881. See also Walter v. Kensinger, 2 Pa. Dist. R. 728. And in Indiana in Citizens' St. R. Co. v. Twiname, 121 Ind. 875, although the statute permitted married women to carry on business for themselves and provided that their earnings, other than those accruing from labor for their husbands or families, should be their separate property, it was held that the husband, and not the wife, was entitled to recover damages for loss of services of the wife in aiding him to carry on the millinery business, as she had done before her injury without any contract or expectation of compensation therefor. In another Indiana case it was said that "it is the duty of the husband to support and maintain his wife, and to furnish medical treatment and care in case of injury or ailment; and, presumptively, all such damages accrue to him, but this is but a naked presumption, and when it is averred and proved that the wife has expended money or incurred a liability on her own account, she is entitled to recover therefor as if she were sole." Board v. Castetter, 7 Ind. App. 309, 34 N. E. Rep. 687. See, also, Ohio & Miss. R. Co. v. Corby, 107 Ind. 32. Under the Arkansas statute, which is similar to that in Indiana, the United States Courts of Appeals also held that a husband still had a valuable right in his wife's services, and that he could recover for the loss of the same by reason of her death caused by the negligence of another. St. Louis, etc. R. Co. v. Henson, 58 Fed. Rep. 531.

There are many cases holding that damages recovered by a married woman in an action for personal injuries become her separate property, or part of her separate estate, but few, if any, of them discuss the question decided in the principal case. It will be seen from the cases which have been briefly reviewed herein that there is much apparent and some real conflict among the few authorities upon the subject. It seems to the writer that the better rule is that announced in the principal case. It may be, however, that a "northwest passage" will be found by following the course mapped out by the New York Court of Appeals, or perhaps the view may be taken that the wife can recover for such services, or rather for impairment of her capacity to perform such services as an ordinary servant might perform, while for the loss of such services as only a wife could perform the husband is the one entitled to recover. This, however, is a very shadowy distinction and the difficulty in applying it would be a serious objection to any such rule. W. F. ELLIOTT. Indianapolis, Ind.

JETSAM AND FLOTSAM.

LIABILITY FOR MALICIOUS PROSECUTON OF CIVIL ACTION.

The CENTRAL LAW JOURNAL of December 6, 1895, contains an article entitled "The Action for the Malicious Prosecution of an Ordinary Civil Action," by Spencer Haven, Esq., of Madison, Wisconsin. By "ordinary civil action" the writer means one in which no provisional remedy, such as attachment or arrest, is resorted to. Decisions by courts of the different States are cited, and the result is stated to be that "we have four States with seven cases directly holding that the action will not lie, together with one State by obiter dictum favoring the same rule; while there are ten States with thirteen decisions directly, and three additional States with six cases by obiter dictum holdlng that the action will lie." This writer therefrom concludes that the weight of authority is in favor of the right to sue for malicious prosecution of an ordinary civil suit, and after considering various arguments pro and con, he approves of such view on principle.

On this latter question of the "weight of reason" there is much to be said on both sides. Taxable costs in the amounts usually allowed in this country do not furnish full indemnity for the actual damage frequently sustained in defending a suit brought without probable cause. In England the larger costs recoverable in civil suits do afford reasonably substantial compensation, and accordingly a new and independent cause of action for prosecuting without reasonable

ground an ordinary civil suit is not recognized. We do not think, however, that public sentiment in America would favor the adoption of the English system of heavy costs, and therefore if an adequate remedy is to be afforded it must be by an independent action. The principal objection to this course is, in Mr. Haven's language, "if each successful defendant in a civil suit is thereupon allowed to turn about and bring an action against the former plaintiff for malicious prosecution, and so on ad infinitum, that there would be no end to such vexatious litigation, and that the courts would be overcrowded." He might have added that in many, if not the majority of cases, the trial of the action for malicious prosecution substantially involves a relitigation of the original contreversy. Mr. Haven's attempted answer to the point made in the above quotation is not at all satisfactory. He says that vexatious litigation would not be increased because "the action (for malicious prosecution) is not allowed unless the previous action was brought maliciously and without reasonable and probable cause." But the very object of the second action is to determine whether the first action was brought "maliciquely and without reasonable and probable cause." The second action would have to be allowed where a cause of action of this class is recognized, what really hinges on the question of malice being whether a recovery shall be allowed. In writing on this subject several months ago, it seemed to us that the law of New York, as it then apparently existed, recognizing the cause of action for malicious prosecution of a civil suit without arrest or attachment, was well enough to be let alone, because such actions had, as matter of fact, been rare, and in exceptional cases the remedy by a second suit might further the interests of justice.

The comparatively recent New York case of Willard v. Holmes, 142 N. Y. 492, seems to have been overlooked by Mr. Haven. He includes New York with the States allowing civil suits for maliciously prosecuting ordinary civil actions, citing Vanduzor v. Linderman, 10 Johns. 106; Pangburn v. Bull, 1 Wend. 345; Dempsey v. Lepp, 52 How. Pr. 11. In the opening sentences of the opinion in Willard v. Holmes the court of appeals apparently casts doubt upon the question whether it would follow the earlier New York decisions, supra, and recognize the rule theoretically allowing suits founded on ordinary civil actions. The court then proceeds to lay down such a stringent essential for recovery, even in cases "where a party has been subjected to some special, or added grievance, as by an interference with his person or property," that actions of this nature will, to say the least, be as infrequent as heretofore. We think the purport of the opinion-which is unanimous-sustains the proposition of the head note: "To sustain an action for malicious prosecution in prosecuting a former civil action, the circumstances must appear to have been such that no reasonable man could have been influenced thereby to the belief that the former action was maintainable." The civil remedy is still theoretically left open, and may exist even against a corporation. And it may serve as a deterrent to legal oppression or abuse, pure and simple, as, for instance, against suing on an absurd claim, and obtaining an attachment or arrest, with the object of coercing the defendant as to a collateral and unrelated matter .-New York Law Journal.

MASTER AND SERVANT-TERM OF HIRING.

The New York Court of Appeals, in the recent case of Martin v. New York Life Insurance Company, have

held that: A general or definite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof; that a hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for the time actually served, and accordingly, that a contract to pay the plaintiff \$10,000 a year salary, payable monthly, no time being specified, was a hiring at will and could be terminated by the defendant at any time; that the fact that the compensation was measured at so much a year did not make the hiring for a year, and the plaintiff being discharged before the end of the year could only recover for the time actually served. The court said: "The learned counsel for the plaintiff argues that a general hiring means, as matter of law, an employment from year to year, and insists that his proposition is sustained by the decision of this court in Adams v. Fitzpatrick, 125 N. Y. 124. "The case cited does not decide the point in question, although certain expressions in the opinion and reference to English cases might seem, upon a casual reading, to justify a contrary contention. "The referee found however that the parties originally contemplated a hiring for a year, and this court held that on the coutinuation of the employment after the expiration of the year, without further agreement, it would be presumed that the parties had assented to renew the contract for a like period. "The present condition of the law as to the legal effect of a general hiring is thus stated by Mr. Wood in his work on Master and Servant (2d edition), section 136, as follows: 'In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year. With us, the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. A contract to pay one \$2,500 a year for services is not a contract for a year, but a contract to pay at the rate of \$2,500 a year for services actually rendered, and is determinable it will by either party. Thus it will be seen that the fact that the compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed, and a recovery had, at the rate, fixed for the services actually rendered.' The decisions on this point in the lower courts have not been uniform, but we think the rule is correctly stated by Mr. Wood, and it has been adopted in a number of States. Evans v. St. L., I. M. & S. R'y Co., 24 Mo. App. 114; Finger v. Brewing Co., 13 Mo. App. 810; De Briar v. Mintura, 1 Cal. 450; Haney v. Caldwell, 35 Ark. 156, 168; Prentiss v. Ledyard, 28 Wis. 131."—Albany Law Journal.

CORRESPONDENCE.

RJECTMENT-DIVORCE.

To the Editor of the Central Law Journal:

I was somewhat interested in the question propounded by J. C. H. in vol. 42, p. 78, of your paper, and have been still more so in the answer of H. C. S., which appears on page 162 of your issue of Feb-

ruary 21. The decision in People v. Baker, 76 N. Y. 78, cited by the latter, though for aught I know it may still be the law in that State, has been disapproved generally by the courts of other jurisdictions, where the question has been presented as involving the manifest absurdity, not only that I may be divorced in one State and a married man in that adjoining, but also that I may be divorced from my wife while she still continues to be married to me. This latter state or quasi-state of matrimony is, according to H. C. S., that in which the Missouri wife finds herself. She still has shusband, though he has no longer a wife. He is now not married to her, but she, nevertheless, is his wife, i. e., the woman to whom he is now married. J. C. H. will find light on the questions, both of his client's status and her rights of property, in the careful and elaborate discussions in Bishop's Marriage, Divorce and Separation, vol. II, §§ 152-158, and 839-845. In the absence of fraud or jurisdictional defects in the divorce proceedings, for which they can be successfully attacked collaterally, I would suggest a suit in equity for alimony, with an application to enjoin the prosecution of the ejectment action pending the determination of the other, as possibly a feasible rem-G. F. P. edy for his client's woes.

HUMORS OF THE LAW.

Judge-Prisoner, did you commit the burglary alone, or with the help of others?

Prisoner-With the kind help of the 83d Regiment Band.

Judge-What? Explain yourself.

Salt Lake City, Utah.

Prisoner—Well, you see, Judge, the band made a halt, and all the people in the house went to the front to listen, so that I worked quite undisturbed in the back.

A famous advocate confessed himself: "I am never so happy as when I am defending a prisoner I know to be guilty; for if he is convicted he will get his deserts, and if I get him off it will be a tribute to my

A story is told of one of her majesty's judges who is as remarkable for the quickness of his eyes and ears as for the keenness of his intellect. The other day a stranger in court, espying a friend, addressed him in a stage whisper with:

"Hallo, old man! I haven't seen you lately. Are you all right?"

The remark was hardly heard beyond the nearest bystanders, and there was, consequently considerable bewilderment among those engaged in the case before the court when the judge looking up from his notes,

"If the old man is all right, he had better go outside and say so."—Green Bag.

WKEKLY DIGEST

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1. ACCORD AND SATISFACTION—Evidence.—Where defendant sends a check for the full amount admitted by him to be due plaintiff for commissions for a sale, and incloses a voucher to be signed and returned by plaintiff, which acknowledges receipt of the check "in full for commissions," and plaintiff accepts the tendered payment, he thereby accepts the conditions on which it was sent, though he does not return the voucher, and writes that there is yet due from defendant for such sale \$1,200.—NASSOIY v. TOMLINSON, N. Y., 42 N. E. Rep. 715.

2. ACTION—Disbarred Attorney—Right to Prosecute.
—Where, after an action had been commenced, the plaintiff therein assigned his claim in good faith to one who had been disbarred from practicing as an attorney at law, and an order was made continuing said action in the name of said plaintiff for the benefit of the assignee, the assignee may personally prosecute the claim.—Philbrook v. Superior Court of City and County of San Francisco, Cal., 43 Pac. Rep. 402.

3. Adjoining Landowners—Shutting off Light.—L and K owned adjoining lots, and L erected on his lot a board fence reaching to the roof of K's house, which stood on the line of the two lots, which fence shut off light and air from the windows of the house of K, to its injury, which fence was so erected by L for no useful or ornamental purpose, but from motives of unmixed malice toward K. In an action by K against L to compel the removal of the fence, held, that L had a legal right to erect and maintain such fence, and that neither law nor equity could compel its removal.—LETTS v. KESSLER, Ohio, 42 N. E. Rep. 765.

4. ADMINISTRATION—Jurisdiction—Collateral Attack.
—An order of sale in administration proceedings, reciting the due publication of an order to show cause why the sale should not be made, is sufficient proof of such publication to admit the administrator's deed as evidence of plaintiff's title, in ejectment, nothing appearing in the transcript to show that said order was not published.—ZILLMER Y. GERICHTEN, Cal., 43 Pac. Rep.

5. Arbitration—Review of Evidence.—Under Code Proc. § 429, providing that, if it shall appear that the arbitrators have committed error in fact or law, the cause may be referred back to the arbitrators, the errors must be apparent upon the face of the award alone, or in some paper delivered with it, and the evidence submitted to the arbitrators cannot be examined.—School Dist. No. 5 of Snohomish County v. Sage, Wash., 48 Pac. Rep. 341.

6. Assignment for Benefit of Creditors—Rights of Creditors.—That a creditor of an insolvent debtor, who had made an assignment for the benefit of creditors, under the belief that certain of the property assigned belonged to a partnership comprised of the assignor and his wife, and therefore did not pass under the assignment, sells the same under a judgment recovered against the husband and wife as partners, does not prevent the creditors, on his judgment being set aside as to the wife, and recovery of judgment against him by the assignee for the value of the prop-

erty sold, from sharing in the assigned estate.—Andresson v. Risdon Oahn Co., Wash., 48 Pac. Rep. 387.

- 7. Assignment for Creditors—Foreign Assignor.—Code, art. 16, § 205, requires every trustee to whom property is conveyed for the benefit of creditors to file with the clerk of the court in which the deed is recorded a bond for the faithful performance of the trust, and provides that, until such bond is filed and approved, no title shall pass to any trustee: Held, that it not being necessary to record an assignment by a foreign corporation for the benefit of creditors of Maryland, in order that personalty in Maryland may pass thereunder, the fact that it was so recorded did not render it necessary for the trustee to file a bond in the latter State.—Moore v. Land Title & Trust Co., Md., 33 Atl. Rep. 641.
- 8. Assumpsit Money Had and Received.—Where plaintiff and defendant enter into a partnership to conduct an illegal business, which, after its conclusion, leaves undivided profits in the hands of defendant, and it is agreed by them that plaintiff is entitled to a certain portion thereof, which he leaves on deposit with defendant, plaintiff may recover it.—McDomald v. Lund, Wash., 43 Pac. Rep. 848.
- 9. Assumpsit—Refusal to Perform Contract.—A declaration in assumpsit to recover back money paid on a contract giving plaintiffs an option to purchase real estate, which payment was to be forfeited in case they failed to purchase, is not demurrable where it is alleged that defendant has failed and refused to comply with the terms of the contract by performing conditions precedent to the completion of the purchase.—Burna VISTA CO. V. MCCANDLISH, Va., 23 S. E. Rep. 781.
- 10. ATTACHMENT—Jurisdictional Defect in Affidavit.—All proceedings in an attachment of property based on an affidavit which fails to aver jurisdictional facts are void, and may be collaterally attacked.—MENTZER V. ELLISON, Colo., 43 Pac. Rep. 464.
- 11. Banks—Action for Bank Deposit.—Where one mails to a bank money and checks for deposit, but the bank refuses to acknowledge receipt thereof, and persistently denies such receipt, the relation of depositor and depositee is not created.—MILLER v. WESTERN NAT. BANK OF YORK, Penn., 33 Atl. Rep. 684.
- 12. CANCELLATION OF DEED—Mistake of Law.—Mere mistake of law will not alone be ground of relief against a conveyance or other act; but when accompanied by fraud in any form, such as misrepresentation or concealment of facts, imposition, undue influence, or misplaced confidence, or advantage has been in any way taken of one's ignorance of law to mislead him, or where there is a relation of trust and confidence, it will be ground of relief in equity.—SCHUTTLER V. BRANDFASS, W. Va., 28 S. E. Rep. 808.
- 13. CHINAMAN—Right to Naturalization.—A native of China of the Mongolian race is not entitled to be admitted to citizenship.—In RE GEE Hor, U. S. D. C. (Cal.), 71 Fed.Rep. 274.
- 14. Constitutional Law Evidence of Facts—Injuries.—The general assembly of this State has authority to prescribe the circumstances that shall constitute prima facte evidence of a fact in issue in an action on trial in the courts of this State, whether the cause of action to which it relates arose within or without the territorial limits of the State.—Pennsylvania Co. v. McCann, Ohio, 42 N. E. Rep. 763.
- 15. CONSTITUTIONAL LAW Judicial Acts.—An act done in the exercise of judicial power—an act performed by a court touching the rights of parties or property brought before it by voluntary appearance or by prior action of ministerial officers—is a judicial act.—ARKLE V. BOARD OF COMMRS., W. Va., 28 S. E. Rep. 804.
- 16. Constitutional Law—Title of Act.—Acts 1888-89, p. 60, § 3, entitled "An act to amend an act entitled 'An act to provide for the registration and lien of judgments,'" which seeks to extend "the laws relating to the satisfaction of mortgages to the satisfaction of the

- liens created by this act," violates Const. art. 4, § 2, providing that each law shall contain but one subject.

 —RICE V. WESTCOTT, Ala., 18 South. Rep. 844.
- 17. CONTRACTS—Parol Evidence.—In a proceeding to construe a contract by which plaintiff sold to defendant "all the timber" on an estate, testimony that at the time of its execution there was a contemporaneous understanding that the contract included only "pine" timber, is inadmissible where no fraud was shown in its procurement.—ALLEN V. CRANK, Va., 28 S. E. Rep. 772.
- 18. CONTRACTS—Quantum Meruit.—Services rendered under a void contract with a board of county commissioners cannot be recovered for in an action upon quantum meruit.—HAMPTON V. BOARD OF COMMRS. OF LOGAN COUNTY, Idaho, 43 Pac. Rep. 874.
- 19. CORPORATION—Change into Partnership.—A corporation formed according to the State law, and duly set going as such, cannot be changed into a copartnership by a court of equity, at the suit of one of the incorporators, merely because the books were kept by him as if the concern was a copartnership.—NIGHTING-GALE V. MILWAUKEE FURNITURE CO., U. S. C. C. (Cal.), 71 Fed. Rep. 224.
- 29. CORPORATIONS—Directors' Liability—Estoppel.—Individuals assuming to act as directors of a corporation, and, as such, contracting debts, are estopped to deny their official position.—JENET v. ALBERS, Colo., 43 Pac. Rep. 452.
- 21. COUNTY TREASURER—Action on Bond—Parties.—The county in which taxes for county and State purposes are levied, being the owner thereof when collected as well as of taxes levied for school purposes till apportioned to the several school districts, is a proper party to an action on the official bond of the tax collector of the county, though it runs in the name of the State; Hill's Ann. Laws, §§ 340, 341, providing that the undertaking of a public officer to the State or a county shall be a security to the State or county as the case may be, and that when he forfeits his bond, any person injured by his misconduct, or who is by law entitled to the benefit of the security, may maintain an action thereon in his own name.—Hume v. Kelly, Oreg., 43 Pac. Rep. 880.
- 22. COUNTIES—Defective Bridges.—A county is not liable for injuries sustained from the unsafe condition of the approach to a bridge, unless expressly made so by statute.—BOARD OF COM'RS OF JOHNSON COUNTY V. HEMPHILL, Ind., 42 N. E. Rep. 760.
- 23. COURTS—Mandamus.—A judgment directing the issuance of a writ of mandamus to compel a board of supervisors to pay to the commissioners of highways money for construction of a bridge is not appealable to the supreme court, as involving a franchise, or a matter in which the State is interested as a party or otherwise, or relating to revenue.—BOARD OF SUP'ES OF SHELBY COUNTY v. PEOPLE, Ill., 42 N. E. Rep. 777.
- 24. COVENANTS Preading.—In an action for damages for breach of covenant, defendant's plea of conditions performed is properly rejected where it fails to show specially the time, place, and manner of performing each condition.—NORFOLK & C. R. CO. V. SUFFOLK LUMBER CO., Va., 23 S. E. Rep. 737.
- 25. CRIMINAL CASES—Subpona for Defendant's Witnesses.—Under Const. art. 1, § 22, giving accused the right to compulsory process to compel attendance of witnesses in his behalf, without advancing any fees therefore, and 2 Code, § 1363, providing that accused shall have the right to compulsory process to compel the attendance of witnesses in his behalf, accused is entitled to have only necessary or material witnesses subpoensed for him at public expense, and subpoense in such case, should be issued only on an order of the court.—STATE V. GRAVES, Wash., 43 Pac. Rep. 376.
- 26. CRIMINAL LAW-Evidence Other Crimes.—In a prosecution for larceny, evidence of a former conviction of defendant for another crime is only admissible to impeach his credibility as a witness, and therefore

an instruction that such evidence could be considered in determining whether defendant had proven a good character for honesty is erroneous, as giving it too large a scope as evidence.—McQUEEN v. STATE, Ala., 18 South. Rep. 843.

- 27. CRIMINAL LAW—Indictment.—An indictment under Rev. St. § 5398, for assaulting a United States officer while engaged in the execution of a warrant, need not allege that the warrant was given to the officer to be by him executed, or that it was in his hands at the time of the alleged assault, or that the officers had any orders, directions or authority to execute the warrant.—BLAKE V. UNITED STATES, U. S. C. O. of App., 71 Fed. Rep. 286.
- 28. CRIMINAL LAW—Sentence.—Under Cr. Code, div. 14, § 1, requiring the court to fix the day for infliction of the death sentence at not less than 15 nor more than 25 days from the time sentence is pronounced, provided, for good cause, the court or governor may prolong the time, it is reversible error to fix the time at more than 25 days from the day of the sentence.—WALLACE V. PROPLE, Ill., 42 N. E. Rep. 771.
- 29. CRIMINAL LAW—Stolen Goods.—In a prosecution for receiving stolen goods, that defendant denied receiving clothing from the negro who had stolen it, and who, defendant knew, was employed in a merchant tailor's store, and who belonged to the best circles of his people, is insufficient to prove knowledge that the goods were stolen, in the face of open conduct of defendant in acknowledging that he had received other goods from the thief, and proof of good character.—WILLIAMSON V. COMMONWEALTH, Va., 23 S. E. Eep. 782.
- 30. CRIMINAL LAW—View.—It is within the discretion of the court, on a trial for burglary, when informed by the jury that they cannot agree on a verdict without a view of the premises, to allow such view, with consent of defendant.—PEOPLE v. HAWLEY, Cal., 43 Pac. Rep. 404.
- 31. Damages—Liquidated Damages.—A provision in a contract for the construction of a residence, that the builder, in case of non-completion of the house by a given date, should pay \$10 for each day's delay, is a stipulation for liquidated damages.—REICHENBACH V. SAGE, Wash., 43 Pac. Rep. 854.
- 82. DEED—Delivery Evidence.—That a father, who had repeatedly acknowledged his obligations to certain of his children, and executed a will whereby he devised to them land which they had helped him to cultivate and pay for, before a second marriage, executed a voluntary deed conveying the land to such children which he left with the notary, with instructions to record and deliver the same on his death, stating that he did not wish to see it again, and that the grantees, who remained in possession of the land with the grantor, were aware of the execution of the deed, and accepted it, shows a delivery of the deed.—CRATTREE V. CRATTREE, Ill., 42 N. E. Rep. 787.
- 33. DEED—Estate Conveyed.—Under Rev. St. ch. 80, § 9, providing that the words "convey and warrant," in a deed, shall be a conveyance in fee-simple without other words of inheritance, a deed reciting that the grantor does "convey and warrant" to the grantees certain land, though the deed contains a subsequent clause reserving a life estate to the grantor, and providing that on the death of one of the grantees the land shall revert to the survivor, conveys to each a fee-simple, subject merely to the life estate reserved to the grantor.—PALMER V. COOK, Ill., 42 N. E. Rep. 796.
- W. Dower-Exchange of Lands.—Dower Act, § 17, providing that if the husband "exchange" land for other land, the wife shall not have dower of both, does not deprive the wife, after enforcement against her husband's estate of a note received in consideration of the release of her dower in lands conveyed by the husband from claiming dower in other lands conveyed by the husband in part consideration of the first conveyement, the balance of the consideration for which was

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- paid in personalty.—HARTWELL v. DE VAULT, III., 42 N. E. Rep. 789.
- 35. ELECTIONS—Marking of Ballot.—Under Act June 10, 1983, a voter cannot mark a cross for a person whose name is printed on the ballot, and also insert in the blank space provided for the same office an additional name, even though it be similar to the other and it is proper to refuse to count a ballot so marked.—IN RE CONTESTED ELECTION FOR JUSTICE OF THE PEACE, Penn., 33 Atl. Rep. 703.
- 86. EQUITY Jurisdiction.—Bailment is not such a trust as gives a court of equity jurisdiction.—THOMPSON V. WHITAKER IRON CO., W. Va., 28 S. E. Rep. 795.
- 87. EQUITY—Rescission—Evidence.—In a suit to cancel a grant of a right of way for an irrigation ditch, on the ground of breach of a representation that the ditch would be so located that the grantor could irrigate his land to the best advantage, evidence, merely, that if the ditch had been placed in one corner of the land it would have been upon higher land, does not entitle plaintiff to a rescission.—Barfield v. South Side Irrigation Co., Cal., 48 Pac. Rep. 406.
- 88. EQUITY—Rescission—False Representations.—To authorize the grantee to rescind a conveyance for false representations, it must be shown that they were material, were relied on by the grantee, and made to induce him to enter into the contract.—BECKLET v. RIVERSIDE LAND CO., Va., 23 S. E. Rep. 778.
- 39. EQUITY—Rescission—Fraud.—After land had been platted, the owner vacated a portion of the plat, and afterwards sold land in the part vacated, the plat being referred to in the deed for description. In the original plat there was ar alley in the rear of the land conveyed, but, on replatting, no alley was located: Held, that the grantor's fraud in concealing from the grantee the fact the original plat had been vacated entitled him to rescind the contract.—FRIDAY V. PARK HURST, Wash., 48 Pac. Rep. 362.
- 40. ESTOPPEL IN PAIS.—In anjaction by the payee of a note against the makers, it appeared that plaintiff had indorsed to two of the makers other notes, but was not liable thereon, on account of their failure to make due demand, which, after maturity, were turned over to the other maker to secure him from liability on the note in suit, which, at his dictation, was executed in a non-negotiable form; he having refused to sign it in its original negotiable form, under the belief that thereby he would be able to set off the other notes against liability on it: Held, that plaintiff was not estopped, as against the latter maker, to deny her liability on the notes indorsed by her and turned over to him, so as to enable him to set them off against her claim.—BEER V. CLIFTON, Cal., 43 Pac. Rep. 411.
- 41. EVIDENCE—Assessment Rolls.—Assessment rolls are themselves the best evidence of their contents, and they cannot be proven by the evidence of a city official.—CITY OF SEATTLE v. PARKER, Wash., 43 Pac. Rep. 860.
- 42. EVIDENCE—Ordinance—Validity.—The introduction of the ordinance book, containing a certain ordinance, and showing its passage by the board, with the vote thereon, and the proper authentication thereof, together with evidence, as to its due publication, is prima facis proof of its validity, though the regularity of the proceedings was denied.—MERCED COUNTY V. FLEMING, Cal., 48 Pac. Rep. 892.
- 43. FALSE IMPRISONMENT—Justification—Legal Writ.
 —Imprisonment by virtue of a legal writ in due form, issued by a court of competent jurisdiction, and served in a lawful manner, is not false imprisonment, though the writ was wrongfully issued.—CARMAN V. EMERSON, U. S. C. C. of App., 71 Fed. Rep. 264.
- 44. FEDERAL COURTS—Circuit Court of Appeals.—Where, in a suit between citizens of different States, the decree of a circuit court of appeals is final, by force of Act March 5, 1891, a decree upon intervention in the same suit, involving the right to property in the actual possession of the circuit court, is likewise final.—GREGORY V. VANEE, U. S. S. C., 16 S. C. Rep. 481.

- 45. FEDERAL COURTS—Supreme Court—Jurisdiction.—The fact that the State supreme court, in affirming a judgment, decided against an immunity from liability expressly claimed under the laws of the United States, does not give jurisdiction to the federal supreme court, if such immunity was not claimed in the trial court.—CHEMICAL NAT. BANK OF CHICAGO V. CITY BANK OF PORTAGE, U. S. S. C., 16 S. C. Rep. 417.
- 46. FRAUDS, STATUTE OF Contract.—A contract for the delivery of railroad ties of specified dimensions is within the statute of frauds, though it was contemplated by the parties that the ties were to be prepared from standing timber or from logs already cut.—ELLIS v. DENVER, L. & G. R. Co., Colo., 48 Pac. Rep. 457.
- 47. FRAUDULENT CONVEYANCES Right of Administrator to Impeach.—An administrator, in his individual capacity, as creditor of the estate, and as administrator, may sue to set aside a voluntary assignment of a chose in action by his decedent, as in fraud of creditors, especially where the bill also alleges that the assignment was not completed.—SPOONER'S ADM'R V. HILBISH'S EX'R., Va., 28 S. E. Rep. 751.
- 48. HUSBAND AND WIFE Tenants by Entirety.—Tenancy by the entirety had its origin in the marital relation, and was founded on the legal fiction of the absolute oneness of husband and wife. Modern legislation has abrogated this theoretical unity, and secured to the wife a distinct and separate right to acquire and enjoy property to her sole use and benefit, and free from the control of her husband.—APPEAL OF ROBINSON, Me., 38 Atl. Rep. 652.
- 49. INJUNCTION Action on Recognizance Bond.—
 Equity will not enjoin an action of scire facias on a
 recognizance bond by the assignee of the beneficiary,
 on the ground that the share of the beneficiary had
 been paid to her, as the remedy at law is adequate.—
 BURTON V. WILLEN, Dela., 33 Atl. Rep. 675.
- 50. Injunction Right of Corporation.—A corporation cannot have persons or organizations enjoined because they have conspired to exterminate it by compelling its members to leave it.—SILVER STATE COUNCIL NO. 1 OF AMERICAN ORDER OF STEAM ENGINEERS V. RHODES, Colo., 43 Pac. Rep. 461.
- 51. INSOLVENCY Mortgage Lien Priorities.—One who lends money, on security, to an embarrassed corporation, on its subsequently becoming insolvent has no lien on its mortgaged property in preference to bondholders under a valid mortgage thereof existing when the loan was made, no matter for what purpose the loan was made, or how it was applied, if the bondholders were not parties to the loan.—FARMERS' LOAN & TRUST CO. v. BANKERS' & MERCHANTS' TEL. CO., N. J., 42 N. E. Rep. 707.
- 52. INSURANCE AGENTS Powers.—A general agent of an insurance company has implied power to appoint subagents, so that their acts in the solicitation of insurance will be as binding on the company as the acts of the agent, and thereby prevent the company from avoiding a policy under a condition avoiding the policy in case of incumbrances or other insurance, where the existence of such other insurance or incumbrances was disclosed to the subagents.—GOODE v. GEORGIA HOME INS. Co., Va., 23 S. E. Rep. 744.
- 53. JUDGMENT—Collateral Attack.—A bill will not lie to enjoin the enforcement of the judgment of a court having jurisdiction of both subject-matter and parties, though erroneous.—A. B. SMITH CO. v. BANK OF HOLMES COUNTY, Miss., 18 South. Rep. 847.
- 54. JUDGMENT Res Judicata.—The sustaining of a demurrer to a declaration to recover for personal injuries, on the ground that it shows the plaintiff to have been guilty of contributory negligence, and the entry of judgment thereon, is an adjudication, and bars a second action for the same injury.—STRAW V. ILLINOIS CENT. R. Co., Miss., 18 South. Rep. 847.
- 55. Laches Charitable Trusts.-Though charitable trusts are highly favored by the law, and a court of

- equity will sometimes entertain a bill, after a long period of delay, to correct the administration of a charitable trust, which is being administered contrary to the plain intent of the founder, it is not a rule of universal application that laches cannot be set up in defense of a suit to enforce a charitable trust. Accordingly, held that, in a suit between rival church sects, each seeking to obtain possession of certain real estate in order to devote it in its own way to pious uses, neither the State nor the public at large having any interest in the litigation, a delay by the complainant of 25 years before asserting its claims, during which the defendant had expended money in buying an apparently valid title and in paying taxes, was laches such as to bar complainant from relief.—CHURCH OF CURIST AT INDEPENDENCE, MO. V. REORGANIZED CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, U. S. C. C. of App., 71 Fed. Rep. 250.
- 56. LIEN Logs and Logging.—Where fence posts have been completed, one employed by the vendor to haul them from the place of their manufacture, and to deliver them to the vendee, acquires no lien on the posts for his services, within Laws 1893, p. 428, § 1, providing that "every person performing labor on or who shall assist in obtaining or securing saw logs, spars, piles or other timber, has a lien upon the same."—RYAN V. GUILFOIL, Wash., 48 Pac. Rep. 851.
- 57. LIFE INSURANCE POLICY Presumption of Death.—In an action on a policy on the life of one who disappeared about a year before the commencement of suit, it is proper to charge that the death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing exposure to danger which might probably result in his death.—NORTHWESTERN MUT. LIFE INS. CO. V. STEVENS, U. S. C. C. of App., 71 Fed. Rep. 258.
- 58. LIMITATIONS Absence from State.—Under Code Civ. Proc. § 401, declaring that if, after a cause of action has accrued against a person, be departs from and resides without the State, and remains continuously absent therefrom for one year or more, the time of his absence is not a part of the time limited for commencement of the action, evidence, merely, that a person, having a domicile and residence in the State went to Europe, and was absent two and a half years, does not show that he resided without the State; it being necessary, for this, that he should at least take up his temporary abode at some particular place, with the intention of making it his home while so absent, and actually reside there.—HART v. KIP, N. Y., 42 N. E. Rep. 712.
- 59. MANDAMUS—Levy of Tax.—Mandamus to a municipal corporation to levy a tax for the purpose of paying a judgment against such corporation is in the nature of an execution to enforce such judgment, and does not require bond for costs where such has already been given in the original action.—STEVENS V. MILLER, Kan., 43 Pac. Rep. 439.
- 60. MARRIED WOMAN.—As Code, § 2284, makes damages for a wrong sustained by a married woman her separate estate, and section 2288 provides that a married woman may sue as if she were unmarried as to matters connected with her separate estate, the hubband is an improper party to an action by his wife for personal injuries, and for the destruction of a horse and buggy owned by her.—NORFOLK & W. R. Co. V. DOUGHERTY, Va., 23 S. E. Rep. 778.
- 61. MASTER AND SERVANT Injury to Employee—Defective Appliance.—An employer is not liable for injuries to an employee resulting from a defective appliance unless he had actual knowledge of the defect, or by ordinary care could have obtained such knowledge, in time to prevent the injury.—ERSKINE V. CHIEO V.AL. BEET-SUGAR CO., U. S. C. C. (Cal.), 71 Fed. Rep. 270.
- 62. MECHANIC'S LIEN Notice Time for Filing.-A plumber, in performance of a contract to put into a



house a water-closet and bath tub, furnished by the owner of the building, notified the owner that the work was complete on May 15th. While the work was being done, the owner sold the house; the purchaser took possession; and on finding that the plumber had, by mistake, connected the hot-water pipe with the closet, instead of the tub, telephoned to him to fix the same, which was done June 2d, in a short time, for which no charge was made: Held, that the contract was performed on June 2d, from which the time for filing notice of lien was to be computed.—CONLEE V. CLARE, Ind., 42 N. E. Rep. 762.

- 63. MECHANIC'S LIEN—Public Bridge.—As bridges are specially designated by Gen. St. § 1663, as subject to mechanics' liens, those who furnish material for public bridges are entitled to the benefit of Gen. St. § 2416, requiring a bond to be given by contractors who do work for a county which, if done for an individual, would create a right of lien.—GILMORE v. WESTERMAN, Wash., 43 Pac. Rep. 345.
- 64. MECHANICS LIENS—Materials Furnished.—Where the plaintiff in a mechanic's lien case has complied with all the provisions of the statute relating to the lien, it is presumed that the materials were furnished or the work was done on the credit of the buildings.—GREEN V. THOMPSON, Penn., 33 Atl. Rep. 702.
- 65. Mining Operations—Injury to Surface.—If the owner of coal beneath the surface undertakes to mine and remove it, and damage results to the surface, which is owned by another person, either from negligence in conducting the mining, or from failure to properly and sufficiently support the surface, or from both these causes, the surface owner may recover compensation.—Pringle v. Vesta Coal Co., Penn., 33 Atl. Rep. 690.
- 66. MINING Surface Owner Right of Support.— Where the mineral estate in land is severed from the surface by a conveyance, the owner of the fermer is bound to leave enough of the mineral in place to support the surface, unless the owner of the latter has released his right to support.—ROBERTSON V. YOUGHIOGHENY RIVER COAL CO., Penn., 33 Atl. Rep. 706.
- 67. MUNICIPAL CORPORATIONS—Control of Streets.—Acity, under its power to lay out streets and regulate the use thereof, may lay out a street over a railroad, and thereafter prevent the railroad company from constructing, without the city's permission, a railway track through such street, within the limits of its right of way.—Pittsburg, Ft. W. & C. By. Co. v. City of Obicago, Iil., 42 N. E. Bep. 781.
- 68. MUNICIAAL CORPORATION—Water Company—Contract.—Where the franchise of a city water company makes it its duty to supply the city with water, and to furnish stations of the city's electric plant with water at a specified price, and the city leases the electric plant, equity has jurisdiction of an action to enjoin the company from refusing to supply the lessee with water for such electric stations on the lessee's refusal to pay a greater price than that for which the company agreed to supply it to the city, though the complaint does not allege that there is no other source from which a supply could be obtained.—Jenkins v. Columbia Land & Improvement Co., Wash., 43 Pac. Rep. 328.
- 89. MUNICIPAL CORPORATION—Water Supply—Pollution.—When the stream from which a water company, organized to supply a borough with water, obtains its supply is rendered unfit for domestic uses and for steam by the discharge therein of water drawn off from oil wells in the process of extracting the oil, it is proper to make the State a party to a suit by the water company to restrain such pollution, and then to determine whether the public interest, apart from the private interest of the water company, does not make such relief proper and necessary.—COMMONWEALTH v. RUSSELL, Penn., 33 Atl. Rep. 769.
- 70. MUNICIPAL IMPROVEMENTS—Constitutional Law.— Act March 9, 1883, providing that, whenever an assessment for a local municipal improvement has been de-

clared void, the council shall make a reassessment on the property benefited by the improvement, whether the defect in the council's original proceedings be jurisdictional or otherwise, and without regard to whether the improvement is already completed, is not unconstitutional, as disturbing vested rights, or on any other ground; and it is immaterial that the act does not require a petition of the property owners, which was prerequisite to the original assessment. It is enough that the act requires notice of the reassessment.—
FREDERICK V. CITY OF SEATTLE, Wash., 43 Pac. Rep. 364.

- 71. MUNICIPAL IMPROVEMENTS—Ordinances.—Under a city charter requiring the mayor to preside at meetings of the council, and providing that, if he is absent from such meetings the council shall select one of its number as acting mayor, who shall thereupon be vested with all the powers of the mayor till his return, such acting mayor, when presiding at meetings of the council, has no vote, within a provision that certain ordinances be passed by a unanimous vote of the council.—CLINE V. CITY OF SEATTLE, Wash., 43 Pac. Rep. 367.
- 72. NATIONAL BANK STOCK-Taxation by State.-The mere fact that a State statute permits some debts to be deducted from some moneyed capital for the purpose of assessment for taxation, but not from that which is invested in the shares of national banks, does not show a violation of Rev. St. § 5219, forbidding State taxation of national bank shares to be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, there being nothing to show that the amount of moneyed capital in the State from which debts may be deducted, as compared with the moneyed capital invested in national bank shares, was so large and substantial as to amount to an illegal discrimination against national bank shareholders .-FIRST NAT. BANK OF GARNETT V. AYERS, U. S. S. C., 16 8. C. Rep. 412.
- 73. NEGLIGENCE Contributory Negligence—Pleading.—Contributory negligence is matter of defense to be pleaded by defendant, and need not be negatived in the complaint.—JOHNSON v. BELLINGHAM BAY IMP. Co., Wash., 48 Pac. Rep. 370.
- 74. NEGDIGENCE—Proximate Cause.—While a car containing binding twine was in the freight yard of a railway company ready for unloading, a fire broke out in a building twenty-three feet away, situated on property, on the other side of an alley, not belonging to the company. The car was then moved promptly, but in the meantime, and within twenty minutes of the breaking out of the fire, the twine caught fire from sparks entering through the car door, which had been left open about ten inches: Held, that the leaving open of the door was not the proximate cause of the loss.—Scott v. Allegheny Val. Ry. Co., Penn., 33 Atl. Rep. 712.
- 75. NEGLIGENCE OF PASSENGER—Remote Cause.—Defendant's train, having slowed down, failed to stop at a station where plaintiff wished to alight, and plaintiff, incumbered with bundles, went out of the car in search of the conductor, and having reached the platform was thrown off the train by reason of its suddenly accelerated speed while passing around a curve: Held, that while it was negligence to fail to stop at the station, said negligence was not the proximate cause of the accident.—Jammison v. Chesapeake & O. Ry. Co., Va., 23 S. E. Rep. 758.
- 76. NEGOTIABLE INSTRUMENT Action—General Denial.—An answer, in an action against defendants as makers of a note, denying that they executed the note as principals, and denying "each and every part of the complaint, except as herein expressly admitted, explained or qualified," followed by an affirmative defense that they signed as sureties, which was demurrable, and inconsistent with a general denial, did not disclose an independent defense, to prevent plaintiff from taking judgment on the pleadings.—LAMBERTON V. SHANNON, Wash., 43 Pac. Rep. 336.

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- 77. NEGOTIABLE INSTRUMENTS—Joint Makers.—In response to a demand, by a person holding a certificate of deposit against a bank, that the bank, in consideration of an extension, send as security a note, signed by the bank and indorsed by the directors, payable in one day, a note, executed in Seattle, payable in one day, and signed on the back by the directors, was on the day following its execution mailed to the payee in San Francisco; the two towns being about 1,000 miles apart: Held, the directors were joint makers and not indorsers.—DONOHOE-KELLY BANKING CO. V. PUGET SOUND SAV. BANK, Wash., 43 Pac. Rep. 359.
- 78. NEGOTIABLE INSTRUMENTS—Legality—Bastardy.—A note given to a woman in compromise of a bastardy proceeding is binding and valid, and on sufficient consideration, and the payment thereof cannot be avoided on the ground that the compromise of such proceeding is contrary to public policy, or against public morals. Nor can the innocence of the putative father be set up as a defense against the recovery of such note, in the absence of fraud on the part of the obligee in procurement thereof.—Billingsley v. Clelland, W. Va., 28 S. E. Red. 812.
- 79. PARENT AND CHILD—Presumption.—A voluntary conveyance of property by a parent to her child is not presumed to be invalid, unless a confidential relation between them is shown to exist.—BAUER v. BAUER, Md., 53 Atl. Rep. 643.
- 80. Partition Riparian Proprietors Equity. Equity has jurisdiction to make partition of the use of water between opposite riparian proprietors when necessary to secure an equal use or enjoyment in their rights.—Warren v. Westbrook Mfg. Co., Me., 38 Atl. Rep. 665.
- 81. PARTMERSHIP ACCOUNTS—Settlement.—The excess of one partner's advances over those of the other constitutes a preferred claim upon the partnership property, or its proceeds.—MATTHEWS V. ADAMS, Md., 38 Atl. Rep. 645.
- 82. PARTMERSHIP—Dissolution—Power of Partners.—
 After the dissolution of a firm, one partner cannot, without the consent of the other, execute a negotiable note in the firm name.—Huntington White Lime Co. v. Mock, Ind., 42 N. E. Rep. 761.
- 83. PARTMERSHIP—Liability of Incoming Partner.—Where tenants in common in a mine form a partnership for the operation of the mine, without the mining property being brought into the partnership as a portion of its capital stock, the property does not, for payment of partnership debts, become partnership property, as between a purchaser of one partner's interest in the mine and the remaining partners.—PATRICK V. WESTOM, Colo., 48 Pac. Rep. 446.
- 84. PARTMERSHIP—Resulting Trust.—Plaintiff's allegations that he held certain property in trust for himself and defendant, and mortgaged the same for a loan which he used for the benefit of himself and defendant as partners, and that defendant purchased said property at the mortgage foreclosure sale, and held it partly in trust for plaintiff, were not established, where it appeared that, while plaintiff held the property, he exercised ownership over it for eight years, that plaintiff failed to prove a partnership between himself and defendant, and that defendant denied having any interest in the property until his purchase at the mortgage sale.—HODGSON v. FOWLER, Colo., 43 Pac. Rep. 462.
- 85. PAYMENT—Receipts.—Where an account for goods sold to defendant was assigned to plaintiff with defendant's knowledge, and afterwards the assignor, in a settlement with defendant, gave a receipt in full for other accounts which, by mistake, included the one previously assigned, such settlement did not relieve defendant from its liability to plaintiff.—McCarthy v. Mt. Tecarte Land & Water Co., Cal., 48 Pac. Rep. 391.
- 86. PLEADING Variance Name of Corporation.—
 The name of a corporation is not the only means of identity. If some words be added, omitted, or changed in the spelling, in the true name of the corpo-

- ration, this is not a fatal variance, if there be enough to distinguish it from other corporations, and to show that the corporation suing or being sued was the one intended.—First NAT. BANK OF CEREBO V. HUNTINGTOM DISTILLING CO., W. Va., 23 S. E. Rep. 792.
- 87. PRINCIPAL AND AGENT Consideration.—Parol evidence is admissible to show that a contract executed in the name of an agent was in fact the contract of the principal, and executed with the intention that he should secure the benefits thereof, though at the time the contract was executed the fact of agency was known to all parties, especially where the other party, at whose request the contract was so executed, has acquiesced in the part of the performance of the contract by the principal, and the contract shows on its face that part of the recited consideration moved from the principal.—Babbee v. Goodale, Oreg., 48 Pac. Rep. 378.
- 88. PRINCIPAL AND SURETY Subrogation.—Unless a surety pays the debt in full, he is not entitled to subrogation to any part of the rights of the creditor.—DICKSON V. BAILEY, Penn., 83 Atl. Rep. 705.
- 89. RAILBOAD COMPANIES—Contributory Negligence.—One, who knowing that trains frequently passed each other at a crossing, goes on the track while it is obscured by the smoke of a train which has just passed, and is struck by a train running in the opposite direction, which he was unable to see, because of the smoke, is guilty of negligence.—OLBSON V. LAKE SHORE & M. B. CO., Ind., 42 N. E. Rep. 736.
- 90. BAILROAD COMPANIES-Fires Set by Locomotives. -A person owning property along the right of way of a railway has a right to occupy such property and erect such buildings as he may have occasion to place thereon, so that he does not occupy it with such buildings as are known to be unsafe and dangerously exposed. He is the owner of the land, and has a right to its occupancy, and has a right to occupy it and use it for all legitimate uses. He is only required to use such care and diligence in the erection of buildings and protection of his property against damage by fire as an ordinarily prudent person would under all the surrounding circumstances. He is no more bound to guard his property against fire than the railway company is to guard against permitting the escape of fire from its engines. Each are held to ordinary care and prudence in the use of their property .- ST. LOUIS & S. F. RY. Co. v. STEVENS, Kan., 48 Pac. Rep. 484.
- 91. RAILROAD COMPANY—Injury at Crossing—Contributory Negligence.—There being on defendant's main track a coal train about to move, deceased stopped on a side track, at the end of two freight cars, until the coal train moved out, when he immediately stepped out on the main track and was struck by a train about 60 feet behind the coal train. There was evidence that the locomotive gave no warning, and it appeared that the space between the side and main tracks was only sufficient to allow the safe passing of trains: Held, that the question of contributory negligence on the part of deceased was for the jury.—GRAY V. PENNSYLVANIA R. Co., Penn., 38 Atl. Rep. 697.
- 92. RAILBOAD COMPANIES—Negligence—Independent Contractors.—A complaint against a railroad company for personal injuries sustained by one who was employed by the independent contractors who were then building a portion of the road, alleging that there was an "arrangement" between the railroad company and said contractors whereby said railroad company was to transport the employees of said contractors, sufficiently showed that there was an agreement to that effect.—Boyle v. Great Northern Ry. Co., Wash., 43 Pac. Rep. 344.
- 98. RAILROAD COMPANY Negligence—Trespasser.—
 It is not error to charge, in an action for death of a
 trespasser en a railroad track, that though he was
 guilty of contributory negligence, recovery could be
 had for his death, if, after his peril was discovered by
 those in charge of the train, the injury "could have
 been prevented," as, after discovery of a trespasser's

peril, those in charge of a train are to use the same care to avoid injuring him as in case of one rightfully en the track.—SEABOARD & R. R. CO. V. JOYNER'S ADM'R., Va., 28 S. E. Rep. 773.

94. RAILEOAD COMPANIES — Stock Killing.—The "Stock-Killing Act," making railroads absolutely liable for stock killed, being unconstitutional, judgment against a railroad for killing cattle cannot be sustained, there being nothing, apart from the fact of the killing, to show negligence, and the train being shown to have been run in the usual way, on a down grade, without steam, under the air brake, 25 miles an hour, and the engineer having applied the brakes as soon as the presence of cattle on the track was disclosed by the headlight.—Denver & R. G. R. Co. v. Wheatley, Colo., 45 Pac. Rep. 446.

35. RECEIVERS — Notice to Adverse Party.—When an order appointing a receiver recites that the adverse party had not been notified "of the change of the time of the hearing, and was not present," and that complainant was not required to give bond, such appointment is invalid, under Acts 1894-95, p. 226, § 1, providing that, when application is made for the appointment of a receiver, without notice to the party adversely interested, the court "must require the complainant to enter into a bond in such sum" as may to the court seem sufficient to cover damages which may result from such appointment.—Capital City Water Co. v. Weatherly, Ala., 18 South. Rep. \$41.

96. REMOVAL OF CAUSES.—In this case the petition for removal to a federal court was not filed until after the time allowed by the State court for filing pleas in abatement, and it was held that the circumstances did not show a waiver of the matter of time, and the case must be remanded.—FIRST LITTLETON BRIDGE CORP. V. CONNECTICUT RIVER LUMBER CO., U. S. C. C. (N. H.), 71 Fed. Rep. 225.

97. REPLEVIN — Ownership — General Denial.—In replevin, to recover goods in the hands of an officer, seized on attachment against the plaintiff's husband, where plaintiff pleaded title generally, and supported the allegation by proof of a gift from her husband, evidence that the husband owed the debt, upon which the property was taken, when the alleged gift was made, and was then insolvent, was admissible, under a general denial.—BURCHINELL v. BUTTERS, Colo., 48 Pac. Rep. 459.

96. REQUESTS FOR SPECIAL FINDINGS—Forcible Entry and Detainer.—It is not error to refuse to direct the jury to answer interrogatories or to return a special verdict, where the request therefor is not made till after the argument of counsel has commenced.—Hamlin v. Escle. Ind., 42 N. E. Rep. 760.

99. SALE—Acceptance.—Where a contract for sale of goods is valid, a delivery, pursuant to its terms, of goods conforming to the contract, entitles the seller to recover, though there was no formal acceptance.—BRIGHAM V. HIBBARD, Oreg., 43 Pac. Rep. 883.

100. SALE — Consummation.—When logs are delivered, measured, and branded with the brand of the purchaser, at a point or place of delivery in strict accordance with the unequivocal stipulations of the written contract of purchase, the sale is complete, and the title passes to and vests in the purchaser, notwith-standing other provisions in such written contract by which the seller agrees for a fixed compensation safely and without loss or damage to deliver such logs at another and different point for the purchaser. As to the latter part of the contract, the original seller becomes the ballee or agent of the purchaser to secure a safe delivery of the logs, and is in no wise reinvested with the title to or property in such plogs.—Bank of Huntimotor, Napier, W. Va., 23 S. E. Rep. 800.

101. Sales-Contracts—Parol Evidence.—Whére the

MI. SALES—Contracts — Parol Evidence.—Where the whole agreement in reference to the sale of property is embraced in a written bill of sale, parol evidence is inadmissible to contradict, vary, or modify the contract which the parties have thus reduced to writing.—MRALV. FLINT, Me., 38 Atl. Rep. 669.

102. Sale of Business—Covenant against Engaging in Business.—Evidence that a woman was assisting her husband to carry on a business, that they were apparently conducting it together, that the property had all been acquired after their marriage and with community funds, and that she joined her husband in executing a contract of sale thereof, is sufficient to sustain a finding, in an action on their covenants not to re-engage in such business, that she had an interest in the property and business.—Potter v. Ahrens, Cal., 48 Pac. Rep. 888.

103. SALE OF INFANT'S PROPERTY.—Testator left leasehold property to his wife for life, with the remainder to his children, charging it, as well as other property, with the payment of legacies to the children, and appointed his wife executrix: Held, that the executrix's assent to this legacy vested the life estate in her, with remainder to the children.—KOPP V. HERRMAN, Md., 83 Atl. Rep. 646.

104. SCHOOLS—Officers—Women.—Laws 1889-90, p. 348 (1 Hill's Code, § 775), providing for the election of county superintendent of schools, provides that "he" shall give bond, etc., and fixes "his" term of office. Section 78 of the same act (1 Hill's Code, § 856), provides that whenever the word "he" or "his" occurs in the act referring to county superintendent, etc., or other school officer, it shall be understood to mean also "she" or "her:" Held, that a woman was capable of holding the office of county superintendent of schools.—RUSSELL V. GUTTILL, Wash., 43 Pac. Rep. 340.

105. SUBROGATION .- A contract for the construction of a United States court house provided that the government might withhold any part of the sums to be paid the contractor, in case of the latter's failure to promptly pay laborers and material-men. A bank, from time to time, lent money to the contractor, with the expectation that it would be used in carrying out his contract, but without any obligation to that effect, and some of it was used by him for paying laborers and material-men: Held that as the laborers and material-men had no enforceable rights against the government, and the payment by the bank of the money used to pay their claims was purely voluntary, there was no room for the application of the principle of subrogation in the bank's favor.-LAWRENCE V. UNITED STATES, U. S. C. C. (S. Car.), 71 Fed. Rep. 228.

106. TAXATION—Bequest—Legacy Tax.—A bequest to a city is not exempt from the legacy tax, under Laws 1887, ch. 713, declaring that bequests to "the societies, corporations or institutions now exempted by law from taxation" shall not be subject thereto.—In RE HAMILTON, N. Y., 42 N. E. Rep. 717.

107. TAX SALES — Purchase by County.—That no bid was made for land at a tax sale on the first day it was put up, and that on the following day it was bid off by the county, does not sufficiently show that the property was reoffered on the second day, and only bid in by the county at the end of the sale; and therefore the sale is invalid.—CHARLTON v. KELLY, Colo., 43 Pac. Rep. 455.

108. Tax TITLE — Sale.—Under Mills' Ann. St. § 3888, providing that, on the day designated for the sale of land for delinquent taxes, the treasurer shall commence the sale, and continue the same until each parcel shall be sold, and if there shall be no bid for any tract offered, the treasurer shall pass it over for the time, and reoffer it at the beginning of the sale next day, until all the tracts are sold, or until the treasurer shall become satisfied that no more sales can be effected, when it shall be his duty to bid off for the county the lands remaining unsold, the lands, after being first offered without being sold, must be offered from day to day until the sale is concluded, and the county cannot become the purchaser except in default of bidders.—Charlton v. Toomey, Colo., 43 Pac. Rep.

109. TRIAL—Findings by Court.—It is a right that either party to a suit has when the case is tried by the





court without a jury, upon request, to have all or any of the issuable facts involved in the pleadings, and upon which there is any evidence, found separately from the conclusions of law, based thereon, so that he may have his exceptions to the separate findings and conclusions.—SEWARD V. RHEINER, Kan., 48 Pac. Rep. 428.

110. TRIAL—Juror.—A juror in an action against a street railway company was, at the time he was summoned, working on a small carpenter job for the company, his name never having been on the company's pay roll. He considered his work ended when forced to give it up to serve on the jury: Held, that the fact that the juror failed to disclose, on voir dire examination, such employment is not ground for a new trial, where plaintiff was aware of the fact before the case was submitted to the jury, and did not object until after verdict.—REYNOLDS v. RICHMOND, & M. Ry. Co., Va., 28 S. E. Rep. 771.

111. TRIAL—Propositions of Law.—Practice Act, § 42, relating to trials by the court, provides that either party may, within such time as the court may require, submit propositions, to be held as law in the decision of the case, upon which the court shall write "Refused," or "Held," or modify the same, to which either party may except: Held, that propositions of law tendered after the decision, though within the time allowed by the court, are ineffectual for any purpose.—Allman V. Lumbden, Ill., 42 N. E. Rep. 797.

112. TRUST—Creation.—The fact that a bank, which had a mortgage on chattels and the crop to be raised on a farm, insisted on payment of the mortgage unless the mortgagor would lease the farm on shares to one of three persons, one of whom was vice-president of the bank—the mortgage to be released as to the lessee's share—does not constitute the taking of the lease by the said vice-president a trust for the bank.—Kin-Caid v. Thompson, Wash., 48 Pac. Rep. 352.

113. TRUST — Resulting Trust.—Where it does not clearly appear that property held by a voluntary trustee was paid for out of the trust funds, and complete justice can be better had by requiring them to account than establishing a resulting trust on the land, a resulting trust will not be decreed.—LEHMAN V. ROTHBAETH, Ill., 42 N. E. Rep. 777.

114. USURY—Interest.—Where a party has dealings with a bank covering a period of two years, and during such time borrows various sums of money, paying thereon usurious interest, and afterwards borrows other money from the bank, giving a note with surety therefor, and a suit is afterwards brought on such note, held, that the party cannot offset such note by usurious interest paid on former loans.—MORRISON V. STATE BANK OF CHANUTE, Kan., 43 Pac. Rep. 441.

115. VENDOR AND PURCHASER.—In a suit brought to rescind a contract for the purchase of real property, and to cancel outstanding notes and a mortgage secured thereby, on the ground that defendant's deed to plaintiff had never been properly executed, defendant may maintain a cross-complaint to foreclose the mortgage.—DUGGAR V. DEMPSEY, Wash., 43 Pac. Rep. 357.

116. VENDOR AND PURCHASER—Contracts—Statute of Frauds.—The acceptance by the grantee of a deed containing a personal agreement to be performed by him, though not connected with the land conveyed, is equivalent to his signature to the agreement, within the requirement of the statute of frauds, that such contracts shall be "signed by the party to be charged therewith."—THIEBAUD V. UNION FURNITURE CO., Ind., 42 N. E. Rep. 741.

117. VENDOR AND PURCHASER—Ejectment—Equitable Defense.—Under Code, § 2741, declaring that a vendor shall not, at law, any more than in equity, recover against a vendee, lands sold to him by the vendor when there is "a writing stating the purchase, and the terms thereof, signed by the vendor," and there has been such performance of the contract by the vendee as would in equity entitle him to a conveyance of the legal

title from the vendor or those claiming under him, defendant in ejectment cannot show that he became purchaser of the land at a sale under a decree, and fully paid therefor, though no deed was made therefor.—Jenning v. Gravelly, Va., 28 S. E. Bep. 768.

118. VENDOR AND PURCHASER—Parol Sale of Land.—A verbal agreement for the sale of land passes no title, unless followed by the making of payments or improvements thereunder, or by the taking of possession by the vendee.—REED v. ADAMS, Penn., 38 Atl. Rep.

119. WATER COMPANY—Furnishing Polluted Water.—Where the water furnished by a water company incorporated under the act of 1874 for the use of inhabit ants of a borough is utterly unfit for domestic use or for use by domestic animals, and is so destructive to pipes and boiler flues as to be unsafe for use for steam purposes it is proper to enjoin the company from collecting water rents for other purposes than the extinguishing of fires and the flushing of pipes and sewers.—BRIMER V. BUTLER WATER CO., Penn., 35 Atl. Rep.

120. WATER COURSE.—A prescriptive easement to overflow land and use the water therefrom is not shown by proof that the land was used for that purpose, where there is no proof that the rights of the owner were thereby infringed, or the land injured, or that such use was adverse to the owner.—TERRE HAUTE & I. B. CO. V. ZEHNER, Ind., 42 N. E. Rep. 756.

121. WILL—Bequests — Liability of Residuary Legatee.—Where testator gives the income of a certain sum to one person for life, and at her death the principal to another, and the rest of his estate to another, and the residuary legatee receives from the executors all the estate, charged with the legacy, action may be maintained against him for the legacy.—GILBERT v. TAYLOR, N. Y., 42 N. E. Rep. 715.

122. WILL—Nature of Estate.—Under a will by which testator, after giving five dollars to each of his children, gave and bequeathed to his wife "the residue of all my estate, both personal and real, subject to a division among the aforesaid heirs, at her death, in accordance with their obedience to her, as she shall deem proper" the wife took testator's land in feesimple.—ROGERS V. WINKLEPLECK, Ind., 48 N. E. Rep. 746.

123. WILLS—Probate.—The affidavit of the witnesses to a will consisting of a will and codicil written on the same sheet of paper, stating that testatrix executed the will and codicil in their presence, and that she was of sound mind, etc., when she signed the said "will," sufficiently states that the testatrix was of sound mind, etc., when she signed the codicil, as well as the original will.—FRY V. MORRISON, III., 42 N. E. Rep. 774.

124. WILL.—Provisions Void for Uncertainty.—Where a testator, after creating a trust fund, the income to be used in educating certain persons, provides that they shall be educated "only in a college" erected on a lot dedicated by him in a certain town, and that, "should the college aforesaid be not erected," the income is to go to two other designated colleges, if the testator fails to dedicate a lot, the income must go to the two designated colleges.—Trustees of Emory & Henri College V. Shoemaker College, Va., 23 S. E. Rep. 765.

125. WITNESS—Competency.—Rev. St. § 858, contains the whole law governing the courts of the United States in respect to the competency, as witnesses, of interested parties, and no State statute can annex any further qualification to its provisions. Accordingly, held, that an interested party could not be wholly excluded as a witness in an action brought in a federal court by an administratrix, but only such parts of his testimony could be rejected as related to transactions with, or statements by, the intestate.—De Beaumort v. Webster, U. S. C. C. (N. J.), 71 Fed. Rep. 726.

126. WITNESS—Fees.—A party called and examined as a witness on his own behalf is not entitled to fees for travel and attendance.—ROUNDTREE v. REMBERT, U. S. C. C. (S. Car.), 71 Fed. Rep. 255.

Central Law Journal.

ST. LOUIS, MO., MARCH 27, 1896.

The senate at Washington has recently passed a wise measure in the form of a bill to withdraw from the United States Supreme Court all jurisdiction in criminal cases, except those involving capital punishment, and to transfer this jurisdiction to the United States Courts of Appeals. This will be a great relief to the Supreme Court whose docket has always been encumbered with embezzlement cases and other criminal matters which have greatly impeded more important litigation. The Circuit Courts of Appeal are well able to attend to such cases and are quite as likely to do them justice as the supreme court is. It is, however, proper that cases involving the death penalty should have the right of appeal to the highest tribunal in the land.

A case recently decided by the court of Oyer and Terminer of Delaware (State v. Lodge, 33 Atl. Rep. 312), has been the subject of considerable controversy and criticism, some upholding the doctrine announced, others disputing it. The court, in that case, held that dying declarations may be contradicted by proof of previous inconsistent statements by the deceased. The technical argument in favor of such position is thus stated by the court: Dying declarations are admitted in homicide cases because the parties are apprehensive of impending death, and there is the prospect of almost immediate dissolution on the ground that, as they are about to enter the presence of their maker, it is supposed that they will not dare to deceive any more than when they invoke the attention of their Creator to the oath when made, so that the fact of their coming dissolution is considered to be quite as binding as the taking of an oath in its obligation upon them. The objection made always is that the accused is deprived of the opportunity of calling the attention of the person who supposed himself to be about to die to certain facts, which, if brought to his attention, he might modify his statement or make none at all; that there is no opportunity to test his judgment, the strength of his recollection, or his bias. But the law says that insures jus-Vol. 42—No. 13.

tice in the greater number of cases, and that it is necessary to let it in, although it does deprive the defendant of testing the memory of the witness and his truthfulness by cross-examination. Then it is as though it says: "Very well, if you are deprived of that opportunity of ascertaining if that witness was wrong, and of bringing any witness to contradict him, when we let in the dying declarations, without an oath, you ought to have the right to put in testimony of previous declarations, without laying the ground." In other words, the party on one hand says: "If you let in the dying declarations, I ought to have the right to contradict them (aside from the rule that I am bound to lay the ground for a contradiction) by proof of a previous conversation." And so the two, according to Judge Field and these other authorities, seem to balance each other; and, where there is a balance, the law leans in favor of human life or personal liberty. That is just the situation. Now the question is, where there is a loss of cross-examination on the side of the defense and also by the State, in that you have not laid the ground, whether the favor of the law should not be on the side of liberty and life, and should let in the previous statements that are contradictory of the statements made by the person who supposed she was dying. Therefore, as dying declarations are admitted on the ground of necessity, ought not, asks the court, proof of contradictory or inconsistent statements by the deceased to be also admitted on the same ground? Bearing in mind the reason of the rule which admits in evidence declarations of this character, the view of the Delaware court seems warranted and in the interest of justice. In the Harvard Law Review for February, however, will be found a vigorous criticism of the ruling.

NOTES OF RECENT DECISIONS.

Landlord and Tenant—Leased Building—Damage by Fire—Insurance.—It is held by the Supreme Court of Tennessee in Anderson v. Miller, 33 S. W. Rep. 615, that an owner of a building, though he has, under a fire policy, recovered the full loss sustained by the burning of his building, caused by his lessees, in violation of their lease, storing



cotton therein, may, in his own name, sue his lessees for the damages to the building. The court said that even if it be conceded that the insurance company, having paid the entire fire loss, is now entitled to be subrogated to the rights of the insured, as against the tort feasor, or to recover back from him the amount he recovers, still it does not prevent a recovery in the name of the insured for the damage sustained. The question of who willbe entitled to the proceeds of the recovery -the insurer or the insured-is a matter between them, and constitutes no defense to an action for the damages caused by the wrong, which, in any event, must be brought in the name of the owner and insured, although it might be for the use of the insurer. 24 Am. & Eng. Enc. Law, pp. 308-30; Perrott v. Shearer, 17 Mich. 48, 55, 56; Clark v. Wilson, 103 Mass. 219-227; Hayward v. Cain, 105 Mass. 213; Weber v. Railroad Co., 35 N. J. Law, 409; Mason v. Sainsbury, 3 Doug. 61; Yates v. Whyte, 4 Bing. (N. C.) 272; Hart v. Railroad Corp., 13 Metc. (Mass.) 99; Insurance Co. v. Woodbury, 45 Me. 453; Carpenter v. Insurance Co., 16 Pet. 501; Insurance Co. v. Updegraff, 21 Pa. St. 518; Kernochan v. Insurance Co., 17 N. Y. 428; Honore v. Insurance Co., 51 Ill. 410; Insurance Co. v. Beomer, 52 Ill. 442.

Accord and Satisfaction — Receipt in FULL—LIQUIDATED AND UNLIQUIDATED CLAIM. -In Tanner v. Merrill, 65 N. W. Rep. 664, it was held by the Supreme Court of Michigan that where defendants deducted from plaintiff's wages an amount paid by them for railroad fare for plaintiff, for which latter sum plaintiff claimed that defendants and not he were liable, the defendants disputing such liability for fare and plaintiff accepting the amount tendered and giving a receipt in full, that he was precluded from maintaining an action for the sum so deducted. The rule is well settled that where a certain sum is tendered and accepted in satisfaction of a claim, the amount of which is unliquidated, the transaction will be held an accord and satisfaction, although no formal release be given. A comparatively recent illustration is Fuller v. Kemp, in the New York Court of Appeals, 138 N. Y. 231. In an earlier Michigan case-Leeson v. Anderson, 58 N. W. Rep. 72,—it was held that a claim by the holder of a promissory note past due was not an unliquidated claim, and that acceptance of a less sum than the face of the note, with an agreement to discharge the debt, did not operate to fully release the debtor. The point involved in Tanner v. Merrill was whether the claim of plaintiff on account of wages and railroad fare constituted a single claim, and whether, if so, it was a liquidated or unliquidated claim. The question was somewhat close and two of the judges of the court dissented.

SLANDER-DISHONOR OF CHECK-BANKS. The case of Suenden v. State Bank, 65 N. W. Rep. 1086, decided by the Supreme Court of Minnesota, presents an unusual question in the law of slander. It is held that when a banker has in his hands funds of a depositor for the purpose of paying the depositor's checks and the depositor is a trader or merchant, and his check is dishonored by the banker, and returned to the payee, for the alleged reason that he has not sufficient funds of the maker in his hands to pay the same. when he in fact has, it amounts to a slander of the merchant or trader in his business, and he is entitled to recover general compensatory damages in an action against the banker. The court says:

It is held by the authorities that in such a case the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover general compensatory damages. Rolin v. Steward, 14 C. B. 595; Schaffner v. Ehrman (Ill. Sup.), 28 N. E. Rep. 917; Bank v. Goos (Neb.), 58 N. W. Rep. 84; Patterson v. Bank, 130 Pa. St. 419, 18 Atl. Rep. 632; 3 Am. & Eng. Enc. Law, 225; 1 Suth. Dam. (2d Ed.) § 77. The case of Patterson v. Bank, supra, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. We are of the opinion that the recovery of more than nominal damages can, on sound principle, be sustained on the latter ground, where the drawer of the check is a merchant or trader. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable per se, and general damages may be recovered for such a slander. Townsh. Sland. & L. (4th Ed.) § 191; Odger, Sland. & L. (2d Ed.) 80. Respondent's position that an action of tort cannot be maintained in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities. The case of Marzetti v. Williams, 1 Barn. & Adol. 415, cited by him, was an action in tort. The amount of the verdict is not reported, but it is very evident that



it was only for a nominal amount, and the only question before the court was whether or not the defendant was entitled to a nonsuit because the action should have been brought on contract, not in tort. The court held against the defendant on that point, and what is said beyond this is merely obiter, and was so regarded in the subsequent case of Rolin v. Steward. In Prehn v. Bank, L. R. 5 Exch. 92, the only question was whether plaintiffs were entitled to recover of the bank certain sums which they had paid to save their credit by procuring money elsewhere to pay bills drawn by them on the bank, and to prevent the bills from going to protest after the bank had notified them that it would not pay these bills, although it had funds in its hands for that purpose. It was held that they could recover the full sum so paid by them to preserve their credit, and the authority of Rolin v. Steward was expressly recognized. The case of Brooke v. Bank, 69 Hun, 202, 28 N. Y. Supp. 802, was an action by the receiver of an insolvent whose check had been wrongfully dishonored by the bank. The plaintiff was forced to concede that he could not maintain an action of tort, or recover any damages but such special damages as he alleged and could prove in an action for breach of a contract. These are all the cases cited which have any bearing on the case. These are the only questions raised worthy of consideration. It necessarily follows from the foregoing conclusions that the order appealed from must be reversed.

EXECUTORS AND ADMINISTRATORS — PERSONAL LIABILITY ON CONTRACT.—The Supreme Court of Montana says, in First Nat. Bank v. Collins, 43 Pac. Rep. 499, that an administrator is personally liable on a note signed by him as such, the proceeds of which were placed with the payee, a bank, and paid out on checks drawn by him to pay, generally, bills and debts of the estate. The court says:

The defendants, in their answer, make their allegations with some vigor of language, but when we arrive simply at the facts set up, the pleading of defendants seem to be that they, as administrators of the Higgins estate, borrowed this money and used it for the estate. We cite the following remarks from some of the leading text writers upon the law of administration, negotiable instruments and commercial paper: "It is a well recognized principle that for liabilities contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. Disbursements, reasonable in amount and for services necessary in the proper discharge of the duties imposed upon them, will constitute a charge in favor of executors and administrators against the estate, although their allowance should leave no surplus to pay creditors of the deceased; but in the absence of statutory authority the probate court, as already stated, has no jurisdiction to adjudicate between the personal reprecontative and the creditor. It follows that the estate not liable to an attorney for his services at the instance of an executor or administrator, but that the latter is himself liable in a suit by the attorney. So for corn fed to the stock of the estate; for the terms ef a contract by the administrator in renting the land of the estate. The same holds good in respect of negotiable paper made, indorsed or accepted by him, although he add to his signature his official character; and a fortiori where he gives a bond. So where the executor employs a salesman to take charge of the stock in trade belonging to the estate, or a sawver to saw lumber. So where money is borrowed by pledging property of the estate, unless pledged for the purposes of administration. For the same reason, the estate is not bound by the administrator's agreement to credit a note payable to his decedent with the value of work done upon the lands of the estate." 2 Woerner Admn., § 356. "The executor or administrator of a decedent has no power to bind the latter's estate by any note or bill which he may make in his representative capacity. So also is it impossible for the executor or administrator to bind the estate by the acceptance of a bill drawn in settlement of a claim against the estate. In all such cases, the executor or administrator is personally liable, even though the signature is stated in the most explicit manner to have been made in his representative character." Tied. Com. Paper, § 146. "An administrator or executor cannot bind the decedent's estate by any negotiable instrument. He can only bind himself. If he make, accept or indorse a negotiable instrument he will bind himself personally, even if he adds to his own name the designation of his office as personal representative. Thus, if he signs himself, 'A B, executor (or administrator) of C D,' or 'A B, as executor of C D,' the representative terms will be rejected as surplusage. And an accommodation indorser, or acceptor, who pays the amount of the instrument, has no claim against the decedent's estate. But if the bill or note of the personal representative be taken for a debt of the decedent, the estate is discharged from liability, and the representative alone is bound." 1 Daniel, Neg. Inst. § 262. "Where a note or bill is given by an executor or administrator, as such, he will, in general, be individually liable for its payment. So upon an indorsement by him as executor; or upon his written promise to pay such debt, he having assets of the estate in his hands at the time of giving the promise. This is true, also, where he has given his note in renewal of one made by his testator. In like manner. an administrator will be individually liable on a note given by him for personal property purchased for the benefit of the estate. But a note given by an administrator, and expressed to be 'for value received by A (the intestate) and his heirs,' has been held to be void for want of consideration. The mere addition of 'administrator' to an acceptor's signature does not qualify his liability or render the acceptance of a bill conditional. But, in general, an executor, like an agent, must expressly limit his promise to payment out of the estate represented in order to avoid individual liability on it. And merely adding the word 'administrator' will not amount to such a restriction, as we have seen; especially where the estate administered is not particularly designated." 1 Rand. Com. Paper, § 439. See also numerous cases cited in these textbooks, which we will not review.

It is not pretended that these notes were given for the expenses of administration. This court said, in Dodson v. Nevitt, 5 Mont. 518, 6 Pac. Rep. 358: "Claims against the estate are those in existence at the date of the death of the deceased. Other claims against an estate are those incurred by the administrator or executor in settling the estate, and are properly denominated 'expenses of administration.'" The rule seems to be as laid down by the above-quoted writers. It is said, in Dunne v. Deery, 40 Iowa, 251, a case relied upon by the appellants, as follows: "The

rule is very well settled that an administrator or executor cannot bind the assets of the deceased by his promissory note. If he executes a note and adds to his signature, 'as executor for' the deceased, he will nevertheless be personally liable. King v. Thom, 1 Term R. 489; Aspinall v. Wake, 10 Bing. 55; Davis v. French, 20 Me. 21; Walker v. Patterson, 36 Me. 278. But while the administrator will be personally and alone bound upon the note, yet if that for which it was given was legally a claim against the estate, the giving and accepting the note will not, without more, discharge the estate." Counsel, in argument, cite this Iowa case as showing that the case at bar is an exception to the general rule, but it does not appear in the case before us that that for which the note was given was already legally a claim against the estate. We take the following from another case relied upon by the appellants-McLaughlin v. Winner (Wis.), 23 N. W. Rep. 402: "It is a general rule that, upon all contracts made by an executor or administrator, in the discharge of his duties as such, he is liable personally; and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred; and the judgment, if any be recovered, is to be satisfied out of his estate, and not out of the estate of the deceased. There are, undoubtedly, exceptions to the general rule, but they depend upon equitable considerations, which clearly show that the estate in the hands of the executor or administrator ought to be charged with the payment of the claim, rather than the property of the executor or administrator"-citing many cases. The case at bar, in our opinion, is not an exception to the rule that the administrators are personally liable. It does not appear that the notes given by them were simply an acknowledgment of a former debt existing against the estate and created by the deceased. It does not appear that the money received by the estate upon the notes given was used for purposes of administration or funeral expenses, if such facts would be important if they existed. It does not appear that the money so obtained was upon any order or permission of a court having power to make such order or give such permission. It does not appear that the money was used in the actual preservation of the estate, as discussed in Dunne v. Deery, supra.

TORTS — RIGHT OF ACTION—CONSENT.—The principle involved in Goldnamer v. O'Brien, 33 S. W. Rep. 831, decided by the Court of Appeals of Kentucky, is an old and well recognized one but its application to the facts of that case was somewhat novel and interesting. The holding was that in an action for inducing plaintiff to submit to an attempted abortion, where defendant was not responsible for the pregnancy if plaintiff voluntarily went to a certain city to have the abortion performed, she could not recover. The court says:

While it is not directly shown that either of them employed or otherwise procured the physician, and such conclusion is based on the barest inference, yet this question was properly submitted to the jury, and we shall assume such a state of facts. Waiving other questions, the important one on this appeal is, can the plaintiff maintain this action? Or, rather, as the pe-

tition avers an abduction and attempted abortion. against the plaintiff's will and consent, the question is, is she entitled to a judgment upon the state of fact thus assumed to exist, and apparently found to exist by the jury? The right to recover is, of course, clear, unless it is destroyed by the complainant's consent to the assault, and whether this affects the right is a question of much conflicting authority. It may be stated, generally, that the suit of a wrongdoer will be rejected when seeking redress for another's having participated with him in the wrong. Thus, a woman who immorally yields to her seducer cannot sue, because she consented to and participated in the wrong whereof she complains. Bish. Non-cont. Law, § 57; Cline v. Templeton, 78 Ky. 550. The author last quoted further says (section 196), that "rape, one of the most aggravated batteries, is, if the woman consents, neither rape, nor eyen assault," and that "the execution of any unlawful contract places it past annullment and leaves no right of action in either party against the other. So that, though a mutual beating by consenting parties is a wrong against the public, because a breach of the peace, it is not such as between themselves, since neither can complain of that to which he consented." And the learned author, after citing a number of American and English cases to sustain the text, adds: "Such is the distinct and inevitable deduction of the reasoning of the law-applicable, however, in all its consequences, only when the beating was not in the excess of the consent. But we have American cases in which the judges have overlooked the distinction between the civil and criminal remedy, and so have held that one may maintain his civil suit for a battery to which he consented, and in which he participated. Decisions like these, proceeding on a misapprehension, and overlooking established law not brought to the notice of the judge, should not be followed in future cases." To the same effect, Mr. Roscoe says (Rosc. Cr. Ev. 306): "In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position." The author cites numerous authorities supporting the text, but points out that not every act of submission implies consent. Thus, from the mere submission of a child or person of weak mind, consent is not necessarily to be presumed. In the case at bar, however, it would be too much to say that the act of the complainant was not willingly and intentionally done. In Wait, Act. & Def. p. 344, § 11, it is said: "An assault implies force upon one side, and repulsion, or at least want of assault on the other. An assault upon a consenting party would therefore be a legal absurdity." On the other hand, Mr. Cooley, in his work on Torts (page 163), says that "consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. . . . But in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. If men fight, the State will punish them. If one is injured, the law will not listen to an excuse based on a breach of law." The rule of law is therefore clear and unquestionable that consent to an assault is no justification; and one wounded in a duel is said by the learned author to have a cause of action for damages against his adversary, for a consent which the law forbids



cannot be accepted as a legal protection. Some of the cases cited by the author, however, are criminal prosecutions, but others support the text. These authorities seem to be irreconcilable. While we readily appreciate the argument that, so far as the State is concerned, no consent can be pleaded in justification, we have not been able to understand how, in a civil suit, in which the party consenting alone is interested, compensation can be allowed by the law. If both parties to the action are violators of the law, must the mouth of one be closed, and the complaint of the other heard? The parties stand on an exact equality before the law, and, if one wrongfully consented to beat another, the other as wrongfully consented to be beaten. In a late work on this subject it is said: "Harm suffered by consent is not, in general, the basis of a civil action. If the defendant is guilty of no wrong against the plaintiff, except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it." 1 Jagg. Torts, p. 199. In Duncan v. Com. (1838), 6 Dana, 295, the defendant in an indictment for an affray pleaded a former conviction under an indictment for an assault and battery, and this court said: "As an affray is a disturbance of the public peace by a fighting with the mutual consent of the combatants, it would be intrinsically improbable that a conviction for an assault and battery—which would not be authorized unless there had been a trespass without the consent of the person injured had been adjudged as a punishment for an act which should be deemed an affray." And while in that case, and the quotation from Roscoe as well, the law in criminal cases was being considered, and the rule as laid down is not now followed, the authority strongly tends to support the principle that at least the party consenting to the injury cannot profit by his wrongful act. The instruction, therefore, asked by the appellants, that if the plaintiff voluntarily went to Louisville for the purpose of having the alleged abortion performed on her, the law was for the defendants-should have been given. Judgment reversed for proceedings consistent with this opinion.

Sale of Defective Articles — Liability to Persons Injured.—The Supreme Court of California decides, in Lewis v. Terry, 43 Pac. Rep. 398, that one who knowing an article to be defectively constructed represents it to be safe and sells it to a person who has no knowledge of the defect, is liable in damages to one who without fault on his part, was injured while lawfully using the same. The court says:

The complaint is faulty in not stating directly that the fall of the bed was caused by the latent defect described, but, as the argument of the parties has proceeded on the theory that such was the fact, we may join in that assumption. Schubertv. J. R. Clark Co., 49 Minn. 385, 51 N. W. Rep. 1103. We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was

neither a party to the contract with him, nor one for whose benefit the contract was made. Coughtry v. Woolen Co., 56 N. Y. 127; Heizer v. Manufacturing Co., 110 Mo. 605, 19 S. W. Rep. 630; Winterbottom v. Wright, 10 Mees. & W. 109 (the leading case); Shear & R. Neg. § 116; 1 Bevan, Neg. p. 60, et seq. But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other who is not himself in fault." Wellington v. Oil Co., 104 Mass. 64, per Gray, J.; Schubert v. J. R. Clark Co., 49 Minn. 831, 51 N. W. Rep. 1103; Elkins v. McKean, 79 Pa. St. 493; Shear. & R. Neg. § 117. See Civ. Code, §§ 43, 1708. The liability of the willful wrongdoer in like instances is recognized in several cases cited in support of the judgment. Longmeid v. Holliday, 6 Exch. 765; Heizer v. Manufacturing Co., 110 Mo. 605, 19 S. W. Rep. 630.

The fact insisted upon by respondents that a bed is not ordinarily a dangerous instrumentality is of no moment in this case. If mere non-feasance or perhaps misfeasance were the extent of the wrong charged against defendants, that consideration would be important (Thomas v. Winchester, 6 N. Y. 397); but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious.

Nor is the further point that the chain of causation implicating defendants in the injury was broken by the intervention of the Appersons, as the persons who furnished the bed immediately to plaintiff, available to defendants on this appeal. To have that effect, it must appear that the Appersons knew of the defect in the structure of the bed, and so, were culpable intervening cause, and this does not appear on the face of the complaint. Pastene v. Adams, 49 Cal. 87; 1 Bevan, Neg. 76. The judgment should be reversed, with instructions to the court below to overrule the demurrer.

WHEN SHOULD THE VERDICT BE SET ASIDE WHERE THE COURT HAS INSTRUCTED THE JURY TO DISREGARD IMPROPER EVIDENCE ADMITTED OVER OBJECTION AND EXCEPTION.

On the trial of actions it frequently happens that improper evidence is admitted over objection and exception taken to the ruling of the court. Afterwards, the court becoming aware of its error, attempts to cure it by instructions to the jury to disregard the improper evidence, or, by withdrawing the evidence in question from the consideration of the jury, when convinced of the error, and afterwards instructing to disregard the im-

properly admitted testimony. Whether the error is cured and the exception vitiated by this procedure on the part of the court, is a question arising often on appeal. The question has not been decided with uniformity, for courts entitled to the highest respect have held such error not cured while other tribunals of equal merit have pronounced the error cured.

In Criminal Cases. — Some jurisdictions distinguish between civil and criminal cases in regard to this subject. In Missouril and England² the distinction is clearly recognized. In Missouri, the rule is that the erroneous admission of evidence, in a criminal trial, is not cured by the withdrawal of the objectionable evidence or the direction of the court that it be disregarded.8 The reason for the rule as stated by the court is, "The extreme solicitude of the law that persons accused of crime shall have a fair trial" for "the improper evidence has already poisoned the mind of the jury and cannot be erased from their memories." In State v. Mix. on an indictment for passing counterfeit notes, the statements of defendant that he had been sentenced to the Kentucky penitentiary, were allowed to be proved by a witness Under the cirwho had heard them. cumstances this was improperly received. "The court, afterwards, did all it could to cure the impropriety, by withdrawing it from the jury, but it was wrong to allow it at first; the injury it caused to defendant, may have been too deeply fixed on the juror's minds to be easily obliterated." The English law, as stated by Stephen, is: "If, in a criminal case, evidence is improperly admitted or rejected, there is no remedy, unless the prisoner is convicted, and unless the judge, in his discretion, states a case for the court of crown cases reserved; but if that court is of the opinion that any evidence was improperly admitted or rejected, it must set aside the conviction." There are criminal cases in other States beside Missouri, where such error has not been deemed cured by the action of the court. These decisions are not on the ground that such is the rule of those States in criminal cases, but, because the jury has been more or less affected by the illegal evi-

dence.4 In Drake v. State, it was observed in regard to the jury obeying the directions of the court to disregard illegal evidence, "they might endeavor to do so, and believe they were doing so, and still be involuntarily and unconsciously influenced thereby." On the other hand numerous decisions have held the error cured even in criminal cases. Some of these hold the error cured by the action of the court and principally because of no reason to think that the jury had been influenced by the improper evidence.5 Others hold the error cured but give only the action of the court in withdrawing the evidence from the jury and giving instructions to disregard it, as the reason.6

In Civil Cases.—Passing to civil actions, the decisions are numerous where the error has been regarded as cured and almost as numerous where the error has not been considered cured. These however, are not conflicting, for with but few exceptions the same principle underlies them all. The principle is the influence on the jury the improper evidence may have had.7 The doctrine that the error cannot be cured was advanced in some of the earlier New York decisions.8 The evidence erroneously admitted in these cases was not only of a tendency to influence the jury, but was in direct violation of the elementary rules for the admission of testimony.9 In these decisions, the influence on the jury does not seem to have been considered. The later cases in the same State, have departed from the doctrine of Penfield v. Carpenter. 10 In Erben v. Lorillard, improper evidence had been admitted to prove value of plaintiff's services. This evidence was excepted to. The judge in his charge, directed the jury to disregard this evidence in determining the value of the services. The court says: "When illegal evidence properly excepted to, has been

¹ Meyer v. Lewis, 48 Mo. App. 417.

³ Stephen's Dig. of Ev. art. 148.

³ State v. Mix, 15 Mo. 153; State v. Daubert, 42 Mo. 242; State v. Thomas, 99 Mo. 235.

⁴ People v. Wolcott, 51 Mich. 617; Drake v. State, 15 S. W. Rep. 725 (Tex.).

S State v. Crafton, 56 N. W. Rep. 257 (Iowa); State v. Towler, 13 R. I. 661; Miller v. State, 31 Tex. Crim. Rep. 609.

⁶ Boyd v. State, 17 Ga. 194; Reitz v. State, 33 Ind. 187; Mimms v. State, 16 Ohio State, 221.

⁷ Erben v. Lorillard, 19 N. Y. 299; Beck v. Cole, 16 Wis. 99.

^{*} Penfield v. Carpenter, 13 Johns. 350; Irvine v. Cook, 15 Johns. 239.

<sup>Graham and Waterman on New Trials, p. 620.
Erben v. Lorillard, 19 N. Y. 299; Holmes v. Moffatt, 120 N. Y. 159.</sup>

received during trial, it must be shown that the verdict was not affected by it, or the judgment will be reversed. If the evidence may have affected the verdict, the error cannot be disregarded." The law of the earlier New York cases was criticised by Parker, C. J. In Deerfield v. Northwood, he says: "If evidence is admitted on trial, which proves to be incompetent, and the jury are directed to disregard it, the admission furnishes no ground for a new trial, unless there is reason to believe that the evidence improperly influenced their verdict. There may be cases in which the irrelevant testimony which has been introduced, is of a nature so well adapted to make such an impression upon the minds of the jury, that instructions to disregard it, cannot well have their legitimate effect; and there may be cases where, after the admission of such testimony, the result of the trial indicates that it must have had an improper operation. If in any case there is good reason to believe that injury has been done to the adverse party by the introduction of such evidence, notwithstanding the caution and instructions of the court, that will furnish a sufficient cause for sending the case to another trial." This statement of the law applies to other States as well, whose decisions practically establish the same doctrine. 12

Error Cured.—The cases holding the error crued may be divided into two classes. Into the first class may be grouped those in which the error is regarded as cured because the improper evidence did not affect the jury; into the second class those cases where the error is deemed corrected by the action of the court, the influence on the jury not being considered. In the first class the appellate court has arrived at the conclusion that the

¹¹ Hamblett v. Hamblett, 6 N. H. 333; Deerfield v. Northwood, 10 N. H. 269.

¹³ L. B. & M. R. R. Co. v. Winslow, 66 Ill. 219; Busch v. Fisher, 89 Mich. 192; Erben v. Lorillard, 19 N. Y. 299; Dillingham v. Anthony, 78 Tex. 47; State Bank v. Dutton, 11 Wis. 389.

18 Hogendobler v. Lyon, 12 Kan. 276; Busch v. Fisher, 39 Mich. 192; Hamblett v. Hamblett, 6, N. H. 333; Holmes v. Moffat, 120 N. Y. 159; Klein v. Thompson, 19 Ohio State, 569; Dillingham v. Anthony, 73 Tex. 47; Northampton Bank v. Balliet, 8 Watts and Sergeant, 311; Conklin v. Parsons, 2 Pinney, 264; Beck v. Cole, 16 Wis. 99; Waterman v. Railway Co., 82 Wis. 618.

¹⁴ Alabama, etc., R. R. Co. v. Frazier, 93 Ala. 45; Smith v. Whitman, 6 Allan, 562; Union Water Co. v. Crary, 25 Cal. 504; Rowland v. Carmichael, 77 Ga. 850; Biszard v. Applegate, 77 Ind. 527; Sullens v. R. R. Co., 74 Iowa, 659; Boone v. Purnell, 28 Md. 607.

erroneously admitted evidence did not influence the jury, from various grounds. The court may be satisfied from the finding of the jury that the appellants could not have been injured by its admission;15 the verdict rendered according to instructions;16 other evidence upon which verdict could have been based and therefore assumed that jury gave verdict upon this competent evidence;17 the nature of the evidence such as not calculated to operate to the injury of the defendants:18 the evidence not of vital importance and did not make or unmake plaintiff's case. 19 In the second class of cases where the error is corrected simply by the court's directions to the jury, the prejudicial character or effect of the improper evidence does not seem to have been considered. While the earlier New York cases went to the entreme of holding an error in the admission of evidence, to be incurable, the decisions of this class go to the other extreme and hold that proper instructions accompanied by withdrawal of the evidence, removes the error. The theory upon which the curative properties of the court's action is based is that the jury will follow the directions given by the court.20 This presumption that the minds of the jurymen are completely subordinate to the will of the court, may be useful as a presumption, but as a reason for a line of decisions, it invests the court with hypnotic power. The comments of Grove, J., in Erben v. Lorillard are in point. "It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence. A juror is never made competent by the direction of the judge to disregard any opinion he had formed previous to taking his An opinion derived from illegal evidence at trial is equally prejudicial."

Error not Cured.—In many cases, where improper evidence has been admitted and the jury has been directed not to consider it, the error has not been regarded as cured and the appellate court has reversed the judgment because the improper evidence had influenced the jury, 21 or, was such as might have in-

- 15 Beck v. Cole, 16 Wis. 99.
- 16 Conklin v. Parsons, 2 Pinney, 264.
- 17 Holmes v. Moffat, 120 N. Y. 159.
- ¹⁸ Hamblett v. Hamblett, 6 N. H. 833; Dillingham v. Anthony, 73 Tex. 47.
- 19 Hogendobler v. Lyon, 12 Kan. 276.
- 20 Smith v. Whitman, 6 Allan, 562.
- 21 Central R. R. Co. v. Vaughn, 98 Ala. 209; Tourte-

fluenced them.22 The verdict in many of these cases show that the jury had not disregarded the evidence in question, as they should have done. In Dr. Harter Medicine Company v. Hopkins, hearsay evidence to prove a counterclaim was admitted. court afterwards instructed the jury that such evidence as was mere hearsay should be rejected. As there was but little competent evidence to establish this counterclaim, the liberal verdict in favor of the defendant, showed that the jury, very probably, took into consideration the hearsay testimony. In Remington v. Bailey, evidence of fraudulent transactions between plaintiff and his brother was introduced by defendant. This was improperly admitted because the defendant was not in position to take advantage of it, and the court gave the usual instructions. only defense here, was this improper evidence of fraud and some weak impeachment evidence, but the jury returned a verdict in favor of the defendant. The judgment was reversed on appeal. In State Bank of Wis. v. Dutton, evidence of an offer to settle improperly received. The erroneous admission was held not cured, though the court directed the jury to disregard it. "Now unless the jury gave this testimony some consideration, and were to a certain extent governed by it in coming to their conclusions as to the amount the respondent was entitled to recover, we are utterly at loss to account for the verdict." The English law on this subject, according to Stephen, is as follows: "A new trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made. some substantial wrong or miscarriage has been thereby occasioned in the trial of the action."28

Action Tried without Jury.—Where the action is tried by the court, without a jury, the judgment will not be reversed for errors in the admission of illegal testimony, if there is ample legal evidence to sustain the find-

lotte v. Brown, 36 Pac. Rep. 78 (Colo.); L. B. & M. R. R. Co. v. Winslow, 66 Ill. 219; Stephens v. Ry. Co., 96 Mo. 207; Gillet v. Mead, 7 Wend. 193; State Bank of Wis. v. Dutton, 11 Wis. 389.

ing. It is presumed in such cases that the court of its own motion, disregards all improper testimony, and bases its findings and judgments upon competent evidence only.

Time of Withdrawal or Directions.—The withdrawal, or striking out, of the evidence improperly received, should take place as soon as the court is aware of the error, at least before the arguments of counsel to the jury.26 There is a contrary doctrine expressed in a few cases, to the effect that the withdrawal or striking out, may take place at any stage of the case, because the jury is presumed to obey the court.27 The emphatic remarks of Reed, C. J., in Tourtellotte v. Brown, on this subject, are applicable here. "Counsel cannot put immaterial, incompetent and improper evidence before a jury, allow it to remain there to the close of the trial and cure it by a formal withdrawal, which if heard by the jury, might utterly fail of comprehension and having been impressed upon the minds of the jurors, have had all the effect it could have had if competent. Such practice cannot be too severely criticised."

Who Withdraws or Strikes Out .- It sometimes happens that the party who offered the improper evidence, desires it withdrawn, and this when done with the consent of the court, becomes the act of the court and is not objectionable on that ground.28 Sometimes the court of its own motion, strikes out the questionable evidence. Whether the court or a party moves to strike out or withdraws the evidence, is immaterial.29 The party who has excepted to the action of the court in the admission of the improper testimony, has the right to insist upon his exception instead of waiving it when the opposite party proposes to withdraw or strike out evidence.30 Nor is the motive of the party who attempts to withdraw or strike out evidence considered. The question is, did the withdrawal take the testimony out of the case?*1

²² Erben v. Lorillard, 19 N. Y. 299; Remington v. Baily, 13 Wis. 370; Dr. Harter Med. Co. v. Hopkins, 83 Wis. 309.

²³ Stephen's Dig. of Ev., art. 143.

²⁴ Laumier v. Gehner, 110 Mo. 122.

²⁵ Travelers' Ins. Co. v. Murray, 16 Colo. 296.

²⁶ Tourtelotte v. Brown, 36 Pac. Rep. 78 (Colo.); Gall v. Gall, 114 N. Y. 109; Richards v. Noyes, 14 Wis-614; Beggs v. R. R. Co., 75 Wis. 444.

²⁷ Smith v. Whitman, 6 Allan, 562.

²⁸ State v. Towler, 18 R. I. 661.

²⁹ People v. Wilson, 141 N. Y. 185; Klien v. Thompson, 19 Oh. St. 569.

³⁹ Furst v. Second Ave. R. Co., 72 N. Y. 542.

³¹ State v. Towler, supra.

In Conclusion.—That the evidence in a jury trial should be as free from exceptions as possible, is a self-evident truth. The tendency of such evidence is to mislead. 32 But during any trial, however well managed, errors will creep in. Evidence which at first glance was admitted as competent, proves, after consideration, clearly incompetent. Often evidence is admitted under a promise to connect it with relevant evidence afterwards. When this connecting evidence fails or is not offered, the former is illegal. If such errors, inseparable from judicial trials, should always be held incurable and thus necessitate new trials, a case once on the court calendar would be there forever. Therefore, courts favor the correction of errors rather than their perpetuation.38 It is true that it is impossible for any human tribunal to correctly judge the influence the improper evidence may have had on the jury, in every case. It may have poisoned their minds, unconsciously to themselves perhaps. Generally, however, the appellate court can judge from the character of the improper evidence, the parties, the subject of the action, the relief sought and the verdict rendered, whether or not the jury has been influenced and the verdict affected.

La Crosse, Wis. Louis M. Larson.

² L. B. & M. R. R. Co. v. Winslow, 66 Ill. 219. ** Holmes v. Moffatt, supra.

LIFE INSURANCE—WARRANTY AGAINST SUI-CIDE—SUICIDE WHILE INSANE.

THE MUTUAL LIFE INSURANCE CO. V. LEBRIE.

United States Circuit Court of Appeals, January, 1896.

- 1. Death by suicide of the assured is not "death by his own hand," within the meaning of a condition whereby a policy of life insurance is to be void in that event, if, at the time of taking his life, the assured's reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act, or when he was impelled thereto by an insane impulse which he had no power to resist.
- 2. It need not be alleged in the complaint that the assured died by suicide, but was insane when he committed the act.
- 3. The testimony of non-professional witnesses, persons who were acquainted with the assured in respect to his actions and apparent mental condition just prior to his death, and their impressions as to his sanity.

are competent as tending to show the mental condition of the assured at the time of his death.

WALLACE, C. J.: This is a writ of error brought by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury.

The action was on a policy of life insurance issued by the defendant February 3, 1890, to Jay C. Leubrie, and payable to him on the 3d day of February, 1905, if then living, or if he should die before that time to a sister, the plaintiff. The policy was based upon and recites that it was issued in consideration of an application in writing signed by Jay C. Leubrie, which, among other things, contained a warranty that he would not die by his own hand during the period of two years following the issue of the policy. He died within two years by suicide. The principal defense to the action was the breach of this warranty. Upon the trial evidence was introduced on behalf of the plaintiff tending to show that the deceased was insane at the time he committed suicide. The trial judge instructed the jury, among other things, that it was incumbent upon the plaintiff to establish by a fair preponderance of proof that at the time the assured committed suicide his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act, or that he was impelled thereto by an insane impulse which he had not the power to resist; and, if this was established, that his death was not by his own hand within the meaning of the warranty. Exceptions were taken by the defendant which present the question whether this instruction was correct, and also whether there was sufficient evidence to authorize a finding by the jury that the deceased was insane when he committed suicide. Since the case of Life Insurance Co. v. Terry 15 Wall. 580, it has been perfectly well settled in the courts of the United States that death by the suicide of the assured is not "death by his own hand" within the meaning of a condition whereby the policy is to be void in that event, if, at the time of taking his own life, his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of the act, or when he was impelled thereto by an insane impulse which he had not the power to resist. The doctrine of that case has been repeatedly reaffirmed by the supreme court. Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284; Charter Oak Life Ins. Co. v. Rodel, 96 U. S. 232; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121; Accident Ins. Co. v. Crandel, 120 U. S. 527, Inasmuch as the instruction of the trial judge was an exact statement of this proposition, its correctness cannot be impeached unless there is a legal distinction between the effect of such a condition when recited in the policy and when made the subject of a warranty in an application upon which the policy is founded. There is no such distinction. In

either case there is a stipulation upon the literal fulfillment of which the validity of the contract depends; and in either the policy is to be void in the event of a breach—a result which, by the condition, is expressly, and by the warranty, is impliedly, assented to. Treating it as a condition precedent, performance of which must be averred in the complaint and affirmatively established in proof by the party who sues upon the policy, the averment is proved if the evidence shows that the assured was insane when he committed suicide.

It was unnecessary for the plaintiff to allege in her complaint that the assured died by suicide, but was insane when he committed the act. It is not necessary to state the facts constituting performance of a condition precedent, and a general averment that it was duly performed is all that is requisite. Code of Civil Procedure, section 553. The complaint of the plaintiff contained this averment; consequently there was no error in the ruling of the trial judge upon the question of pleading.

Although there was no controversy as to the sufficiency of the proofs of death, and they were received in evidence without any objection on the part of the defendant, the plaintiff was allowed to show, against the objection of the defendant, that when they were presented she did not know whether assured was sane or insane. Error is assigned of this ruling. It suffices to dispose of this assignment that no ground of objection to the evidence was assigned. The testimony of non-professional witnesses, persons who were acquainted with the assured, in respect to his actions and apparent mental condition just prior to his death, and their impressions as to his sanity. was allowed against objection on the part of the defendant, and error is assigned of this ruling. The competency of such evidence was affirmed in Charter Oak Life Ins. Co. v. Rodel, in this language: "Although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony and expressed in an inartificial way the impressions which are usually made by insane persons upon people of ordinary understanding." In Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U.S. 612, the question of the competency of such evidence was fully considered and its reception approved.

The evidence tended to show that within a few weeks of his death the assured was a bright, shrewd, joyful man. He was a merchant, about thirty-three years of age, unmarried, and doing a prosperous business. Suddenly, without any apparent cause, he became melancholy and despondent; thought he was sick and was going to die; complained of pains in his legs and in his toes, and other ailments; almost every night would get up from his bed and walk the room; became inattentive to his business. The physician who attended him after these symptoms intervened could not discover that he was sick, and testified that there was no organic trouble, and that he was physically in usual good health, and that

"the greatest trouble I had with him was to convince him that he was not sick;" that "he was always right when I left him, but I always found him in a melancholy mood." Several days before his death he attempted to commit suicide by taking laudanum. The night of his death, after the family with whom he lived had retired, he left his room in his night clothes, proceeded to the back yard of the premises, and there gashed himself on his wrists and neck in several places with a razor, and, although bleeding profusely, went back to his room and thence a considerable distance to the Arkansas river, where he drowned himself.

Notwithstanding there was evidence to show that he was rational in his conversation, and perhaps preponderating evidence tending to overthrow the theory of his insanity, we cannot doubt that the case presented a fair question for the decision of the jury, and that the trial judge was not only justified in submitting it to them, but that it would have been error if he had refused to do so.

Error is assigned of the refusal of the judge to instruct the jury as requested on behalf of the defendant, that the opinion of a physician, a witness for the plaintiff, who had testified that the deceased was insane, but that the opinion was wholly founded upon the fact of suicide, should be disregarded by the jury. The court had previously instructed the jury that suicide was not of itself evidence of insanity. To have granted the instruction would have been in effect but to repeat the instruction which had already been given. Under the circumstances the disposition of the request was matter which rested wholly in the discretion of the court.

We find no error in the rulings at the trial and the judgment is accordingly affirmed.

NOTE .- I. In Absence of Provision Against Suicide in Policy. 1. Where Policy is for Benefit of Assured .-In the absence, in a policy of life insurance, of a provision stipulating against self-destruction by the assured, in those cases where the policy is for the benefit of the assured, suicide by the assured while sane, that is, conscious self-murder, will avoid the insurance: (1) because of the fraud practiced upon the insurance company, and (2) because against public policy as tending to encourage suicide. See Supreme Commandery Knights Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 338, 385; Chandler v. Worcester Mutual F. Ins. Co., 57 Mass. (8 Cush.) 828; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 886; Hartman v. Keystone Ins. Co., 21 Pa. St. 466, 1 Big. L. Ins. Cas., 649; Bank of Oil City v. Guardian Mutual Ins. Co., 6 Leg. Gay. 348, 5 Big. L. Ins. Cas. 478; Waters v. Merchants Louisville Ins. Co., 36 U. S. (11 Pet.) 218; bk. 9, L. ed. 691; Amicable Ins. Co. v. Bolland (Fauntleroy's Case), 2 Dow. & C. 1; Moore v. Woolsey, 4 El. & Bl. 248, 82 Eng. C. L. 242, 28 Eng. L. & Eq. 248, 24 L. J. Q. B. 40, 1 Jur. (N. S.) 468; Horn v. Anglo-Australian & U. Fam. Ins. Co., 7 Jur. (N. S.) 673. Lord Chief Justice Campbeli says, in Moore v. Woolsey, supra, that "if a man insures his life for a year, and then commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship, who insures her for s year, cannot recover upon the policy if, within the

year, he causes her to be sunk; a stipulation that, in either case, upon such an event, the policy should give a right of action, would be void." In the case of Supreme Commandery Knights Golden Rule v. Ainsworth, supra, after quoting the above language of Lord Justice Campbell, the court say: "In Amicable Ins. Soc., 2 Dow. & C. 1 (known as Fauntleroy's Case) it was held by the House of Lords, that though there was not in the policy an exception of the liability of the insurer, in the event the insured came to his death by the hands of public justice, the exception would be implied for the reason that an express contract for liability in that event would contravene good morals and sound policy. The inference or implication of the law, therefore, was that the execution of the assured by the hands of public justice, for the commission of crime, is not within the risk of the policy. A construction or an implication which will preserve the legality of a contract is preferred to one which will have the opposite effect. Referring to Fauntleroy's Case, it was said by Wood, V. C., in Horn v. Anglo-Australian & U. Fam. L. Ins. Co., 7 Jur. (N. S.) 678: 'The argument might be pressed, although I do not know that any case has so decided, to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony and losing his life thereby.' In Hartman v. Keystone Ins. Co., 21 Pa. St. 466, Black, C. J., said, that though the policy was silent in reference to selfdestruction, if the accused committed suicide he was guilty of such a fraud upon the insurer of his life that his representatives cannot recover for this reason alone. Hunt, J., however, said of this case, in Mutual L. Ins. Co. v. Terry, 82 U. S. (15 Wall.) 580, 586, bk. 21, L. ed. 236, 240, that it was in this respect 'confessedly unsound.' The case, in its entirety, is not supported by the current of authority. . . . In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property or health or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud or the criminal misconduct of the assured is, in contracts of marine or fire insurance, an implied exception to the liability of the insurer. Waters v. Merchants' Louisville Ins. Co., 38 U. S. (11 Pet.) 218; bk. 9, L. ed. 631; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386; Chandler v. Worcester Mutual F. Ins. Co., 57 Mass. (3 Cush.) 328. Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties, that the assured, by his own criminal act, shall deprive the contract of its material element, shall vary and enlarge the risk and hasten the day of payment of the insurance money." Upon a similar principle it has been held that a death caused by an abortion voluntarily procured by the assured, without sufficient medical cause, resulting in death, will vitiate the contract of insurance, on the ground of public policy. See Hatch v. Mutual L. Ins. Co., 120 Mass. 550, 552, 21 Am. Rep. 541, 2 Bost. Rep. 362. The court say: "We are of the opinion that no recovery can be had in this case because the act, on the part of the assured, causiag death, was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we have no question that a contract to insure a woman against the risk of her dying under, or in consequence of, an illegal operation for abortion, would be contrary to public

policy, and could not be enforced in the courts of this commonwealth. See Amicable Soc. v. Bolland, 4 Bligh N. R. 194; Horn v. Anglo-Australian Assurance Co., 30 L. J. (N. S.) Ch. 511; Moore v. Woolsey, 4 El. & Bl. 243, 82 Eng. C. L. 242, 28 Eng. L. & Eq. 248, 24 L. J. Q. B. 40, 1 Jur. (N. S.) 468."

2. Where Policy for Benefit of Assured has Been Assigned.—But the rule is different where the policy has been taken for the benefit of the assured, and he assigns or pledges it for a valuable consideration. In the case of Moore v. Woolsey, supra, it is said that "where a man insures his own life, we can discover no illegality in a stipulation that, if the policy should be afterwards assigned bona fide for a valuable consideration, or a lien upon it should afterwards be acquired bona fide for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned." This is on the general principle treated in the next section.

3. Where Policy for Benefit of Wife and Children.—In those cases where a policy is taken out on the life of the husband for the benefit of the wife and children, his subsequent suicide will not vittate the policy as to them, in the absence of any condition of forfeiture in case of suicide, for the reason that the beneficiaries are not bound by the acts of the assured after the insurance was effected. See Fitch v. American Popular Ins. Co., 59 N. Y. 577, 17 Am. Rep. 372, 11 Alb. L. J. 91.

II. Provisions in Policy Against Self-destruction.

1. The Conflict.—There seems to be an almost hopeless conflict in the decided cases as to whether or not self-destruction, induced by insanity, is within a stipulation against suicide in a policy of insurance; and if not, what kind and degree of insanity will prevent a forfeiture. Chief Justice Pierpoint says, in the case of Hathaway v. National Life Ins. Co., 48 Vt. 335, that none of the decisions successfully lay down the line of demarkation between those cases in which the insanity would prevent the forfeiture and those in which it would not.

2. The English Rule.—The question first came before the English courts in the case of Borradaile v. Hunter, 5 Man. & G. 689, 44 Eng. C. L. 885, 7 Jur. 448, 12 L. J. C. P. 225, 2 Big. L. & Acc. Cas. 280, decided in 1848. In that case a life policy of insurance contained a proviso (inter alia) that in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong." The court held that if the assured knew, when the suicidal act was done, that his life would be destroyed thereby, and intended it to be so, the act vitiated the policy under the condition, even though the assured was insane at the time, and incapable of distinguishing as to the right or wrong, or moral character of the consequences, in the act he was doing. The rule laid down in this case has ever since been followed by the English courts. See White v. British Empire Assur. Co., L. R. 7 Eq. 894, 19 L. T. (N. S.) 308, 88 L. J. Ch. 53; Eufaur v. Professional Life Assn. Co., 25 Beav. 99, 4 Jur. (N. S.) 841, 27 L. J. Ch. 817: Dorman v. Borradaile, 5 Man. G. & S. (3 C. B.) 880, 57 Eng. C. L. 379; Clift v. Schwabe, 3 Man. G. & S. (3 C. B.) 437, 54 Eng. C. L. 846. According to those decisions, to take a case out of the proviso, the party must have been insane to such a degree as to render him unconscious that the act he did would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist. His mind must have been so far gone that it was not moving to the act. It is not sufficient that his moral sense was so impaired as to deprive the act of its criminal character. See Van Zandt v. Mutual Benefit L. Ins. Co., 55 N. Y. 169, 173.

3. The American Rule.—The question first came before the courts of this country in the case of Breasted v. The Farmers' Loan & Trust Co., 4 Hill (N. Y.), 73, decided in 1848, and affirmed on appeal. 8 N. Y. 299, 59 Am. Dec. 482. In this case it was held that a provision that a life insurance policy shall be void if the assured "die by his own hand," imports an act of criminal self-destruction, and this is, in substance, the prevailing doctrine of this country, and is supported by the decided cases of the Supreme Court of the United States. The question was first presented to that court in the case of Mutual Life Ins. Co. v. Terry, 82 U.S. (15 Wall.) 580; bk. 21, L. ed. 236, in which Mr. Justice Hunt said: "The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then made by him, would have been rejected by a surrogate if offered for probate. If, upon trial for a criminal offense, upon all the authorities, he would have been entitled to a charge, that upon the proof of the facts assumed, the jury must acquit him. Freeman v. People, 4 Den. (N. Y.) 9; Willis v. People, 32 N. Y. 719; Seaman's Soc. v. Hopper, 33 N. Y. 619; Winchester's Case, 6 Coke, 23; Combe's Case, Moore, 759. We think a similar principle must control the present case, although the standard may be different. We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." This decision has been followed in a number of cases, and doubted or questioned in none, though distinguished in some. See Merritt v. Cotton States L. Ins. Co., 59 Ga. 564, 55 Ga. 103; Life Association of America v. Waller, 57 Ga. 533; Phillips v. Louisiana Eq. L. Ins. Co., 26 La. Ann. 404, 21 Am. Rep. 549; Eastbrook v. Union Mut. L. Ins. Co., 54 Me. 224, 89 Am. Dec. 743; John Hancock Mut. L. Ins. Co. v. Cooper, 84 Mich. 41; Scheffer v. National L. Ins. Co., 25 Minn. 534, 8 Ins. L. J. 387; Connecticut Mut. L. Ins. Co. v. Groom, 86 Pa. St. 92, 27 Am. Rep. 689, 7 Ins. L. J. 597; Phadenhauer v. Germania L. Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623; Hathaway v. National L. Ins. Co., 48 Vt. 385; Accident Ins. Co. of N. A. v. Crandal, 120 U. S. 527, 531; bk. 30, L. ed. 740, 742; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121; bk. 21, L. ed. 878; Charter Oak Ins. Co. v. Rodel, 95 U. S. 232; bk. 24, L. ed. 433; Bigelow v. Berkshire Ins. Co., 93 U. S. 284; bk. 23, L. ed. 918, 19 Am. Rep. 628n; Waters v. Connecticut Mut. L. Ins. Co., 2 Fed. Rep. 892, 9 Ins. L. J. 337; Moore v. Connecticut L. Ins. Co., 3 Fed. Rep. 444, 4 Big. L. & Acc. Cas. 138; Hiatt v. Mutual L. Ins. Co., 2 Dill. C. C. 572; Coverston v. Connecticut Mut. L. Ins. Co., 1 Am. L. T. (N. S.) 239, 4 Big. L. & Acc. Ins. Cas. 169; Jarvis v. Connecticut Mut. L. Ins. Co., 5 Ins. L. J. 507. 6 Id. 811. In the case of Manhattan L. Ins. Co. v. Broughton, supra, Mr. Justice Gray says: "The most important question in the case is whether a selfkilling by an insane person, having sufficient capacity to understand the deadly nature and consequences of his act, but not its moral aspect and character, is a death by suicide, within the meaning of the policy. This is the very question that was presented to the court in 1872 in the case of Mutual L. Ins. Co. v. Terry. At that time there was a remarkable conflict of opinion in the courts of England, in the courts of the several States, and in the circuit courts of the United States, as to the true interpretation of such a condition. All the authorities agreed that the words "die by suicide," or "die by his own hand," did not cover every possible case in which a man took his own life, and could not be held to include the case of selfdestruction in a blind frenzy or under an overwhelming insane impulse. Some courts and judges held that they included every case in which a man, sane or insane, voluntarily took his own life. Others were of the opinion that any insane self-destruction was not within the condition," and ending by laying down the doctrine that "a self-killing by an insane person, understanding the physical nature and consequences of his act, but not its moral aspect, is not a death by suicide, within the meaning of a condition in a policy of insurance upon his life, that the policy shall be void in case he shall die by suicide, or by the hands of justice, or in consequence of a duel, or of the violation of any law."

4. Limitation of the American Rule -The American cases are not all harmonious. The doctrine, as laid down in the case of Breasted v. Farmers' L. & T. Co, and approved by the Supreme Court of the United States in the case of Mutual L. Ins. Co. v. Terry, has been somewhat modified by later New York decisions. Thus, in Van Zandt v. Mutual Benefit L. Ins. Co., 55 N. Y. 169, it is held that where a policy of life insurance contains the usual condition declaring it void in case the assured shall die by his own hand, the only exceptions to the condition are where self-destruction is clearly shown to be accidental or involuntary; to take a case out of the proviso, on the ground of insanity, the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the impulse of an insane impulse which he could not resist; it is not sufficient that his mind was so impaired that he was not conscious of the moral obliquy of the act. The court say: "I do not find that any of the cases have gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was voluntary and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse or want of gower of will or self-control, is sufficient to take a case out of the proviso. The contrary has been held in several cases, and the doctrine of Barradalie adopted. Dean v. American Mut. L. Ins. Co., 86 Mass. (4 Allen) 101; Cooper v. Massachusetts Mut. L. Ins. Co., 102 Mass. 227, 3 Am. Rep. 453; Nimick v. Mutual Benefit L. Ins. Co., 3 Brewst. (Pa.) 502, 3 Pittsb. Rep. 293; 1 Big. L. & Acc. Ins. Cas. 758; 10 Am. L. Reg. (N. S.) 102; Gay v.



Union Mut. L. Ins. Co., 9 Blatch. C. C. 142, 2 Big. L. & Acc. Ins. Cas. 4; Wharton & Stille Med. Jur., § 240; Fowler v. Mutual L. Ins. Co., 4 Lans. (N. Y.) 202. In the case of St. Louis Mut. L. Ins. Co., 6 Bush (Ky.), 268, the Court of Appeals of Kentucky was equally divided." See also Penfold v. Universal L. Ins. Co., 85 N. Y. 317, 321; Newton v. Mutual Benefit L. Ins. Co., 76 N. Y. 426, 429; Weed v. Mutual Benefit L. Ins. Co., 70 N. Y. 561, 568; De Gogorza v. Knickerbocker L. Ins. Co., 65 N. Y. 232, 248. Earl, J., in his dissenting opinion in De Gogorza v. Knickerbocker L. Ins. Co., supra, says, in speaking of the Van Zandt Case: "In the latter case the law, as announced in the English cases, was followed, and hence in this State, whatever doubt there may have been before, it must now be regarded as settled that when a policy contains a proviso that it shall be void in case the assured shall die by his own hand, a death by the voluntary, intentional act of the insured, whether he was sane or insane, avoids the policy; but self-destruction by the assured when his mind was so disordered that he did not know that the act committed would cause death, when he could form no intention and be influenced by no motive, or when he was under the influence of some insane impulse which he could not resist, does not avoid the policy."

The doctrine announced in the later New York decisions seems to be that of the courts of Massachusetts and Pennsylvania. See Cooper v. Massachusetts Mut. L. Ins. Co., 102 Mass. 227, 3 Am. Rep. 453; 1 Big. L. & Acc. Ins. Cas. 758; Dean v. American Mut. L. Ins. Co., 86 Mass. (4 Allen) 101; Connecticut Mut. L. Ins. Co. v. Groom, 86 Pa. St. 92, 27 Am. Rep. 689, 6 Bost. Rep. 376; American Life Ins. Co. v. Isett, 74 Pa. St. 176, 2 Ins. L. J. 825, 4 Big. L. & Acc. Ins. Cas. 422; Nimick v. Mutual Benefit L. Ins. Co., 3 Brewst. (Pa.) 502, 3 Pittsb. Rep. 293, 10 Am. L. Reg. (N. S.) .02, 1 Big. L. & Acc. Ins. Cas. 758; Gay v. Union Mut. L. Ins. Co., 9 Blatchf. C. C. 142, 2 Big. L. & Acc. Ins. Cas. 4. JAMES M. KERR.

HUMORS OF THE LAW.

"No," said the great student of sociology, thoughtfully, "I do not consider this man a criminal."

"Not a criminal?", exclaimed the man of unscientific mind.

"I consider him very far from being one."

"But think of what he did?"

"I do. That is why I have came to this conclusion."

"He committed murder, didn't he?"

"Legally, I suppose he did."

"The deed was absolutely fiendish in its cruelty."

"I admit that."

"Four people died horrible deaths as a result of his deliberate act."

"That's quite true."

"Then if he is not a criminal, there are none."

"On the contrary there are a great many of them. The shoplifter in the next cell is a criminal. So is the fellow on the other side who assaulted a man with a slungshot. But it is absurd to call this man a criminal."

"Then what is he?"

"He is a degenerate."

"Oh, yes, of course," returned the man of unscientific mind. "I forgot that science had made such great strides of late, and so I failed to apply the usual test."

"The usual test?" repeated the student, inquiringly.
"Yes. As I understand it, a criminal becomes a degenerate when he does something for which he ought to hang."

WEEKLY DIGEST

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- 1. ACTION—Who may Maintain.—L, being the owner of certain notes and chattel mortgages executed by J, assigned them, in absolute terms, to S, for the purpose of enabling him, by action thereon, to compel J to pay a debt owing by him to S. If the proceeds were collected, they were to be turned over to L: Held, that for such purpose S was a trustee of an express trust, and might maintain an action in his own name.—STRUCKMEYER V. LAMB, Minn., 65 N. W. Rep. 930.
- 2. ADMIRALTY JURISDICTION Maritime Contract—Storage of Grain in Vessel—A contract made near the close of the season of lake navigation for the shipment of a cargo of grain from Chicago to Buffalo, the grain to be stored in the vessel at Buffalo until the following spring, is not maritime in character in respect to the provision for such storage; and admiralty has no jurisdiction of a suit for damage to the grain during the storage.—The Biohard Winslow, U. S. C. C. of App., 71 Fed. Rep. 426.
- 3. APPEAL OR ERROR—Review.—If the judgment which the litigant seeks to have reviewed is appealable, he may have it reviewed, on appeal or error, at his election, and he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or vice versa. But if he makes no such election, this court will review the judgment of the district court on error, when there is filed with the transcript a petition in error.—Beatrice Paper Co. v. Beloit Iron Works, Neb., 65 N. W. Rep. 1059.
- 4. ATTACHMENT—Civil Action.—An action for money lost at gambling on defendant's premises is a civil action for the recovery of money within the meaning of the attachment law of Ohio.—Jenks v. Richardson, U. S. C. C. (Ohio), 71 Fed. Rep. 366.

- 5. ATTACHMENT Interpleader—Sale of Property.—Where seven separate attachment suits are begun against an insolvent debtor, and a creditor files an interplea in each, claiming the property attached, which, by consent of all plaintiffs, is sold, the proceeds to await the order of the court, no disposition of such proceeds can be made till all of the suits have been determined.—STATE V. HOCKADAY, Mo., 33 S. W. Rep. 812.
- 6. ATTORNEY AND CLIENT—Action—Dismissal.—The general employment of an attorney to prosecute an action does not confer on him the power to dismiss it.—RHUTABEL V. BULE, IOWA, 65 N. W. Rep. 1813.
- 7. Banks—Proceeds of Mortgaged Chattel—Deposit in Bank.—In an action by a chattel mortgagee against a bank for the proceeds of mortgaged property, deposited by the mortgagor (the bank's cashier) to his account, and applied by the bank to its own debt due from the cashier, the admission of declarations of the mortgagor, while acting as such cashier, that the application was without his consent, and that he made the deposit in good faith for the mortgagee, on the issue as to whether the bank had notice, if error, is harmless, where the same facts have been testified to on trial by the cashier and another witness without objection.—ROCK SPRINGS NAT. BANK V. LUMAN, Wyo., 43 Pac. Rep. 514.
- 8. CARRIERS OF GOODS Contracts Authority of Local Agents.—It being out of the usual course of business, the presumption is that a local station agent has no power to bind his company by a contract to ship property over connecting lines of railway, and such authority will not be inferred from the mere fact that the freight for the entire distance was collected by such agent.—COATES V. CHICAGO, M. & ST. P. RY. Co., S. Dak., 65 N. W. Rep. 1067.
- 9. CHATTEL MORTGAGE—Book Accounts—Description.

 —A mortgage of book accounts, describing them as "all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise" theretofore mortgaged, and described as situated in a certain building, sufficiently describes the accounts as between the mortgagee and third persons.—DAVIS V. PITCHER, IOWA, 65 N. W. Rep. 1005.
- 10. CHATTEL MORTGAGES—Failure to Record.—By the provisions of § 4879, Comp. Laws, a chattel mortgage, executed and delivered, but not properly deposited in the office of the register of deeds of the county, is void, as against the creditors of the mortgagor, who became such while such chattel mortgage was withheld from the record.—NOYES v. BRACE, S. Dak., 65 N. W. Rep. 1071.
- 11. CONDEMNATION OF LAND FOR BRIDGE.—A city having condemned one of plaintiff's lots for the purpose of building a viaduct which would pass over said lot, plaintiff is entitled to compensation for the value of said lot, and for the depreciation in the value of his adjoining lots; it appearing that the plans for said viaduct had been made before the condemnation, and the erection thereof completed before the trial of the action for damages.—ORTH v. CITY OF MILWAUKEE, Wis., 65 N. W. Rep. 1029.
- 12. Constitutional Law Appropriations. Acts passed in violation of Const. art. 10, § 16, prohibiting the general assembly from making appropriations or authorizing expenditures in excess of constitutional limits, are void, and create no indebtedness against the State.—Parks v. Commissioners of Soldiers' & Sailors' Home, Colo., 43 Pac. Rep. 542.
- 18. Constitutional Law—Marine Insurance—Foreign Companies.—If a party, while in the State, takes out an open policy in a marine insurance company, domiciled out of the State, and which has not complied with the laws of the State for doing business within its territory, covering property situated within the State, he is liable to the penalty imposed by statute.—STATE v. ALLGEYER, La., 18 South. Rep. 304.
- 14. CONSTITUTIONAL LAW-Special Legislation.—After the legislature, in pursuance of Const. art. 11, § 6, pro-

- viding that it shall classify municipal corporations in proportion to population, had made a classification, the first class of which comprised those containing 100,000 inhabitants or over, Act March 28, 1895, providing for the appointment of a board of election commissioners in municipalities having a population of over 150,000 inhabitants, was passed: Held, that the act was unconstitutional, as special legislation.—DENMAN v. BRODERICK, Oal., 48 Pac. Rep. 516.
- 15. Constitutional Law-Title-Game Law.—Section 2171, Gen. St. 1894, making it a misdemeanor for any person to have in his possession, within this State, any game or fish which has been captured in or shipped out of any other State or country in violation of the laws thereof, is unconstitutional, because its subject-matter is not expressed in the title of the act whereof it is a part, as required by § 27, art. 4, of the State constitution.—Keith v. Chapel, Minn., 65 N. W. Rep. 940.
- 16. CONTRACT.—A contract in the form of an order for goods given to a traveling salesman, and accepted by him, though originally conditional and dependent on approval by the company which he represented, becomes binding on it by reason of its failure to repudiate till twelve days after submission thereof to it; it never having intended to accept and fill the order.—BLUE GRASS CORDAGE CO. V. LUTHY, Ky., 85 S. W. Rep. 835.
- 17. CONTRACT—Mutuality.—Alleged want of mutuality in an agreement guarantying the performance of the contract of another is no defense, where the contract had become executed.—WHEELER & WILSON MFG. CO. V. LYON, U. S. C. C. (Minn.), 71 Fed. Rep. 874.
- 18. CONTRACT—Parol Evidence.—The rule as to the inadmissibility of parol evidence to contradict or vary the terms of a written instrument is not violated by proving the existence of any separate oral agreement as to any matter on which the instrument is stilent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the instrument to be a complete and final statement of the transaction between them.—HAND V. RYAN DRUG CO., Minn., 65 N. W. Rep. 1081.
- 19. CONTEACT Performance.—A building contract provided that, on failure of the contractor to properly complete the work, the owner of the building could himself correct defective work, and deduct the cost thereof from the contract price. The contractor having laid defective flooring, the owner corrected the defective work at the cost of two per cent. of the contract price: Held, that thereafter the owner could not defeat a recovery of the contract price, less damages for the omission, on the ground of non-performance.—OHARLES V. E. F. HALLACK LUMBER & MANUFACTURING OO., Colo., 48 Pac. Rep. 548.
- 20. CONTRACT—Testamentary Sale.—A provision in a deed stating that the grantee is to have all the grantor's personal estate at his death, after payment of all past debts and charges, if sustained by a valuable consideration, is not against public policy, and will be enforced.—PETERBOROUGH SAV. BANK V. HARTSHORN, N. H., 33 Atl. Rep. 730.
- 21. CONTRACTS Waiver.—Where one who has contracted for a new machine accepts one which he knows to have been used, he thereby waives objection to it on that ground.—AULTMAN-TAYLOR MACHINERY CO. V. RIDENOUR, IOWA, 65 N. W. Rep. 980.
- 22. CORPORATION Directors—Stockholder.—While, as a general rule, an action to protect corporate interests must be brought by the corporation itself, still, the right of stockholders to bring such action in their individual names is recognized, where the corporation, by its directors, refuses to bring the action, or where their conduct is such as to be equivalent to a refusal.—Loftus v. Farmers' Shipping Ass'n, S. Dak., 65 N. W. Rep. 1076.
- 23. CORPORATION—Evidence as to Action of Directors.

 —An instrument, in form a certified copy of a resolution by the board of directors of a corporation, duly attested by the signatures of the president and secre-

tary, under the corporate seal, ratifying the execution of a mortgage, and sent to the mortgagee, is presumably the act of the corporation, and admissible in evidence to prove the ratification, without proof of the loss of the corporate record of such resolution.—PURSER V. EAGLE LAKE LAND & IRRIGATION CO., Cal., 48 Pac. Rep. 528.

- 24. CORPORATIONS—Filing of Articles of Incorporation.—The failure of a corporation to file a copy of its articles of incorporation in a county where it has property, and in which it brings an action, as required by Ulv. Code, § 299, does not affect its cause of action, and can only be taken advantage of by plea in abatement.—Cal. Sav. & Loan Soc. v. Harris, Cal., 48 Pac. Rep. 526.
- 25. CORPORATION Stock Certificate Transfer.—A corporation is not estopped from asserting a lien on stock for a debt due it, as against a transferee thereof, by the fact that the certificate states that the shares are "transferable personally or by attorney on the books of the company," without any reference to such a lien.—National Bank of the Republic v. Rochester Tubbler Co., Penn., 33 Atl. Rep. 748.
- 26. CORPORATIONS-Ultra Vires .- A State bank which, under its charter, had power to accept stock in a national bank as security for a loan, or to acquire such stock by levy and sale under execution to satisfy a debt due to it, but which had no power to purchase such stock as an investment, purchased shares of the stock of a national bank, which were transferred to it on the books of the national bank. The latter bank subsequently became insolvent, and an assessment upon the stockholders was made by the comptroller of the currency, payment of which was resisted by the State bank on the ground that the purchase of the stock was ultra vires: Held that, as the purchase of the stock was merely the exercise, for an unauthorized purpose, of a power existing for other and legitimate purposes, the defense of ultra vires was not available. -CETIZENS' STATE BANK OF NOBLESVILLE V. HAWKINS. U. S. C. C. of App., 71 Fed. Rep. 869.
- 27. Courts—International Comity.—Plaintiff entered the service of the defendant railway company in the republic of Mexico, and while in such employment was injured in that country, as is alleged, through defendant's negligence. The laws of Mexico governing liability for negligence, and also the procedure for their enforcement, differ essentially from those of Texas, and many of the provisions of the law of that country could not be enforced: Held that, the laws of Mexico having been proven, and the fact established that defendant still owns and operates its railway therein, and is subject to the jurisdiction of its courts the courts of Texas will refuse to take jurisdiction of an action to recover for the injury.—MEXICAN NAT. R. Co. v. Jackson, Tex., 83 S. W. Bep. 858.
- 28. CRIMINAL LAW Confessions.—Where defendant, while under arrest, but not under indictment, is used as a witness for the State, and also makes statements as to the crime to an officer, and no warning whatever was given him, as required by Code Cr. Proc. art. 750, neither the evidence at the trial nor the confession is admissible on a subsequent trial of an indictment against him for the same offense.—GILDER v. STATE, Tex., 38 S. W. Rep. 367.
- 29. CRIMINAL LAW—Grand Jury—Charge of Court.—
 It is error for the court, when the grand jury asks to
 be discharged, in directing them to return and investigate violations of the temperance law, to state that he
 feels sure evidence can be obtained warranting them
 in returning indictments for such violations, and that
 he does not believe that they, as citizens, can justify
 themselves in going to their homes without making an
 attempt to bring the guilty parties to justice.—State
 7. WILL, Iowa, 65 N. W. Rep. 1010.
- 80. CRIMINAL LAW—Murder.—Where defendants are tried together under an indictment for murder in the first degree, an instruction that it is necessary to find both actuated by express malice, before they could

- both be found guilty, is proper.—MOOTRY V. STATE, Tex., 88 S. W. Rep. 877.
- 81. CRIMINAL LAW Murder—Malice.—In a prosecution for murder, expressions of ill will by defendant towards deceased, made seven months before the homicide, are admissible to show malice.—TUTTLE V. COMMONWEALTH, Ky., 33 S. W. Rep. 528.
- COMMONWEALTH, Ky., 33 S. W. Rep. 828.

 32. CRIMINAL LAW New Trial Newly-discovered Evidence.—Where, in a prosecution for rape, a witness testified that he and another person saw defendant having copulation with prosecutrix, a new trial should be granted for newly-discovered evidence consisting of the denial of such other person that he saw such act.—Owens y. State. Tex., 38 S. W. Rep., 876.
- act.—Owens v. State, Tex., 35 S. W. Rep. 875.

 83. Oriminal Law—Trial—Presence of Accused.—It was error, in the trial of a criminal case, to permit the solicitor general to proceed with his argument to the jury while the accused was absent and confined in jail, he not having been admitted to bail. This is true, although the presiding judge was not actually aware of the prisoner's absence, it not appearing that any waiver of his presence, express or otherwise, had been made, either by himself or his counsel. Because of such error, a new trial should be granted.—TILLER v. STATE, Ga., 23 S. E. Rep. 825.
- 84. CRIMINAL TRIAL Embezzlement.—Under Const. art. 6, § 19, probibiting judges from instructing in criminal cases as to the matters of fact, an instruction to the jury on defendant's testimony that in "weighing his testimony you are to consider what he has at stake. You are to consider the temptations brought to bear upon a man in his situation, to tell a falsehood for the purpose of inducing you to acquit him or to disagree," is ground for reversal.—PEOPLE v. VAN EMAN, Cal., 48 Pac. Rep. 521.
- 85. DEED—Acknowledgment.—The acknowledgment of a deed cannot be taken by a grantee or party interested therein.—Florida Savings Bank & Real Estate Exchange v. Rivers, Fla., 18 South. Rep. 850.
- 36. EQUITY Agency—Accounting.—Equity will not require an accounting by a principal for money voluntarily paid by the agent, without knowledge of the principal, in managing real estate securities intrusted to him, on the theory that enough can be realized on the securities to pay the agent's claim after the principal's claim has been satisfied, on the mere testimony of the agent, based on the opinion of his subagents and his own casual inspection of the property, that "if the lands are properly handled" there will be a surplus.—Carpenter v. Momsen, Wis., 65 N. W. Rep. 1027.
- 87. EQUITY Dispute between Partners.—A court of equity may require an accounting and distribution of the assets of a firm between the partners in the proportion fixed by an award made under a submission by the partners.—WITZ V. TREGALLAS, Md., 38 Atl. Rep. 722.
- 38. EQUITY—Jury Trial.—Courts of chancery are not strictly courts according to the course of the common law, and the constitutional guaranty of trial by jury has no reference to such courts in their recognized sphere of equity jurisdiction, nor does such guaranty extend to all cases at law, as there are proceedings in many inferior courts and many summary proceedings in nist prius courts in which a jury was never employed.

 —WIGGINS V. WILLIAMS, Fla., 18 South. Rep. 859.
- 89. EQUITY Pleading Bill.—A bill which alleges that the subject-matter of the controversy arose out of senior defendant's failure to pay complainant his share of the profits arising from the negotiation of certain mortgage loans on real estate, and that part of the lands from which complainant was entitled to derive profits had vested in junior defendant, whose relation to the property was that of a trustee, entirely subsidiary to senior defendant, states a cause of action, and is not multifarious.—CHEW V. GLENN, Md., 88 Atl. Rep. 722.
- 40. EQUITY Reformation of Mortgage.—Equity will correct a mistake in a mortgage whereby property intended to be included therein was inadvertently

omitted, even after the mortgage has been foreclosed, and the property described in it has been levied upon and sold under the mortgage f. fa.; and after such correction the lien of the mortgage on the omitted property will be superior in dignity to that of a judgment obtained after the mortgage was originally executed, and before its reformation.—PHILLIPS V. ROQUEMORE, Ga., 28 S. E. Rep. 855.

- 41. EVIDENCE—Judicial Notice—Municipal Improvements.—Courts take notice of the streets, and of the names and locations of the suburbs from time to time brought within the city limits.—POLAND v. DREYFOUS, La., 18 South. Rep. 908.
- 42. EVIDENCE—Parol Evidence Action on Subscription.—In an action upon a written subscription, parol evidence is not admissible to add conditions to those expressed in the writing sued upon.—NEBRASKA EXPOSITION ASS'N V. TOWNLEY, Neb., 65 N. W. Rep. 1062.
- 43. EVIDENCE-Statutes of Sister State.-In garnishment proceedings it appeared that defendant had a life estate in land in Indiana on which tobacco, the proceeds of which was garnished, were raised. He leased the land for one-third of the tobacco as rent. Claimants, his children, were the remainder-men, and had mortgaged their interest to secure a debt of their father, and he agreed that they should have his share of the crop to apply on the debt. When the tenant stated that he was going to ship the tobacco to Kentucky, claimants, fearing that in that State it might be subjected to plaintiff's debt, paid the father the value of his interest in the crop. Plaintiff, defendant, and claimants lived in Indiana: Held, that on an issue whether the transaction between defendant and claimants was fraudulent, it was error to refuse to permit one learned in the statute law of Indiana to testify that under the laws of that State neither the tobacco nor its proceeds could be made liable to the payment of plaintiff's debt .- BARKER V. BROWN, Ky., 28 8. W. Rep. 883.
- 44. EXECUTION—Husband and Wife.—Where a wife loaned money to her husband to buy certain goods, and there was no understanding that they were to be hers, they are liable under the execution for a debt of the husband.—GOBSCHEL v. FISHER, Mich., 65 N. W. Rep. 965.
- 45. FRAUDULENT CONVEYANCE Change of Presession.—The continued possession and use of personal property by the vendor for his own use is inconsistent with a bona fide sale of the property, and requires satisfactory proof in explanation of such possession and use.—BRIGGS V. WESTON, Fla., 18 South. Rep. 852.
- 46. FRAUDULENT CONVEYANCE Evidence.—A mortgage of its assets, real and personal, made by a land company to secure bonds provided that until default the company should retain the mortgaged property and the income therefrom, and have the same power to control and sell the same as if the mortgage had not been made, and that upon the sale of any part thereof a release for such part should be given by the trustee in the mortgage. It appeared that the mortgage covered all such solid assets as would furnish grounds of confidence to creditors: Held, that the mortgage was void as against existing creditors, but not as against subsequent creditors.—CENTEAL TRUST CO. OF NEW YORK V. EAST TENNESSEE LAND CO., U. S. C. C. (Tenn.), 71 Fed. Rep. 353.

47. FRAUDULENT CONVEYANCE — Insolvent Debtor—Gift.—A gift by a debtor insolvent at the time is void as to his then existing creditors, whether made for the purpose of defrauding them or not; but a gift by such a debtor is not void as to a person who subsequently becomes his creditor, unless at the time of making the gift there was an actual intention on the part of the debtor to afterwards obtain credit from and defraud that person, and the gift was made in whole or in part for the purpose of accomplishing this result. Even if the money of the subsequent creditor was obtained by the debtor for the express purpose of paying debts existing when the gift was made, and was actually used

- for that purpose, these facts alone would not make the gift void as to this creditor, if the conduct of the debtor throughout the entire transaction was honest, and he had no real intent to defraud.—First NAT. BANK OF CARTERSVILLE v. BAYLISS, Ga., 23 S. E. Rep. 815.
- 48. GARNISHMENT—Admissions—Estoppel.—The obligors upon a bond given to procure the discharge of a garnishee as provided in Gen. St. 1894, § 5342, in which was admitted that the plaintiff had garnished the money, property, and effects of the defendant in the hands of the garnishee, are estopped in an action upon the bond, and cannot be permitted to assert that the admission was false.—Greengard v. Fretz, Minn., 65 N. W. Rep. 949.
- 49. GARNISHMENT—Receivers.—Funds in the hands of a receiver are not subject to garnishment; a proceeding by garnishment not being a suit, within Sayles' Civ. St. art. 1468, stating conditions under which a receiver may be sued.—KREISLE v. CAMPBELL, Tex., 38 S. W. Rep. 852.
- 50. INJUNCTION—Appeal.—Upon an appeal from an order denying a preliminary injunction, as well as upon appeal from an order granting such injunction, the decision of the judge who made the order will not be reversed, unless it appears, after a consideration of the grounds presented to him for his action, that his legal discretion to grant or withhold the order was improvidently exercised.—Thompson v. Nelson, U. S. C. C. of App., 71 Fed. Rep. 389.
- 51. INJUNCTION—Dissolution—Damages.—In a suit for damages on an injunction bond, plaintiff sought to recover, as one item of damages, fees paid to an attorney who resisted the injunction, and also tried the cause on its merits: Held that, since the attorney was employed generally, fees could not be recovered as damages.—Greek v. McManus, Mont., 48 Pac. Rep. 497.
- 52. INJUNCTION-Pleading.—On motion to dissolve a temporary injunction restraining, as unreasonable, the enforcement of a city ordinance requiring a railroad company to light its tracks at certain street crossings, the bill, though containing merely conclusions, in alleging the unreasonableness of the ordinance, and for that reason confessedly insufficient on demurrer, in the absence of objection, will be held sufficient.—LOUISVILLE & N. R. CO. V. CITY OF BESSEMER, Ala., 18 South. Rep. 880.
- 53. INJUNCTION—Trespass to Land.—Equity will enjoin repeated and continued trespasses to land where the trespasser is insolvent.—MARTIN V. DAVIS, IOWA, 65 N. W. Rep. 1001.
- 54. INSURANCE—Action—Time of Bringing.—McClain's Code, § 1734, providing that no actions shall be begun on an insurance policy within 90 days after notice of loss has been given, prevents the insured from suing within that time, though the insurer, on receipt of proof of loss, absolutely denied liability.—FINSTER V. MERCHANTS' & BANKERS' INS. CO., IOWA, 65 N. W. Rep. 1004.
- 55. INSURANCE Conditions Waiver. Where the agent of an insurance company is notified, at the time the application for insurance is made, that insured only owns an estate for years in the land on which the buildings to be insured are situated in surer will be held to have waived a condition in the policy, when issued, avoiding it in case insured in terest in the land is not a fee-simple, though the policy also contain a condition that no agents can waive provisions of the policy, except in writing indorsed thereon.—Goss v. Agricultural Ins. Co. Of Watertows, Wis., 65 N. W. Rep. 1036.
- 56. Insurance—Damage by Explosion.—Under an insurance policy containing a provision that the insurer should not be liable for loss or damage "by explosion, from any cause, unless fire ensues, and then only for the loss or damage by fire," damage resulting from the exploding of dynamite or some other substance by some person at the door of the insured building, 20

fire ensuing, cannot be recovered, though the explosive was ignited by fire.—PHOENIX INS. CO. V. GREER, Ark., 33 S. W. Rep. 840.

57. INSURANCE—Increase of Risk.—Where a fire policy provides for the ascertainment of the increase of risk due to the location of any engine on the premises, and requires the insured to pay additional premium for any increase of risk found, the location of an engine on the premises the day before a loss will not prevent recovery, where the insured, 10 days prior to its occurrence, notified the company that he frequently used an engine on his premises, and offered to pay the additional premium, but the company failed to act on the notice.—Farmers' Mut. Fire Ins. Co. of Dug Hill v. SCHARFFER, Md., 38 Atl. Rep. 728.

58. INTOXICATING LIQUORS - Statutes-Repeal. - Act April 3, 1889, providing "that it shall be unlawful for any person to sell wine at any place in this State, except as authorized in this act," and authorizing its sale, in quantities not less than one quart, on the premises where the fruit from which it is made is grown, and in any place where the sale of intoxicating liquors is licensed and authorized, impliedly repeals Sand. & H. Dig. §§ 4851, 4868, in so far as they authorize the sale of wine in original packages containing not less than five gallons; and therefore, since the provisions authorizing the sale of wine on the premises on which the fruit is grown is unconstitutional, the manufacturer of wine from fruit grown by him can only sell the wine in places where the sale of intoxicating liquors is licensed .- HUBMAN V. STATE, Ark., 88 S. W. Rep. 843.

- 59. JUDGMENT—Vacation.—A judgment and sale of land in an action aided by attachment will not be set aside, after the lapse of three years, because no notice of the action was served on defendant, where it appears that defendant had actual knowledge of the action; having appeared in a suit in equity commenced at the same time to set aside a conveyance of the land by him as fraudulent, in which defendant acknowledged the commencement of the action at law, and failed to object to the judgment for want of notice, when set up in the equity action, after recovery, by amended complaint.—Corn Exch. Bank v. Appelgars, lowa, 65 N. W. Rep. 1007.
- 60. LANDLORD AND TENANT—Condition Subsequent.—The breach of a condition subsequent in a deed does not, of itself alone, defeat the grantee's estate, nor revest title in the grantor, until after entry, or recovery in an action brought by him or his heirs; and the same rule is applicable in case of the lease of realty for a term of years.—PEACOCK & HUNT NAVAL STORES CO. V. BROOKS LUMBER CO., Ga., 23 S. E. Rep. 386.
- 61. LANDLORD AND TENANT—Rent—Counterclaim.—When lessees enter into and retain possession of the rented premises under a covenant in the lease that the landlord will make improvements, which he fails to do the lessees, when sued for the rent, may recoup the damages resulting from such breach of the covenant, or set up the resulting damages as a counterclaim. Such counterclaim arises out of the contract sued upon as the foundation of the landlord's claim, and is connected with the subject of the action.—PIONEER PRESS CO. V. HUTCHIMSON, Minn., 65 N. W. Rep. 988.
- 62. LIEN—Laborer's Lien—Excavation of Land.—Gen. 8t. 1894, § 6220, provides that whoever performs labor, etc., "for grading, filling in, or excavating any land," etc., shall have a lien upon the land for the price of his labor: Held, that a hole drilled in the ground solely for the purpose of ascertaining whether there is ore underneath, and, if so, whether it exists in paying quantities, it is not an excavation of the land for which the statute gives a lien; that the statute only return to excavations made for the purpose and in the progress of making improvements upon the land.—COLVIN V. WEIMER, Minn., 65 N. W. Rep. 1079.
- 6. Malicious Prosecution—Civil Suit.—An action for damages will lie for maliciously and without prob-

- able cause prosecuting a civil suit against one resulting in actual damage, though it was commenced with an ordinary summons, and without seizure of the person or property.—LIPSCOME v. SHOFNER, Tenn., 88 S. W. Red. 818.
- 64. Mandamus—Constitutional Law.—The constitutionality of an act of the legislature cannot be determined collaterally by the court in an application for a writ of mandate by a private party to enforce a private right. WRIGHT V.KELLY, Idaho, 43 Pac. Rep.
- 65. MARRIED WOMAN—Surety on Note.—Evidence in an action against a married woman upon a note executed by her, as surety, examined, and held sufficient to sustain a verdict against her.—SPATZ V. MARTIN, Neb., 65 N. W. Rep. 1063.
- 66. MASTER AND SERVANT—Defective Appliances.—An employee cannot recover for injuries from defective appliances while using them, without necessity, in a manner and for a purpose not intended, where the defects would not render such appliances unfit to be used as intended.—JAYNE V. SEBEWAING COAL CO., Mich., 65 N. W. Rep. 971.
- 67. MASTER AND SERVANT Unsafe Machinery.—A railway company is liable for injuries resulting to its employees from its failure to use ordinary care to furnish safe machinery and appliances for their use in operating the road. Ordinary care in this connection means such care as an ordinarily prudent man would use under the circumstances, and it is to be measured by the character and risks of the business. The company is not, however, bound to insure the absolute safety of its machinery, or to provide the best, safest or newest machinery.—TEXAS & P. RY. CO. V. ELLIOTT, U. S. C. C. of App., 71 Fed. Rep. 878.
- 68. MECHANICS' LIENS—Construction of Contract.—A building contract provided that the owner should retain 10 per cent. from payments on partial estimates until completion of the building, and also that a certain part of the contract price should be paid in an order on another: Held, that as affecting claims of subcontractors to mechanics' liens, the 10 per cent. should be retained from the amount of the order, as well as the cash payments.—MERRITT v. HOPKINS, Iowa, 65 N. W. Rep. 1015.
- 69. MECHANIC'S LIEN—Hauling Material for Building.

 —One who, under a contract with the owner or contractor, hauls material for a building, erection or other improvements, and which is used in the erection of the same, is entitled to a lien therefor under the mechanic's lien laws of this State.—KEHOE v. HANSEN, S. Dak., 65 N. W. Rep. 1075.
- 70. MECHANIC'S LIEN—Notice.—The fact that a wife, who has a community linterest with her husband in real estate, is not named as owner in a notice of claim for lien thereon, will not defeat the lien, where it does not appear that the claimant knew of her interest, and she is made a party to the action to foreclose.—BOLSTER V. STOCKS, Wash., 48 Pac. Rep. 540.
- 71. MECHANIC'S LIEN-Notice—Sufficiency.—A notice of mechanic's lien, which recites the contract as being to furnish "the hardware and other like material" for a building, will be construed to mean all the hardware for the building, and is sufficiently definite.—BOLSTER V. STOCKS, Wash., 48 Pac. Rep. 482.
- 72. MECHANIC'S LIEN Prior Mortgage. Where buildings on mortgaged premises are burned, and the mortgagee allows insurance money to be used in erecting new buildings thereon, one furnishing material for the new buildings is entitled to a lien thereon prior to the mortgage, under Sayles' Civ. St. art. 3171, providing that mechanics' liens shall attach to buildings in preference to any prior incumbrance on the land on which the buildings are erected.—Prople's Building, Loan & Savings Assn. v. Clark, Tex., 83 S. W. Rep.
- 73. MORTGAGES Foreclosure by Advertisement.— Gen. St. 1894, § 6051, provides that the party foreclosing



a mortgage shall make and file an affidavit of costs and disbursements "within ten days after foreclosure:" Held, that the ten days begin to run, not from the day the property is offered for sale and struck off to the purchaser, but from the time the foreclosure sale is completed by the execution and recording of the certificate of sale.—LAROCQUE v. CHAPEL, Minn., 65 N. W. Rep. 941.

- 74. MORTGAGE Redemption from Foreclosure Tender.—A tender of the amount required to redeem from a mortgage foreclosure sale must be kept good in order to be effectual as the basis of a subsequent action to compel a redemption, brought after the time for redemption has expired.—Dunn v. Hunt, Minn., 65 N. W. Rep. 948.
- 75. MORTGAGES—Transfer of Mortgaged Property.—Granting that the maker of a note and mortgage, who transfers the property to another, assuming payment of the mortgage debt, becomes thereby a surety only for its payment, the extension of one of two notes secured by the mortgage does not extend the other, even if both have matured by the terms of the mortgage because of default in payment of one, nor prevent the immediate enforcement of the one not extended, and will not release the maker from liability thereon, though the extension was made without his consent.—OWINGS V. MACKENZIE, MO., 38 S. W. Rep. 802.
- 76. MORTGAGE FORECLOSURE Redemption—Constitutional Law.—Act February 28, 1895, which amends Hill's Ann. Code, \$803, by increasing the time for redemption from forced sales of real estate from four months to one year from confirmation of the sale, applies to subsequent decretal sales for mortgages made prior to its passage.—STATE v. SEARS, Oreg., 48 Pac. Rep. 482.
- 77. MORTGAGE FORECLOSURE—Sale Under Decree.—The highest bidder at a sale under a decree in an action to foreclose a mortgage has, before confirmation of sale, no right to resist a resale, the commissioner conducting the sale having authority only to receive and report the highest bid for consideration and action of the court.—CENTRAL TRUST CO. V. GATE CITY ELECTRIC ST. RY. CO., LOWA, 65 N. W. Rep. 982.
- 78. MUNICIPAL CORPORATIONS—Change of Grade of Streets—Liability.—The occupation of a public street for its entire width by a permanent viaduct approach on a higher grade than the street is equivalent to a change of grade, and as such does not entitle abutting owners to damages as for an original taking of private property for public use, though the act authorizing its construction, for its protection and police purposes, provides that it shall remain under the absolute control of the city, and prohibits the granting of any exclusive franchise for its use for any purpose.—Collough v. City of Milwaurer, Wis., 65 N. W. Rep. 1040.
- 79. MUNICIPAL CORPORATION Contract Construction.—Where a city, in consideration of the erection of waterworks, agrees to rent for a certain term a certain number of hydrants, which are to be furnished and placed at the expense of the city, it is not liable for rental of the hydrants on failure to furnish them and direct where they shall be placed, in the absence of any showing that it was called upon to do so by the other party.—ELLENSBURG WATER SUPPLY CO. V. CITY OF ELLENSBURG, Wash., 48 Pac. Rep. 531.
- 80. MUNICIPAL CORPORATIONS Defective Streets Imputed Negligence.—Negligence of plaintiff's companion, who was merely walking upon the sidewalk with him, in stepping upon a loose board, whereby plaintiff was thrown and injured, cannot be imputed to plaintiff, so as to prevent a recovery from the city on account of its negligence in keeping the walk in repair.—Barnes v. Town of Marcus, Iowa, 65 N. W. Rep.
- 81. MUNICIPAL CORPORATION—School Districts—Annexation.—Where a city annexes a part of a school township, and therewith a school house and lot, the

- school corporation of such city is entitled to a deed from the school township from which the territory was taken conveying such school property free from any liability for the value of it, or for a part of an unpaid indebtedness of such school township incurred in either the purchase of the lot or the erection of the house.—Board of School Commes. Of CITY of Indianapolis v. Center Tp. of Marion County, Ind., 42 N. E. Rep. 808.
- 82. MUNICIPAL CORPORATIONS—Torts of Servants.—Where a city contract with one for the disposal of garbage regulates the place of deposit by providing that it shall be thrown into Lake Michigan, at a point not less than fifteen miles from the city, and reserves no right to control the mode or manner of its performance, the city is not liable for injuries to nets set in the lake caused by the garbage floating into them.—KUEHN V. CITY OF MILWAUKEE, Wis., 65 N. W. Rep. 1080.
- 83. NEGLIGENCE—Personal Injuries—Damages.—In an action for personal injuries, that the effect of the injuries was increased through the unskillfulness of the surgeon employed by plaintiff to attend her will not diminish the amount of her recovery, where she used reasonable diligence and care in the selection of the surgeon.—REED v. CITY OF DETROIT, Mich., 65 N. W. Rep. 167.
- 84. NEGOTIABLE INSTRUMENTS Procurement by Fraud—Batification.—The mere promise to pay, or the procuring an extension of the time for paying, a promiseory note obtained from a party without his fault, by fraud and artifice, and which he is under no legal or moral obligations to pay, does not, as a matter of law, constitute a ratification of the note, in the absence of any facts creating an estoppel in pais.—FIRST NAT. BANK OF DECORAH V. HOLAN, Minn., 65 N. W. Rep. 962.
- 85. NEGOTIABLE INSTRUMENT—Usury—Interest after Maturity.—Where, by the terms of a promissory note, it is provided that it shall bear interest until maturity at a given rate, and thereafter at a higher lawful rate, such contract is not usurious, nor is the agreement for the higher rate of interest after maturity a mere penalty.—OMAHA LOAN & TRUST CO. V. HANSON, Neb., 65 N. W. Rep. 1058.
- 86. NUISANCE-Prescription-Estoppel.-Action to enjoin the maintenance of a nuisance caused by the escape of nauseous and offensive gases from a gas plant, and smoke, cinders and soot from an electric light plant, owned and operated by defendants, into and upon the adjacent premises of the plaintiff. That part of the plant constituting the gas works had been operated by defendant for fifteen years, but had been enlarged, and the mode of making gas changed, within that time. That part of the plant constituting the electric light works had only been built and operated about eight years. The plaintiff did not object to the construction of the works while they were being built, but ever since they have been operated has continuously objected to and remonstrated against the acts creating the nuisance: Held, that plaintiff is not estopped by his conduct from objecting to the continuance of the nuisance.-Matthews v. Stillwater Gas & Electric LIGHT Co., Minn., 65 N. W. Rep. 948.
- 87. OFFICERS—State Officers—Title to Office.—A mayor of a city of the third class, who acts wholly under the powers conferred by the municipal charter, is not an officer "under this State," within Const. art. 6, \$13, and Amend. 1884, \$5, which together give the supreme court appellate jurisdiction in cases involving "the title to any office under this State."—STATE v. WALKEE, Mc., 88 S. W. Rep. 818.
- 88. Partnership Contract—Evidence.—In the case of an express promise by one partner to repay to the other his share of advances made by the latter on account of partnership business, the amount of such share becomes the debt of the promisor, recoverable by an action at law, without dissolution of partnership or an accounting between the partners.—HASKINS V. CURRAN, Idaho, 48 Pac. Rep. 559.

- 99. PARTNERSHIP Contract—Abandonment.—Where persons, in contemplation of partnership, and holding themselves out as partners, contract as such, a subsequent abandonment of the formation of the partnership will not affect their liability as partners on the contract.—Cain Lumber Co. v. Standard Dry-Kiln Co., Ala., 18 South. Rep. 882.
- 90. PLEADING Amendment of Declaration.—An amended declaration which seeks to recover on the same contract as the original, and for the same property, though the breach is differently alleged, does not state a new cause of action.—STRANG V. BRANCH CIRCUIT JUDGE, Mich., 65 N. W. Rep. 969.
- 91. PLEADING—Sham Answer—Motion to Strike.—Under Rev. St. § 2682, providing that a sham answer, whether by way of denial or avoidance, may be stricken out, but no defense shall be deemed sham, the truth of which shall be supported by the affidavit of a single witness, either by way of verification, or in opposing a motion to strike out, a verified answer is not open to a motion to strike out as sham.—PFISTER v. WELLS, Wis., 56 N. W. Rep. 1041.
- 32. PRINCIPAL AND AGENT Commissions.—Plaintiff contracted with defendant, a corporation of another State, to act as its agent in selling school furniture on commission, and bound himself to sell to such persons only as were legally qualified to enter into contracts, which contracts were to be subject to defendant's acceptance. Plaintiff sold on contracts that were not binding on the districts they purported to obligate, and such contracts were accepted by defendant; both plaintiff and defendant acting in good faith, believing them to be legal: Held, that defendant was not estopped by its acceptance of the contracts to plead their illegality in defense to a claim for commissions, nor to recover back commissions already paid under the mistake of both parties.—CLEVELAND SCHOOL-FURNITURE CO. V. HOTCHEUSS, Tex., 38 S. W. Rep. 255.
- 38. PRINCIPAL AND SURETY Official Bond.—A judgment against a constable is not even prima facte evidence against the sureties on his bond, conditioned for faithful performance of the duties of his office.—
 BODINI V. LYTLE, Mont., 48 Pac. Rep. 501.
- 94. PROCESS—Service of Summons—Privilege of Litigens.—Under Sand. & H. Dig. § 5696, permitting certain actions to be "brought in any county in which the defendant, or one of several defendants, resides or is summoned," jurisdiction cannot be obtained of a defendant, in a county other than that of his residence, by service of summons on him while in such county in attendance on the taking of depositions in a pending action to which he is a party.—POWERS V. ARKADEL-PHIA LUMBER CO., Ark., 33 S. W. Rep. 842.
- 35. PROHIBITION—Constitutional Law.—The constitutionality of an act of the legislature will not be passed upon in an application for writ of prohibition, in a case where it is not directly in issue, and is only collateral to the questions in issue as shown by the petition.—Bellevie Water Co. v. Stockslager, Idaho, 48 Pac. Rep. 568.
- 36. PUBLIC BUILDINGS Mechanic's Lien.—In an action to enforce a claim for furnishing materials for a public building, a refusal to allow an amendment of the notice of claim after the time for filing the notice has expired, so as to make it comply with the statute, is proper.—MCGILLIVEAY V. DISTRICT TP. OF BARTON, Iowa, 65 N. W. Rep. 978.
- 97. Quo WARRANTO—Trial of Title to Office.—Quo warranto is the only direct and adequate remedy for the trial and determination of a title to a public office, and the judgment in such an action is the only one which affords complete and substantial relief. The review, by certicorari, of the proceedings of an election or appointment to a public office, can determine nothing which would be of any efficacy as a bar, or have any other effect in a subsequent information in the nature of the warranto, nor could the question arising upon such review, although judicially determined, be re-

- garded as res adjudicata in the subsequent information.
 —STATE v. MAYOR, ETC., OF CITY OF BAYONNE, N. J.,
 88 Atl. Rep. 784.
- 98. RAILROAD COMPANY Electric Railway Negligence.—An instruction in an action for injury to a person who, while driving between the tracks of an electric street car line and the curbing, was struck by a car coming from the rear, that if, when plaintiff was seen by the employee in charge of the car he was partly on the car track, and thereupon the bell was rung, and thereafter plaintiff left the track, and went to the side thereof, and the speed of the car was then increased, complaint could not be made of such increase in the speed, as the employee would have the right to suppose plaintiff left the track because of the warning, is properly refused, because ignoring the fact that the employee may have known or had reason to believe plaintiff was not aware of the approach of the car.—Wilkims v. Omaha & C. B. Railway & Bridge Co. Iowa; & N. W. Rep. 997.
- 99. RAILROAD COMPANIES—Receivers Redelivery.—
 The return of its property to a railroad company by
 receivers, on their discharge, and the acceptance
 thereof by it, do not tipeo facto render the company liable on ciaims accruing during the receivership through
 acts of the receivers.—Missouri, K. & T. Ry. Co. v.
 MCFADDEM, Tex., 33 S. W. Rep. 863.
- 100. RAILROAD COMPANY—Bules—Waiver.—A rule of a railway company, directing brakemen to not uncouple cars while in motion, may be waived by the company by disregard thereof on the part of brakemen for such a time that the officers were chargeable with notice, though the brakemen have knowledge of the rule, and also the dangers incident to the employment.—Fish v. ILLINOIS CENT. R. Co., Iowa, 65 N. W. Rep. 996.
- 101. RECEIVER—Appointment—Intervention.—Where a corporation, having procured a policy of insurance, makes an assignment, and thereafter a receiver is appointed, the insurance company, on loss by fire, after action on its policy by the receiver, cannot intervene in the original action, and ask that the appointment of the receiver be set aside.—Barth v. American Ins. Co. Of Boston, Wis., 65 N. W. Rep. 1035.
- 102. RES JUDICATA.—Where one to whom a decree awards the right to appropriate a certain quantity of water in excess of what he is entitled to from a natural stream for irrigation, after decree, continuously asserts that right by user, the decree is, as to the parties to it, resjudicate in a subsequent action between them for the same quantity.—BOULDER & WELD COUNTY DITCH CO. V. LOWBR BOULDER DITCH CO., Cole., 48 Pac. Rep. 540.
- 103. SALE OF BUSINESS—Covenants.—Action may be maintained on the covenant of an insurance agent, in his contract of sale of his business, not to re-engage in the business, though the buyer does not execute to the seller notes for deferred payments, as provided in the contract of sale; the seller having given orders to insurance companies, on the buyer, for the purchase price, which were accepted by the buyer, and the insurance companies having thereafter accepted, in lieu of the buyer's personal liability on his acceptances, the undertaking of his transferee of the business that such payments should be a charge on the business.—
 KLEIN V. BUCK, Miss., 18 South. Rep. 891.
- 104. SCHOOLS—Teachers Revocation of License.—Where the statute authorizes the revocation of the license for immorality, incompetency, and "other adequate causes," and the revocation of the license is after notice to the person, the examiner is not liable for damages if he acted in good faith and without malice, though his decision that the person's conduct authorized the revocation is erroneous.—LEB V. HUFT, Ark., 38 S. W. Rep. 846.
- 105. SPECIFIC PERFORMANCE.—Specific performance of a contract of sale, signed, in the name of the owner of the land by another, will not be enforced, when no authority for such other to sign the contract was

shown and payments made under the contract were never received by such owner, and the contract price was inadequate to the knowledge of all parties to the contract.—CONDON v. OSGOOD, Iowa, 65 N. W. Rep. 1008.

106. TBLBGRAPH COMPANIES—Damages—Excessive.—Upon the assumption that all of the evidence introduced by the plaintiff was legally admitted, he was entitled to a recovery; but according to the principles announced by this court in Margarahan v. Wright, 10 S. E. Rep. 584, 83 Ga. 778, and Baldwin v. Telegraph Co., 21 S. E. Rep. 212, 93 Ga. 692, the verdict rendered was too large, for, even if the offer of employment made to the plaintiff contemplated a longer term of service than one month, how much longer such term was to be, or would have been, had the contract of employment been completed, is, under the evidence, too indefinite and uncertain to render the plaintiff's loss of time for a greater period than one month a basis for damages.—Mondon v. Western Union Tel. Co., Ga., 23 S. E. Rep. 858.

107. TRIAL—Motion for Verdict.—In an action to recover on the ground of negligence, unless facts are undisputed from which contributory negligence of plaintiff, or want of negligence of defendant, is obvious, the question should be submitted to the jury.—STEOBLE V. CITY OF NEW ALBANY, Ind., 42 N. E. Rep.

106. TROVER AND CONVERSION—Repledge of Collateral Paper.—In an action on a note it appeared that, at the time defendant made it, she pledged to plaintiff's intestate other notes as collateral security; that decedent had repledged them as collateral to a loan made to; himself, and that plaintiff was unable to produce them; that defendant admitted her liability on her note, and, in a counterclaim, prayed judgment against decedent's estate for the difference between the value of the collateral notes and the amount due from her: Held, that the repledging of the notes was a conversion, and that defendant was entitled to judgment as prayed.—RICHARDSON v. ASHBY, Mo., 38 S. W. Rep. 396.

109. TRUSTS—Equity Jurisdiction.—For the purpose of preserving a trust, a court has power to order a sale, mortgage, or lease of the trust property, although the trust instrument contains no power or authority for so doing, and to bind by its judgment parties, not in being, who may thereafter become beneficiaries of the trust.—MAYALL v. MAYALL, Minn., 65 N. W. Rep. 942.

110. TRUSTS—Purchase by Trustee.—Where one managing property for the benefit of a widow and her children buys in an outstanding title, he cannot charge the cost thereof to the latter, on the ground that the purchase was for their benefit, unless they consented to the purchase.—SHAW V. DEVECMON, Md., 38 Atl. Rep. 716,

111. USURY - Contract to Release Debt in Case of Death.—One K, having applied to defendant for a loan of \$2,000, entered into a contract with it which provided that K should give 10 promissory notes for \$860 each, payable in installments of \$80 per month, to be secured by mortgage on real estate, and that in case of K's death before the full payment of the notes the remainder of the debt should be released by defendant, K agreeing to pass a medical examination before the execution of the contract. The notes and mortgage were given according to the contract, K receiving in cash \$1,970, and installments amounting to \$1,280 were paid. It appeared that defendant had an arrangement with a life insurance company for indemnity against loss by K's death, for which it paid much less than the amount which K had agreed to pay in excess of the loan and legal interest: Held, that the contract was contrary to public policy and tainted with usury, and that K was entitled to a cancellation of the notes and mortgage.—Krumsieg v. Missouri, K. & T. Trust Co., U. S. C. C. (Minn.), 71 Fed. Rep. 850.

112. Usury-Equitable Relief.-Code, § 2818, provides that all contracts for the loan of money at a greater

rate than 6 per cent. shall be deemed to be for an illegal consideration as to the excess beyond the principal sum loaned: Held that, where usurious interest has been voluntarily paid, as interest, on a debt secured by deed of trust, equity, in a suit to enjoin a sale under the deed, will not, after the year within which usurious interest may be recovered at law, apply any of the payments of usurious interest in reduction of the principal. — MUNFORD v. MCVBIGH'S ADM'R, Va., 28 S. E. Rep. 857.

118. WILL—Attestation—Codicil.—Rev. St. § 2282, provides that a will must be in writing, signed by the testatrix, and attested and subscribed in the presence of testatrix by two competent witnesses: Held, that an instrument bearing the genuine signature of the testatrix, subscribed before the signing by two competent witnesses, and not in their presence, is valid, where it was subscribed by the witnesses in the presence of the testatrix.—Skinner v. American Bible Soc., Wis., 65 N. W. Rep. 1037.

114. WILL—Construction.—The punctuation of an instrument may be considered, in order to solve an ambiguity which was not created by the punctuation.—OLIVET V. WHITWOETH, Md., 83 Atl. Rep. 724.

115. WILLS—Mental Capacity—Undue Influence.—The testator's declarations subsequent to the execution of the will are not admissible to prove undue influence, but, if such influence be otherwise established, such declarations may be considered to determine the testator's mental condition at the time of making the will and the effect of such undue influence.—KIRMPATRICK V. JENKINS EX'RS., Tenn., 88 S. W. Rep. 819.

116. WILL—Owner of Life Estate.—A will gave plaintiff "all the estate" of the testator "for her sole use and
benefit during her natural;" afterwards to be divided:
Held, that it gave plaintiff a life estate in the testator's
real estate.—SMITH v. RUNNELS, Iowa, 65 N. W. Rep.
1002.

117. WILLS—Reformation.—Reformation and correction of a will to make it conform to the purpose and intention of testator, not expressed in the instrument as executed by him, cannot be decreed.—SCHLOTTMAN V. HOFFMAN, Miss., 18 South. Rep. 963.

118. WILL—Testamentary Capacity.—On the issue of testator's capacity to make a valid will, it is error to charge that: "In order to possess testamentary capacity it is not necessary that one should know the number and conditions of his relations or their claim upon his bounty, or that he should know or understand the reason for giving or withholding his bounty to or from any relative."—MORIARITY V. MORIARTY, Mich., 65 N. W. Bed., 964.

119. WITNESS — Child—Criminal Trial.—Rev. St. 1889, § 8925, makes a child under 10 years of age who appears incapable of receiving just impressions of the facts, or of relating them truly, incompetent to testify: Held, that it is within the discretion of the court to allow a child under 10 years of age to testify who has shown to the court that he is capable of receiving just impressions and relating them truly.—STATE v. NELSON, Mo., 38 S. W. Rep. 809.

120. WITNESS — Competency.—Where a stockholder of a corporation did not act as its agent in negotiating a contract it has sued on, he is not an incompetent witness as a party to the contract, within Rev. St. 1889, § 8918 (formerly Rev. St. 1879, § 4010), providing that a party in interest shall be incompetent where one of the original parties to the contract in issue is dead.—BANKING HOUSE OF WILCOXSON & CO. v. ROOD, Mo., 33 S. W. Rep. 816.

121. WITNESS—Husband and Wife.—In an action by a woman on a promissory note, her husband is not a competent witness for defendants, within Code, § 3841. making husband and wife, incompetent witnesses one against the other, "except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other."—WARD v. DICKSON, IOWA, 65 N. W. Rep. 997.

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The attitude of the Supreme Court of the United States on the question presented by the recent case of Lehigh Min. & Mfg. Co. v. Kelly is of more than ordinary interest to those who have followed the decisions of the federal courts on the subject of "tramp" corporations in those courts. It appeared, in that case, that the individual stockholders and officers of a Virginia corporation organized another corporation under the laws of Pennsylvania, for the express purpose-according to a stipulated state of facts-of bringing a suit in a federal court to recover possession of certain lands in Virginia, which had been claimed by the Virginia corporation against citizens of Virginia. Such claim was assigned and transferred, without payment of a valuable consideration, from the Virginia corporation to the Pennsylvania corporation before the bringing of the suit. It was held that the attempted transfer of the claim constituted in law a fraud upon the federal court, and a wrong to the defendants, and that the federal court below had properly declined to assume jurisdiction of the case.

Though the opinion is supported by abundant federal authority and its result practically just, three of the members of the supreme court dissented, principally upon the ground of the inability of the court to go behind or inquire into the Pennsylvania incorporation, in view of the legal presumption that "where a corporation is created by the laws of a State * * * its members are citizens of the State which created the corporate body; that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against the citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the States." United Railroad Company v. Wheeler, 1 Black, 296.

On the other hand Mr. Justice Harlan, who wrote the opinion of the majority, con-Vol. 42—No. 14.

tended very forcibly that "it is not decisive of the present inquiry that, under the adjudications of this court, the stockholders of the Pennsylvania corporation—the question being one of jurisdiction-must be conclusively presumed to be citizens of that commonwealth. Nor is it material, if such be the fact, that the Pennsylvania corporation could not have been legally organized, under the laws of that commonwealth, in February, 1893, unless some of the subscribers to its charter were then citizens of Pennsylvania. We cannot ignore the peculiar circumstances which distinguish the present case from all others that have been before this court. stockholders who organized the Pennsylvania corporation were, it is agreed, the same individuals, who at the time were the stockholders of the Virginia corporation. And under the rule of decision adverted to, the stockholders of the Virginia corporation, just before they organized the Pennsylvania corporation, as well as when the Virginia corporation conveyed the legal title, were, presumably, citizens of Virginia. If the rule which has been invoked be regarded as controlling in the present case, the result, curiously enough, will be that immediately prior to February, 1893, before the Pennsylvania corporation was organized, the stockholders of the Virginia corporation were, presumably, citizens of Virginia; that, a few days thereafter, in February, 1893, when they organized the Pennsylvania corporation, the same stockholders became, presumably, citizens of Pennsylvania; and that, on the 1st day of March, 1893, at the time the Virginia corporation conveyed to the Pennsylvania corporation, the same persons were, presumably, citizens at the same moment of time, of both Virginia and Pennsylvania."

An Eastern law exchange commenting upon this decision says that "the fact that three justices took the view that the incorporation in another State of citizens of Virginia was not open to an attack even in such an extreme case shows that the tendency to recognize so-called 'tramp' corporations is generally prevailing. The Courts of New York (Delmarest v. Flack, 128 N. Y. 205), and and Rhode Island (Oakdale Mfg. Co. v. Garst, 28 Atl. Rep. 973), treat as legitimate suitors, with the ordinary rights of aggression



and defense, foreign corporations, organized by their own citizens and doing business within their own territories respectively, although the facts make it very apparent that such outside incorporation was sought for the purpose of taking advantage of what were considered more lenient or available statutes than those in force at home. It seems to us that, in general, this is the only practicable view, and it by no means follows from this recent decision of the Supreme Court of the United States in Lehigh Min. & Mfg. Co. v. Kelly, that that tribunal would not feel bound to accept the fact of incorporation under a State law as a legal finality, in a case where it did not affirmatively appear that to entertain the presumption of citizenship of stockholders in the State of incorporation would lead to palpable absurdity." In a recent issue of this JOURNAL (42 Cent. L. J. p. 215) will be found a valuable paper on this subject written by Judge Seymour D. Thompson.

NOTES OF RECENT DECISIONS.

INFRINGEMENT OF PATENT — Use by Gov-ERNMENT—SUIT AGAINST OFFICERS — INJUNC-TION.—It is held by the Supreme Court of the United States in Belknap v. Schild, 16 S. C. Rep. 443, that persons using a patented article without any license are not exempt from liability for the infringement because they did so only as officers of and for the benefit of the United States; that an injunction cannot issue to restrain employees of the United States from using an article made by the United States in infringement of a patent, and which is owned by and in the possession of the government, the United States being an indispensable party, and that in a suit for infringement of a patent against the United States officers, who used the patented article only for the benefit of the United States, a decree cannot be rendered against such officers for the gains and profits which accrued to the government from the use of such ar-Mr. Justice Gray delivered an exhaustive and learned opinion. Mr. Justice Harlan dissented from the conclusion of the court as to the two last propositions above stated.

MUNICIPAL CORPORATION — CONTRACTS — STATUTORY RESTRICTION. — The Supreme Court of Indiana decide, in City of Indianapolis v. Wann, 42 N. E. Rep. 901, that under the act governing cities of 100,000 inhabitants, providing that no executive department or officer shall have power to bind such city by any contract, to any extent, beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts of any sort, beyond such existing appropriations, are declared to be absolutely void, a contract for the lighting of the city for five years, let by the board of public works at a time when the appropriation for that purpose was available only for the current month and the one following is void and cannot be ratified by a subsequent appropria-

Such statutory regulations for city governments are not new. Statutory restrictions, very much like those before the Indiana court have been enacted in the States of Minnesota, Illinois, Pennsylvania, California, Ohio, Michigan, and Oregon, and such statutes have received by the courts of those States the same construction placed upon the statute here involved. Kiichli v. Electric Co. (Minn.), 59 N. W. Rep. 1088; Garrison v. Chicago, 7 Biss. 480, Fed. Cas. No. 5,255; City of Superior v. Norton, 12 C. C. A. 469, 63 Fed. Rep. 357; Bladen v. Philadelphia, 60 Pa. St. 364; City of Philadelphia v. Flanigen, 47 Pa. St. 21; Jonas v. City of Cincinnati, 18 Ohio, 318; Wallace v. Mayor, etc., 29 Cal. 181; Gas Co. v. Brickwedel, 62 Cal. 641; Niles Waterworks v. City of Niles, 59 Mich. 311, 26 N. W. Rep. 525; Coulson v. City of Portland, Deady, 481, Fed. Cas. No. 2,275; Pullman v. Mayor, etc., 43 Barb. 57.

Wrongful Act of Servant—Liability of Master.—In Richberger v. American Exp. Co., 18 South. Rep. 922, decided by the Supreme Court of Mississippi, it appeared that defendant express company's agent overcharged plaintiff for some matter of express; that plaintiff complained to defendant's general agent, and requested the local agent to refund; that later plaintiff was in defendant's office on other business, and the agent informed him that he wished to repay the overcharge; that he required plaintiff to sign a

receipt for the money; that "immediately," while plaintiff was then in the office of defendant, the agent willfully and wrongfully cursed and maltreated plaintiff "because plaintiff had demanded and received" the overcharge. It was held, that the acts and declarations of the agent were a part of the res gestæ, and therefore the company was liable for the injuries inflicted. The following is from the opinion of the court:

The old doctrine of M'Manus v. Crickett, 1 East, 106, that the master is never liable for the willful or malicious act of his servant (like the early doctrine that a corporation was never so liable, which latter doctrine arose out of the early misconception of the nature of a corporation. See 5 Thomp. Corp. §§ 6275, 6277, 6280, 6298), has long since been repudiated. Cowen, J., put the whole argument for the opposite view in a single sentence when he said, in Wright v. Wilcox, 19 Wend. 343, that "the dividing line was the willfulness of the act." But the whole argument against liability, on such reasoning, is definitely and conclusively answered in Thompson on Corporations, where the whole question is exhaustively treated. Says this author, in section 6298: "The courts which have so ruled have proceeded on the theory that authority from the master to the servant to commit a willful wrong will not be implied, and that the servant when so acting will therein be deemed to act, not for his master, but for himself. If he makes use of his master's property in committing this wrong, he will be deemed, according to the fantastic reasoning of Lord Kenyon, in M'Manus v. Crickett, borrowed from Rolle's Abridgment, to have acquired, for the time being, a special property therein. The fallacy of this reasoning was that it made a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not. Moreover, with respect of all individual acts done by a servant in the supposed furtherance of his master's business, it clothed the master with immunity if the act was right, because it was right; and if it was wrong, it clothed him with a like immunity because it was wrong. He thus got the benefit of all his servant's acts done for him, whether right or wrong, and escaped the burden of all intentional acts done for him which were wrong. Under the operation of such arule, it would always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of wrong acts connected with his business springing from the imperfection of human nature, because done by another, for which he would be responsible if done by himself. Meanwhile the public, obliged to deal or come in contact with his agents, for intentional injuries done by them might be left wholly without redress. A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence." And he states that it is repudiated by eminent text-writers, and the great weight of modern authority, citing quite fully the authorities to date. He then clearly shows the true test to be, not whether the act was committed in parsuance of orders from the master or against orders, whether the master ratified or not, whether the tort was willful and malicious or not, but whether, and solely whether, the act constituting the tort was dense in the master's business. As well said in Rail-

road Co. v. Young, 21 Ohio St. 518: "If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master." Sections 6299-6316, inclusive. He also clearly points out that the rule is not one of logic, but of public policy and necessity,—a view concurred in by Judge Andrews in Higgins v. Turnpike Co., 46 N. Y., at page 27, the reasoning in which case, and in Rounds v. Railroad Co., 64 N. Y. 129, is unanswerable. To the same effect, see Palmeri v. Railroad Co. (N. Y. App.) 30 N. E. Rep. 1001; Cooley, Torts, p. 626 (1); Mechem, Ag. §§ 740, 741; and the authorities cited by these writers. Judge Thompson is not alone in his criticism of M'Manus v. Crickett, supra. Chief Justice Ryan, in Craker v. Railroad Co., 36 Wis. 657, points out the fact that M'Manus v. Crickett rested on Middleton v. Fowler, 1 Salk, 282, the only case cited in its support. and that that case was not a case of malice, but of negligence; and said, with great pertinence and power, that "one employing another in good faith, to do his lawful work, would be as little likely to authorize negligence as malice," and that "either would be equally dehors the employment." See, also, Express Co. v. Patterson, 73 Ind. 480; Express Co. v. Fitzner, 59 Miss. 581; Williams v. Insurance Co., 57 Miss. 759. It thus appears that M'Manus v. Crickett is not now law. Counsel for appellee relies upon and cites this case and the cases of McCoy v. McKowen, 26 Miss. 487, and Railroad Co. v. Harrison, 48 Miss. 112. It is true that both these cases are based on M'Manus v. Crickett. It is also true that both expressly declare that "it is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned by him," thus declaring immaterial that which is the very test of liability in this class of cases. So far as this declaration is concerned, these cases are hereby overruled expressly, that they may not further mislead! They have been practically overruled by repeated subsequent decisions of this court. Williams v. Insurance Co., 57 Miss. 759. As to Railroad Co. v. Harrison, supra, it is correctly said by Judge Thompson (section 6300, bottom of page 4929), that "the true reason of the decision was not that the act was willful or malicious, but that it was plainly outside the line of duty of the servant."

But it is urged that, however applicable this doctrine may be to carriers of passengers, it is not applicable to an express company. Doubtless, there is a difference in the extent of the application of the principle, as between carriers of passengers and express companies, measured exactly by the difference in the things done by them in the discharge of their duties, respectively. But the principle applies to both. An express company does not transport passengers, and cannot be made liable, as a carrier of passengers might, for willful torts committed by its agent on passengers in their transportation; but it keeps offices for the transaction of its proper business, a business calling to its offices every day thousands of citizens, and in its dealing with its customers in its offices, in its business, it is bound, in Judge Story's language, "for respectful treatment and for decency of demeanor." It is impossible to say, on the allegations of this declaration, that the tort committed immediately upon the delivery of the receipt to the agent, and because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been an act done in the master's business. The whole transaction occurred in the shortest time, and was one continuous and unbroken occurrence. The cursing and abusing and maltreatment were all administered in connection with the taking of the receipt, and immediately upon its delivery, and because of the demand for his rights in that matter, and while plaintiff was in appellee's office to transact, and transacting, this very business. What was said and done thus immediately upon the delivery of the receipt was part of the res gestæ. As well said by Judge Thompson, in his Commentaries on Corporations (section 6299, top of page 4928): "In this view, even under the modern doctrine, the acts or declarations of the servant or agent tending to show his state of mind at the time of the act complained of would be admissible in evidence as part of the res gestæ." We have heretofore quoted from the masterly opinion of Judge Andrews in Rounds v. Railroad Co., 64 N. Y. at page 136; in Latham v. Railroad Co. (Miss.), 16 South. Rep. 757, to show when in this character of case the corporation would not be liable. Complementary to that, we close this opinion with the words of the same great judge, in the same case, at page 134, 64 N. Y., to show here a case of liability: "The master who puts a servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another." Reversed, demurrer overruled, and cause remanded.

COURTS—RECORD MINUTES — AMENDMENT AFTER JUDGMENT.—The Supreme Court of California decides in Kaufman v. Shain, 43 Pac. Rep. 393, that it is within the discretion of the trial court on satisfactory evidence, outside the record that the record minutes incorrectly set forth its orders, to direct an amendment thereof at any time after judgment, and that where judgment is entered in conformity to record minutes incorrect by directing it, on amendment of the minutes to conform to the actual order of the court, the judgment must be set aside. The court says in part:

Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. In re Wight, 134 U.S. 136, 10 Sup. Ct. Rep. 487; Balch v. Shaw, 7 Cush. 282; Fay v. Wenzell, 8 Cush. 315; Frink v. Frink, 43 N. H. 508; Crim v. Kessing, 89 Cal. 486, 26 Pac. Rep. 1074. In the exercise of this power the court is not, however, authorized to do more than to make its records correspond

to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given. Egan v. Egan, 90 Cal. 15, 27 Pac. Rep. 22. The power to change its judgment, as well as the time within which such change may be made, depend upon different principles; and it was held in this State, until a different rule was prescribed by statute, that this power could not be exercised after the adjournment of the term in which the judgment had been entered. Baldwin v. Kramer, 2 Cal. 582; Morrison v. Dapman, 3 Cal. 255; Carpentier v. Hart, 5 Cal. 406; Lattimer v. Byan, 20 Cal. 628; Wilson v. McEvoy, 25 Cal. 169; Casement v. Ringgold, 28 Cal. 335. The history and development of the procedure in this State upon this subject is set forth in Brackett v. Banegas, 99 Cal. 623, 34 Pac. Rep. 844. In Branger v. Chevalier, 9 Cal. 172, the same rule was applied to an order revoking the settlement of a statement, on the ground that, by being filed, the statement had become a part of the record. In De Castro v. Richardson, 25 Cal. 49, the rule was applied to an order amending a previous order granting time within which to prepare a statement on motion for a new trial. But in Spanagel v. Dellinger, 84 Cal. 476, the court held that it had erred in making such application; that, notwithstanding the adjournment of the term after judgment had been entered, the court had jurisdiction to correct or amend orders made in proceedings for a new trial, for the reason that such orders did not form a part of the "record," which had become final by the adjournment. And in Wilson v. Cleaveland, 30 Cal. 192, it was held that the adjournment for the term did not affect the jurisdiction of the court over its orders made during that term, unless final judgment in the case had been entered. The same question was argued by counsel in Hegeler v. Henckell, 27 Cal. 491, but, as it did not appear from the record that any order amending the minutes had been made, the point was not passed upon by the court.

Whether the clerk has correctly recorded an order made by the court, or whether an amendment of the entry shall be made, so that the minutes shall correctly express what was done or directed, is to be determined by the court in which the motion is made; and the evidence that may be offered in support of the motion must be satisfactory to the judge of that court. The motion to correct a minute entry is eminently addressed to the court in which the entry is made, and its determination upon any conflict of evidence concerning the order that it had made is not open to review. "The amount and kind of evidence requisite to satisfy that court as to what was the real order of the court, and what was the proper entry on the docket or extended record, must rest with that court." Fay v. Wenzell, supra. In acting upon the motion, the judge is in the exercise of one of the functions of his judicial office, and will not direct the amendment unless the evidence is such as will clearly satisfy him that the entry does not correctly express the order which was made. If the motion is made upon the day succeeding the entry, his own memory of what he had directed might be sufficient; whereas, if there had been a great lapse of time between the making of the entry and the motion for its amendment, he would naturally require more explicit evidence that the entry was incorrect. See Porter v. aughan, 22 Vt. 269.

The court is not precluded from correcting the entry merely because the "record" does not show that it is itself incorrect. The rule at common law, that

the record can be amended only when there is something in the record to amend by, was applied when it was sought to amend a judgment at a term of the court subsequent to that in which it had been signed and enrolled; but it has no application to the amendment of matters that do not form a part of the judgment roll or "record." Until the entry of the judgment the record was in the breast of the court. Afterwards, it was in the roll. It was only the "record" thus made up which imported[absolute verity. "The making up of the judgment roll is the equivalent, under our practice, of the entry of record at common law." De Castro v. Richardson, 25 Cal. 49. So long as the matters remained "in paper,"—that is, before the record had been enrolled on parchment—it was not a matter of record, but was subject to amendment upon mere suggestion. 1 Tidd. Prac. 697, 711. Mere entries in the minutes of the court are not, properly speaking, matters of record. Weed v. Week, 25 Conn. 344. They become so only by being incorporated into bills of exception, and thus made a part of the judgment roll. In Spanagel v. Dellinger, supra, the original entry in the minutes of the court gave the appellant time within which to prepare a "statement on appeal," and after the adjournment of the term the court directed an amendment of the entry by causing it to read "a statement on motion for new trial." There was no record or minute entry that such an order had been made, and the amendment was allowed upon a showing by the affidavit of the attorney that such was the order that had been made. In Crim v. Kessing, 89 Cal. 478, 26 Pac. Rep. 1074, an order, of which there was no entry in the minutes, was made and entered nunc pro tunc upon "proofs to the satisfaction of the court." In Rousset v. Boyle, 45 Cal. 64, after the judgment had been affirmed by the supreme court, it was amended in matter of subtance, upon a showing, by matters outside of the record, that it did not conform to the judgment which had been in fact rendered. In Weed v. Weed, supra, it is said: "It is often the case that the court announces in open court the decision which it has made, without furnishing the clerk with any writing upon the subject. Were the latter to make a mistake in entering up the judgment, the injured party would be remediless, unless the mistake could be corrected upon the testimony of the judge who made the decision, and the counsel and others who were present and heard it announced." In Frink v. Frink, supra, the court said: "We think it clear, upon the authorities, that the court may make such amendments upon any competent, legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or actual proceeding before it -what was the proper entry to be made upon the docket, and how the record should be extended." See, also, Gillett v. Booth, 95 Ill. 183; Bank v. Seymour, 14 Johns. 219; Hunt v. Wallis, 6 Paige, 375. This power of a court to amend its records so that they may correspond with the fact, and correctly express what was done by the court, may be exercised at any time. Crim v. Kessing, 89 Cal. 486, 26 Pac. Rep. 1074; Egan v. Egan, 90 Cal. 21, 27 Pac. Rep. 22; Frink v. Frink, 43 N. H. 508; Balch v. Shaw, 7 Cush. 282; Fay v. Wenzell, 8 Cush. 815; Hart v. Reynolds, 3 Cow. 42, note. "No lapse of time will divest the court of its power, or absolve it from its duty, to supply deficiencies in the records of its own proceedings, where justice and the truth of the case require it." Lewis v. Ross, 87 Me. 230. In Cradock v. Radford, 4 Mod. 871, the court ordered the roll to be brought in

and amended 20 years after the judgment had been signed. In Frink v. Frink, supra, the amendment was allowed after a lapse of 12 years, and in Baich v. Shaw, a still longer time had intervened between the entry and the amendment. In Crim v. Kessing, supra, the court, in January, ordered a nunc pro tunc order to be made as of the previous March, prior to the trial of the cause. In Roussett v. Boyle, supra, the court permitted the amendment several years after the entry of the judgment, and after it had been affirmed in the supreme court.

THE RIGHT OF STOPPAGE IN TRANSITU.

Where a creditor sells goods to another who, after the sale, but before actual receipt of the property, becomes insolvent, the law gives the right of stoppage in transitu. This is given the creditor for his protection both from the uncertainties of collecting his claim from the insolvent debtor, and to the end that the property thus sold may not be resorted to by other creditors of the same debtor in their zeal to realize their claims. The law supposes that the creditor whose goods are in transit to the vendee has a better right to the same before there is an actual delivery to the debtor than has either an insolvent vendee or his other creditors, however diligent they may be. Another theory of the right is that the vendor in extending credit to the vendee and delivering the goods to the carrier to be transported to him in pursuance of the credit so extended, does so on the implied assurance on the part of the vendee that he will keep his credit good. And when the vendee fails to so preserve his good credit the vendor is no longer under any obligations in either law or morals to continue the credit, but may seize the goods so sold by virtue of his right to stop them upon the discovery of the insolvency of the consignee and subject them to his vendor's equitable lien in order to protect himself from his vendee's insolvency.1 Where an agent is authorized to act for the seller, either in a general way, or specially as to the consignment, he will likewise have authority to assert the right of stoppage in behalf of his principal. And this is true though he may have no actual express authority to stop the particular goods or merchandise.2 Nor is it necessary in order to properly as-

² Reynolds v. Boston & Maine R. R., 43 N. H. 580; Chandler v. Fulton, 10 Tex. 2.



¹ Thompson v. B. & O. R. R. Co., 28 Md. 396.

sert the right for the vendor to show that his vendee became insolvent after the contract of sale was made, but it will suffice if it becomes known to the vendor after the sale and before delivery to the consignee.8 It is not necessary that the vendor give the carrier express notice or demand for the goods; it is sufficient that the carrier, or other person in whose hands the goods may be, be clearly informed that the shipper wishes and intends to take the goods.4 And notice to this effect to the agent of the carrier at the station where the goods have arrived is effective notice to the carrier, and binds it accordingly.5 Nor is the levy of an attachment upon the goods by the creditors of the vendee after they have arrived at the place of destination, and after they have been unloaded and placed in the warehouse of the carrier, enough to preclude the assertion of the right. The goods in the possession of the carrier as a warehouseman are no more delivered to the consignee than while in actual transit upon the line of the carrier. . And the law does not tolerate a displacement of the right under such circumstances by the process of attachment, or other like proceeding.6 Nor is the right extinguished though the goods be sold under order of court in attachment proceedings;7 the attaching creditor stands in no better attitude than his debtor, and if the right of stoppage could be exercised by the vendor before attachment proceedings, he could exercise it just as effectively as he could have done had the goods not been attached.8 And when property which is subject to be stopped in transit by the vendor, the onus is on the attaching creditors to show that the property claimed in the attachment proceedings is the property of their debtor.9 And where goods

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⁵ Id.

7 O'Brien v. Norris, Caldwell & Co., 16 Md. 122.

subject to the right of stoppage in transitu are seized under execution, attachment, or other process, the vendor may maintain an action against the officer so seizing for the goods or their value. 10 And replevin will lie at the instance of the vendor for the purpose of regaining possession of the goods from the sheriff or other officer, who has seized them under attachments sued out by other creditors and levied on the property before actual delivery to the vendee, where proper notice of assertion of the right of stoppage has been given." But if the property has been attached, however, and the attaching creditor has been obliged to pay the carrier from which the goods are taken, its proper freight charges, the vendor will be required to pay the attaching creditor the amount thus paid out.12 The carrier in any event has a right to its freight charges, and the attaching creditor, when he pays such charges, becomes subrogated, as it were, to the rights of the carrier to the extent of requiring that he be reimbursed for the actual money he was compelled to pay before a delivery of the goods could be demanded. This lien for lawful freight charges is paramount to the right of the shipper to stop the goods, and he cannot have a right of possession of the goods as against the carrier until such freight charges are paid or tendered.18 But a usage of a carrier in retaining goods in its possession for a general balance due it from the consignee will not authorize it to retain the property for such balance as against the right of the consignor to stop the same, except for its actual, legitimate freight charges on the particular goods sought to be stopped.14 And when a common carrier having in its possession goods which the consignor, having a right to stop in transit, notifies it accordingly, and that, therefore, it must not deliver the same to the consignee, it will be liable to the shipper if, in disregard of the rights of the consignor thus asserted, it delivers the same to the consignee. 15 But the familiar elementary principle that a delivery to the carrier is a

11 O'Neil v. Garrett, 6 Iowa, 480.

⁴ Jones v. Earl, 37 Cal. 630.

⁶ Shuster v. Carson, 28 Neb. 612, 44 N. W. Rep. 734; Drake Attachment, Sec. 245; U. S. Wind Engine & Pump Co. v. Oliver, 16 Neb. 612, 21 N. W. Rep. 463; Greve v. Dunham. 60 Iowa, 108, 14 N. W. Rep. 130; Hutch. Carr. Sec. 409; Farrell v. Richmond & Danville R. R. Co., 102 N. C. 390, 9 S. E. Rep. 302; Bayonne Knife Co. v. Umbenhauer (Als.), 18 South. Rep. 175; Harris v. Tenny, 85 Tex. 254, 20 S. W. Rep. 82.

⁸ Chandler v. Fulton, 10 Tex. 2; Hausse v. Judson, 4 Dana, 7; Buckley v. Furneiss & Stickney, 15 Wend. 187, 143; Blum & Co. v. Marks, 21 La. Ann. 268; Covell v. Hitchcock, 23 Wend. 611; Blackburn v. Pierce, 28 Cal. 508; O'Neil v. Garrett, 6 Iowa, 480.

⁹ Dickman & Hill v. Williams, 50 Miss. 500.

¹⁰ Callahan v. Babcock, 21 Ohio St. 281; Sheppard v. Newhall, 54 Fed. Rep. 306.

¹² Greve v. Dunham, 60 Iowa, 108, 14 N. W. Rep. 120.

¹⁸ Rucker v. Donovan, 13 Kan. 251.

v. Richmond & Danville R. Co., 102 N. C. 390, 9 S. E. Rep. 302.

¹⁵ Jones v. Earl, 37 Cal. 630.

delivery to the consignee does not obtain to the extent of defeating the right. Such delivery is effective as between the parties directly concerned, and perhaps others with notice, subject to the right of the vendor to stop same before delivery in case of insolvency.16 "The right of the unpaid vendor to stop goods in transitu upon the bankruptcy or insolvency of the vendee is not defeated by the mere arrival of the goods at their destination; the transitus is not at an end until they have come to the vendee's actual possession or his constructive possession by delivery to his agent."17 The right ceases when the goods come to the possession of an agent of the vendee duly authorized to receive same for his principal, with like effect as if received by the vendee himself, and the right after such delivery will be lost. 18 But where the property is so cumbersome or ponderous as to be incapable of immediate, manual delivery, symbolic delivery will suffice and destroy the right of stoppage.19 The general rule is that where a carrier has goods in its possession as such, it is sufficient if the seller give it notice not to deliver to the consignee. It is not necessary to the exercise of the right that the seller or his agent demand the actual delivery of the goods to him. The notice not to deliver serves the purpose of asserting the right and fixes the status of all the parties;²⁰ and, as a rule, the notice must be given to the person who has the immediate possession of the property at the time of such notice.21 And where goods are in the possession of the carrier in transit, the right of the seller to stop them cannot be defeated by process of garnishment served on the carrier,

¹⁶ Buckley v. Furneiss & Stickney, 15 Wend. 187.

¹⁷ Mason v. Wilson, 43 Ark. 172; Newhall v. Vargas,

and the vendor, having asserted his right by giving proper notice before delivery to the consignee, may replevy same from the carrier if it refuse to surrender them, notwithstanding the service of a writ of garnishment.22 It is a general rule that in order that the right of stoppage may be successfully asserted that "three things must concur before the right attaches so as to enable the seller to retake the goods, viz.: 1st, the buyer must be insolvent; 2d, the goods must be unpaid for, and 3d, the goods must not have reached the possession of the buyer or his authorized agent."28 And a mere surety of the vendee to the vendor for the price has no right of stoppage by virtue of such suretyship; he cannot detain the goods for what he owes the vendor as surety of the vendee. Such a surety has, in other words, no right of stoppage in transitu;24 the part payment of the purchase price by the vendee will not defeat the right.25 Nor can the vendor be required to refund such part payment as a condition precedent to the assertion of the right.26 And the seller cannot assert the right simply because he may learn that his debtor has absconded before the goods reach their destination. A person may abscond for other reasons than for the purpose of defeating his creditors in the effort to collect their debts; and, moreover. may be perfectly solvent and have ample property within the jurisdiction of the courts out of which all his indebtedness may be realized; and if this is the case, the right certainly cannot be exercised as the very vitality of the right itself is insolvency of the debtor-not the fact that he may have fled to parts unknown.27 The mere fact that the property of the vendee is attached by other creditors is not evidence that he is insolvent: and before the seller can successfully assert his right of stoppage he will be required to establish by other and competent evidence that his vendee is insolvent.28 And the vendor will not be permitted to assert his right of stoppage if he knows, at the time of ef-

²² Chicago, Burlington & Quincy R. Co. v. Painter, 15 Neb. 196, 19 N. W. Rep. 489.

¹⁷ Mason v. Wilson, 43 Ark. 172; Newhall v. Vargas, 18 Me. 93; Jones v. Earl, 37 Cal. 630; O'Neil v. Garrett, 6 Iowa, 480: McFetridge v. Piper, 40 Iowa, 627; Thompson v. Baltimore & Ohio R. R. Co., 28 Md. 396; Markwell, Caspari & Co. v. Their Creditors, 7 Cal. 213; Greve v. Dunham, 60 Iowa, 108, 14 N. W. Rep. 180; Chicago, Burlington & Quincy R. R. Co. v. Painter, 15 Neb. 396, 19 N. W. Rep. 468; O'Brien v. Norris, Caldwell & Co., 16 Md. 122; Callahan v. Babcock, 21 Ohio St. 281; Inslee v. Lane, 57 N. H. 454; Chandler v. Fulton, 10 Tex. 2.

¹⁹ Smith's Mercantile Law (3d ed.), p. 684; U. S. Wind Engine & Pump Co. v. Oliver, 16 Neb. 612, 21 N. W. Rep. 463.

¹⁹ Thompson v. B. & O. R. R. Co., 28 Md. 896.

^{**} Reynolds v. Boston & Maine R. R., 43 N. H. 580; O'Brien v. Norris, Caldwell & Co., 16 Md. 122, 130; Smith's Mercantile Law (3d ed.), p. 687.

²¹ Id.; Rucker v. Donovan, 13 Kan. 251; Whitehead v. Anderson, 9 M. & W. 517.

<sup>Walsh v. Blakely, 6 Mont. 194, 9 Pac. Rep. 809.
Siffken v. Wray, 6 East, 371; Smith's Mercantile Law (3d ed.), p. 682.</sup>

²⁵ Newhall v. Vargas, 13 Me. 93.

²⁶ Id.

³⁷ Smith v. Parker (Ala.), 15 South. Rep. 240; Loeb v. Peters, 43 Ala. 243.

²⁸ Schuster v. Carson, 28 Neb. 612, 44 N. W. Rep. 784.

fecting the contract of sale of the goods, that his vendee is insolvent. The courts favor the right of stoppage in all cases where the vendor is entitled to it; but this favor is extended on the presumption that the vendor has been misled to his injury in supposing his vendee solvent, and that he learns the contrary only after the goods have been sold and started on their journey to the vendee.29 But the right cannot be defeated by showing that the vendee was insolvent at the time of buying the goods; it must be also shown that he was so at the time of the sale, and that the vendor knew it when effecting the sale.30 If the vendee, at the time of the sale was ignorant of the insolvency, he may stop the goods though he do not learn of the insolvency until after the sale. 31 Though if he knew of the insolvency at the time of the sale, and notwithstanding such knowledge, sold the goods, relying on the integrity and honor of his vendee to make due payment, there will be no case presented for the protection the law gives a bona fide vendor who makes a sale under the belief of the solvency of his vendee. It is only where the solvency of the vendee is relied on at the time of the transaction that the law permits the privilege of stopping the property intransit.82 As between the vendor and the vendee, the right would probably exist; but it cannot shut out the rights of other creditors who have proceeded against the property of the vendee by attachment or other process even before the goods are actually delivered to the consignee.38 It is not necessary to show the insolvency of the vendee by direct proof, but this may be shown by circumstances tending to establish the fact or any competent presumptive proof that would lead to such conclusion.⁸⁴ In a case where goods were shipped from a foreign country on an ocean bill of lading in favor of E H or assigns, and E H delivered the bill of lading to a third person, not the consignee, without any indorsement or assignment thereof, other than the mere act of delivery, such transfer of the bill of lading will not take away any right of property or ownership in the goods such as would defeat the right of

29 Buckley v. Furneiss & Stickney, 15 Wend. 137.

the seller to assert his privilege of stopping the goods before actual delivery to the consignee. 85 But where the vendor ships goods by railroad to his vendee, taking the usual form of negotiable bill of lading for same, sends the bill of lading to the consignee who, in the usual course of trade, indorses the same for value to an innocent party without notice, the carrier will be bound to deliver the goods to such indorsee though it may have been notified by the seller to hold the same under his right of stoppage. In such case the equities of the innocent purchaser of the bill of lading are paramount to those of the vendor, and as between the vendor and such indorsee, his right of stoppage is lost. * But where the goods are in transit and before delivery the vendee writes his vendor a letter rescinding the contract of purchase, and the vendor accepts such rescission, the title to the goods thereby again vests in the vendor absolutely, and his right of stoppage will prevail over that of a purchaser of the vendee though without notice.37 Where goods are brought to this country from a foreign land, and are entered at a custom house in the United States by the consignee, who gives bond as required by law for the payment of the duty on the same, and they are accordingly placed in a bonded warehouse, and a receipt executed therefor by the revenue officials, the property is practically transported, in effect delivered to the consignee, and the right of stoppage is lost.88 But where property is brought from a foreign country and reaches its destination, but owing to the failure of the consignee to pay the duty on same it is lodged in the King's stores, it may be recovered by the assertion of the right of stoppage in transitu at any time before it is sold, or, after the government officials by the consignor paying to the government the lawful duty." The distinction which seems to be made is, where the government has been paid or secured the duty the transit is at an end. Where it has not the right may still be asserted. The right of the vendor is simply a

85 Sheppard v. Newhall, 54 Fed. Rep. 306.

57 Kloes v. Wormser & Louis, 34 Mo. App. 458; Chandler v. Fulton, 10 Tex. 2.

38 Sheppard v. Newhall, 54 Fed. Rep. 806.

39 Northey & Lewis v. Field, 2 Esp. 618.

³⁰ O'Brien v. Norris, Caldwell & Co., 16 Md. 122.

⁸¹ Blum v. Alexander, 21 La. Ann. 268.

³² Fenkhauesen v. Fellows, 20 Nev. 312, 21 Pac. Rep. 886.

⁸⁸ Id.

²⁴ Reynolds v. Boston & Maine R. R., 48 N. H. 580.

³⁸ Newhall v. Cent. Pac. Ry. Co., 51 Cal. 345; Mo. Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. Rep. 608.

right to repossess himself of his property and hold it in a sense as pledgee for the payment of the amount for which it was sold. He is then placed in the position of an unpaid vendee and must hold the goods when thus retaken until the maturity of his debt. He may then enforce his lien thus secured in the proper tribunal for the amount due on the property if his debt is not paid at maturity.40 The right of stoppage is simply the assertion of a right to possession whereby the vendor is enabled to enforce his specific equitable lien and right to proceed in rem for this purpose.41 And proof of the exercise of the right is not, therefore, proof of ownership of the property in the vendor.42 But where the vendor has asserted his right to stop the goods if the debt be not due, he must hold them until it is, and be ready to deliver them upon the payment of the purchase price, in default of the payment of which at maturity he may proceed to enforce his common-law lien against the res for the purchase money.48 A resale of the goods by the consignee before they have reached him will not defeat the right of stoppage.44 In the case of Mills v. Ball,46 a merchant of London had sold goods to a customer living near Exeter. They were sent by ship and arrived at Exeter in transitu where they were delivered by the ship to a wharfinger who received the same on account of the consignee and paid the freight charges thereon. While so in the custody of the wharfinger it became known to the consignor that the consignee was insolvent, and he thereupon applied to the wharfinger for the goods, tendering him the amount of freight he had paid together with his charges as wharfinger, and asserted his right to stop and take the goods. It was held that the right could be maintained. The rule thus laid down has been followed in this country.46 In the case of Dreyfus v. Meyer,47

40 Sheppard v. Newhall, 54 Fed. Rep. 306.

Atl. Rep. 841. 4 69 Miss. 282, 12 South. Rep. 267.

one S had sold his entire stock of goods and certain goods in the depot of the L. N. O. & T. Ry., executing a bill of sale for the same, having paid the freight two days before the arrival of the property. The vendee took possession without moving the goods from the depot, however, and billed them to another station. Some days after and before the goods had left the depot they were attached and taken into custody by the officer at the suit of another creditor. After this had been done, and while the goods were so held the sellers asserted their right of stoppage in transitu, and it was held to have been done in apt time. The Supreme Court of Texas, in a comparatively recent case,48 held that the purchaser for value of a duplicate bill of lading took the same rights as one who became the purchaser of the original. though a bill of lading may be issued in duplicate, triplicate, quadruplicate, etc., it is nevertheless but one bill of lading, and that the purchaser of any of these parts takes the same rights as the purchaser of any other parts, and may defeat the right of stoppage in transitu. The case, in this respect, is vulnerable to criticism, and is in direct conflict with the case of Castanolo v. Ry., 49 which is supported by much the better reasoning. Indeed, any other rule would enable a shipper. who, himself, may not be always solvent or even honest, to perpetrate all kinds of fraud, if the purchaser of any part of a bill of lading may demand of the carrier the property called for in the bill of lading, to the exclusion of the right of the shipper to stop them. Again each holder for value of perhaps a half dozen parts of the bill of lading, all having the force of the original, would be defeated in their effort to get to the goods called for therein by the one who got to the carrier with his part first. All the others in just as good faith may have paid full value for their respective duplicates, triplicates, etc., and their claims would be just as equitable, yet these might be entirely defeated in their rights under a negotiable instrument because the indorser thereof may be law proof, or because another holder of the same bill of lading may have obtained the property from the carrier. So, an ordinary bill of exchange

49 84 Fed. Rep. 268.

⁴ Rucker v. Donovan, 13 Kan. 251; Chandler v. Fulton, 10 Tex. 2.

a Id.

⁴⁸ Babcock v. Bonnell, 80 N. Y. 244.

⁴⁴ Bell v. Moss, 5 Whart. (Pa.) 189.

^{4 2} Bos. & P. 457.

Covell v. Hitchcock, 23 Wend. 611; Markwell, Caspari & Co. v. Their Creditors, 7 Cal. 213; O'Neil v. Garrett, 6 Iowa, 480; Scott Bros. v. Grimes Dry Goods Co., 48 Mo. App. 521; Inslee v. Lane, 57 N. H. 454; Greve v. Dunham, 66 Iowa, 108; Callahan v. Babcock, 21 Ohio St. 281; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. Rep. 841.

⁴⁸ Mo. Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. Rep. 608.

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may be executed in duplicate, triplicate, etc. If it should be held, as the Texas court contends, that any of these parts have the force of originals, it is difcult to imagine the confusion in the commercial world that would follow. And if all parts of a bill of lading executed in duplicate have the force of the original, why not all parts of any other negotiable instrument which may likewise be executed in duplicate.

Nashville, Ark. W. C. Rodgers.

NEGLIGENCE—DANGEROUS PREMISES — LIA-BILITY OF LESSOR.

STENBERG V. WILCOX.

Supreme Court of Tennessee, January 31, 1896.

A party who leases premises in a dangerous condition is liable to a third party, who without negligence on his part, is injured by reason of such defects, if the lessor knew or should have known of the existence of such defects.

WILKES, J.: The facts in this case, and the result of the trial in the court below, are the same, substantially, as in the case of Hines v. Wilcox, 33 S. W. Rep. 914, except that the plaintiff Mrs. Stenberg was a boarder in the house which Mrs. Hines occupied as a tenant of defendant, Wilcox. She was injured at the same time and by the same accident as that which resulted in the injury to Mrs. Hines. The plaintiffs have appealed, and assigned errors. The same errors are assigned as in the Hines Case, and others specially applicable to this, and not to that, case.

We need not go over the ground already occupied in that case, but merely content ourselves with saying that, if plaintiffs can recover at all in this case, it must be upon the ground that the landlord leased premises in a dangerous and unsafe condition, when he knew, or might, by the exercise of reasonable diligence and care, have known, of such unsafe condition, and upon the further ground that plaintiffs did not know of such unsafe condition, and could not have known of it by the exercise of reasonable diligence and care, and not upon any contract between the defendant and Mrs. Hines, of which Mrs. Stenberg may have known nothing, and to which she was not a party.

The court charged the jury that: "If an owner of a building leases it while it is in a dangerous condition, he is liable to persons injured on account thereof, provided such persons stand upon their rights strictly as third persons. For illustration, if a house be rented where the wall fronting on a street is in a decayed and defective condition, and during the time of the lease it falls upon a passer-by in the street, then the owner is liable for injuries so sustained. But those who

claim upon the ground that they were invited into a dangerous place must seek their remedy against the party extending the invitation. If they are guests of the tenant, or boarders of the tenant, then the tenant, not the owner, must be held liable for injuries to such persons, even though the defects existed when the lease was made. The reason of this is (continues the learned judge) that such persons would never have suffered injury from the defects, if they had not entered the premises, and such entry was not made at either the request or invitation of the owner, but upon the invitation of the tenant, who holds herself out to the public as a keeper of a boarding or lodging The language is substantially the same as in Shearman & Redfield on Negligence (section 711), but the same authors say, "If the landlord lets the premises for a purpose which he knows (or ought to know) it to be unfit for, knowing that strangers will be invited there, it has been held that he is liable to them." And the same author says (section 709), "Even the entire surrender of control by the landlord does not relieve him from liability to third persons for defects which existed in the premises when he parted with the control,—not even if the tenant has agreed to make repairs," etc. It clearly appears by the proof in this case that the defendant knew the premises were to be used as a boarding house, recommended it for this purpose, and urged its location, near the Union Depot, as a desirable feature for this purpose. The court also charged: "It is admitted in this case that the plaintiffs were boarders with the tenant, when injured; and, in consequence, there is no liability to them, upon the part of defendant, upon the ground that he rented premises while in a dangerous and defective condition. So, as to that theory of the case, you will not inquire, but will find for the defendant." These charges are assigned as errors, among others. Upon the legal questions raised by these assignments, the able counsel have furnished elaborate arguments, and have cited many authorities.

In the case of Swords v. Edgar, 59 N. Y. 28, the owners, and not the lessee, of a pier used in unloading vessels, were held liable for injuries sustained by a longshoreman by reason of defects which existed at the time of the lease. The court held that the plaintiff, being in the employ of the vessel, was there by invitation, and was entitled to the protection which would result from having the pier in an ordinary state of strength and security. In Albert v. State, 66 Md. 325, 7 Atl. Rep. 697, plaintiff's parents were drowned by reason of the defectiveness of a wharf in the occupation of defendant's tenant. The jury were charged that if they found "that the defendant was the owner of the wharf, and that he rented it out to the tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then

the plaintiff was entitled to recover." Approved on appeal as correct. In Godley v. Hagerty, 20 Pa. St. 387 (approved in Carson v. Godley, 26 Pa. St. 111), it was held that where the owner of real estate erected thereon a row of buildings, with the intention of renting them to the government as a bonded warehouse, and with the knowledge that they would be obliged to stand very great weight, he was liable in damages for an injury to a person employed in one of the storehouses, occasioned by its fall, after having been so rented, though the immediate cause of the accident was the storage of heavy merchandise in the upper story; it appearing that the building had been constructed on defective plans, and of insufficient strength. See, also, cases collected and digested in Ray, Neg. Imp. Dut. (Pers.) pp. 48-53. In Waggoner v. Jermaine, 3 Denio, 306, it was held that the seller of premises upon which a nuisance existed at the time of sale was liable on the ground that the nuisance existed when the conveyance was made; and the same principle is recognized in Saltonstall v. Banker, 8 Gray, 195, where the court said that if the nuisance existed at the time of the lease the landlord would be liable. And in Durant v. Palmer, 29 N. J. Law, 545, the landlord was held liable for a nuisance arising from the structure of the building. Camp v. Wood, 76 N. Y. 92, was a case where defendant owned an inn or boarding house. In the third story was a hall, which he rented out to certain parties, who used it for the purpose of giving a dance. Plaintiff bought a ticket, and attended the ball. He left about 11 o'clock at night, somewhat under the influence of liquor, and instead of going to the ground floor, leading to the street, he walked out through an open door onto the top of a piazza, which had no railing around it, and from there stepped off to the ground. Held, that the landlord was liable. In Jessen v. Sweigert, 66 Cal. 182, 4 Pac. Rep. 1188, it was held that the owner, and not the tenant in possession, was liable for injury resulting to a third person from the fall of an awning in front of the building. It is the duty of the landlord, when he leases the property, to disclose to the tenant the true condition of the same, and to point out and make known to the tenant such defects as he knows to exist in the premises, or which he could know by reasonable diligence; and if he fails to do so, and the tenant or person relying upon his representations is injured, the landlord is responsible therefor. This principle was settled in Coke v. Gutkese (Ky.), 80 Ky. 598. This was an action for damages resulting to appellant by reason of a defective privy floor, through which she fell into the vault below and was injured. The petition alleged, in substance, that the father of the plaintiff had rented from the defendant the premises on which the privy was situated, for one year, and at the time he rented the defendant knew the timbers upholding the floor were unsafe, but did not disclose, but suppressed, his knowledge of its condition from the father; that neither she nor her father could discover the dangerous condition of the floor, by reason of the character of its construction; that she fell through the floor, and was precipitated into the vault below, and was greatly damaged physically and mentally by the fall, for which she prayed judgment for \$10,000 as damages. The court said that "although the law presumes that it was her father's duty to repair, in the absence of an agreement otherwise, still we are of the opinion that if the appellee rented the premises, knowing that the privy was in the condition alleged, it was his duty to disclose his knowledge, because it was a portion of the premises, as all men know, would be in daily use by his tenant and family, and, unless apprised of the hidden danger, they would be inevitably injured, and the younger and more helpless, perhaps, lose their lives. And if, as alleged he failed to disclose his knowledge, but nevertheless rented the dangerous tenement to the plaintiff's father, with whom she lived, he is responsible for the injury she received." To the same effect, see the holding of the New York court in Cesar v. Karutz, 60 N. Y. 229, where the landlord knowingly rented to the tenant premises infected by a contagious disease, without notifying the tenant thereof. The landlord was held to be liable, in a case where the disease was communicated, for the damages sustained. In Edwards v. Railroad Co., 98 N. Y. 249, it was held that it is the duty of the landlord to disclose to the prospective tenant any defective condition from which danger or accident is likely to arise. The court say: "If he demise the premises knowing that they are dangerous and unfit for the use they are hired for, and fails to disclose their condition, he is guilty of negligence which will, in many cases, impose responsibility upon him. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of, he is liable. If not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is weak, and so imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes a liability upon him for the injury to the person or property of any one who may lawfully be upon the premises, using them for the purpose for which they were demised. If one builds a house for public amusements or entertainments, and lets it for those purposes, knowing that it is so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it is designed, he is liable to the persons injured for his carelessness. And this rule of responsibility goes far enough for the protection of lessees and the public generally." In the case of Ahearn v. Steele, 115 N. Y. 203, 22 N. E. Rep. 193, numerous cases are cited by Earle, J., holding that, if the landlord lease premises with a nuisance on them, he will be responsible in damages. In support of the position the learned judge cites the case of Rosewell v. Prior, 2 Salk. 460, where a tenant for years erected a

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nuisance, and afterwards made an underlease, and the question was whether, after a recovery against the first tenant for years, for the erection, an action would lie against him for the continuance after he had made an underlease; and it was held that it would, "for he transferred it with the original wrong, and his demise affirms the continuance of it." Again, "in Todd v. Flight, 9 C. B. (N. S.) 377, it was held that an action lies against the owner of premises, who lets them to a tenant in a ruinous and dangerous condition, and who causes and permits them to remain so until, by reason of the want of reparation, they fall upon and injure the house of an adjoining owner." Again, in Nelson v. Brewery Co., 2 C. P. Div. 311, it was held that a landlord is liable for an injury to a stranger by the defective repair of demised premises only when he contracted with the tenant to repair, or where he has been guilty of misfeasance, as for instance, in letting the premises in a ruinous condition, and that in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy." Again, in Woodf. Landl. & Ten. (13th Ed.) 735, it is said: "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for any accidents or injuries occasioned to them by the premises being in a dangerous condition. The only exception to the rule appears to arise when the landlord has either (1) contracted with the tenant to repair; or (2) where he lets the premises in a ruinous condition; or (3) where he has expressly licensed the tenants to do acts amounting to a nuisance." Again, in Nugent v. Railroad Co., 80 Me. 62, 77, 12 Atl. Rep. 797, Virgin, J., writing the opinion, said: "It is settled law that where the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injury which results, from their state of insecurity, to persons lawfully upon them; for, by reason of the letting for profit, he authorizes the continuance of the condition they were in when he let them, and he is therefore guilty of misfeasance." Again, in the case of Gandy v. Jubber, 5 Best & S. 78, the owner of premises, attached to which was an area, let the same to a tenant from year to year, and died, having devised the property (with an iron grating over the area, improperly constructed and out of repair, so as to amount to a nuisance) to the defendant, who, having notice of the nuisance, suffered the tenant to remain in occupation of the premises upon the same terms as before, receiving the rent; and it was held that he was liable for the damage caused by the nuisance, on the ground that he had relet the premises with the nuisance thereon. Again, quoting from Wood, Landl. & Ten. (2d Ed.) p. 1297: "The landlord's right of possession being suspended during the term, it follows that his lia-

bilities in respect to the possession are also suspended, except as to such matters or defects in the premises as existed when the premises were let, arising from the manner of use, or defective construction. If a nuisance existed upon the premises at the time of the demise, the landlord, as well as the tenant, is liable for the damages resulting therefrom, although it only becomes a nuisance by the act of the tenant while using it for ordinary purposes." This we understand to be the holding of this court in Young v. Bransford, 12 Lea, 244, citing 1 Thomp. Neg. 317; Whart. Neg., § 817. See, also, collation of authorities holding the same doctrine in 12 Am. & Eng. Enc. Law, pp. 690, 691, and notes; Tayl. Landl. & Ten. (8th ed.), § 175; Shear. & R. Neg., §§ 175, 175a. We think there was error in the learned trial judge, in his charge upon the liability of the landlord to plaintiff, under the facts of this case; and the judgment is reversed, and cause remanded for a new trial. The appellee will pay the costs of the appeal.

NOTE.-The liability of one party to another, who has been injured on his property by the negligence of such owner in guarding against such accidents, is generally held to accrue from the existence of a legal duty or obligation toward the person injured, existing at the time and place of the injury, which such owner failed to perform or fulfill, by reason whereof such injury was occasioned. Thiele v. McManus, 3 Ind. App. 132; Indianapolis v. Emmelman, 108 Ind. 530; Sweeney v. Railroad Co., 10 Allen, 368. No such duty is due to a trespasser, nor to one who goes on the premises merely for his own convenience or pleasure, and if he is injured by reason of such negligence on the part of the owner there is no liability. Sweeney v. Railroad Co., supra; Gillis v. Railroad Co., 59 Pa. St. 129; Sterger v. Van Sicklen, 132 N. Y. 499; Hart v. Cole, 156 Mass. 475. In all cases reasonable care is presupposed on the part of the injured party before he can assert any claim for damages. Generally the duty of keeping the premises in safe condition devolves upon the occupant alone, and in such cases he alone is responsible for injuries sustained by reason of their dangerous condition. Butler v. Townsend, 84 Hun, 100; Denver v. Soloman, 2 Colo. App. 534; Gordan v. Peltzer, 56 Mo. App. 599; Ahern v. Steele, 115 N. Y. 203. It has been held, that if the occupant receives the premises in a bad condition he is not liable for an accident occasioned thereby, unless he knew the condition thereof, or had means of knowing or sufficient time had elapsed for him with reasonable diligence to have ascertained the condition (Timlin v. Standard Oil Co., 126 N. Y. 514), nor if he merely suffers the nuisance to remain if he had no power to abate it. Lufkin v. Zane, 157 Mass. 117.

Liability of Owner when Bound to Repair.—Though the occupant is liable to a third party who, without his fault, sustains injury by reason of the dangerous condition of the premises in accordance with the maxim sic utere two ut alienum non lædas, yet there are occasions when the owner of the property is under obligation to prevent such accidents and is held liable for their occurrence. When the owner has contracted with the tenant to keep the premises in order he is held liable for injuries occasioned by his failure so to do. Denver v. Soloman, supra; Union, etc. Co. v. Lindsay, 10 Ill. App. 583; Fleischner v. Citizens, etc. Co., 25 Oreg. 119; Ahern v. Steele, 115 N. Y. 203. The

party injured can in such case sue the owner directly inorder to prevent circuity of action, since whatever the injured party recovered from the occupant the latter could in turn recover from the owner. Denver v. Soloman, supra; Ahern v. Steele, supra. On the other hand the owner, when the property is in the hands of a lessee, is not liable, unless he expressly agrees to repair, and in the absence of a covenant no such duty is imposed on him. Gordon v. Peltzer, 56 Mo. App. 599; Fellows v. Gilhuber, 82 Wis. 689. Where a lessee had covenanted with the owner to keep the premises in repair and then sublet a portion of the land without any covenant to the sublessee to keep the sublet property in repair, it was held that a party injured by reason of the dangerous condition of the premises could sue the sublessee, but not the lessee, because as to the sublessee the lessee was not bound to repair the premises. Clancy v. Byrne, 56 N. Y. 129. A party, who acquires by grant or by inheritance property which is out of repair, or has a nulsance on it, is not liable for any injuries sustained by any one by reason thereof, unless he has a right of entry and is bound to keep the premises in repair. Butler v. Townsend, 84 Hun, 100; Lufkin v. Zane, 157 Mass. 117. Even though the owner is granted the right of entry for the purpose of making repairs, still he is not liable unless he contracted to make the repairs. Ahern v. Steele, 115 N. Y. 203. When the tenant creates the nuisance, and the landlord subsequently renews the lease, the landlord is liable to one afterwards sustaining injury from such nuisance, on the ground that his demise affirms the continuance of the nuisance. Ahern v. Steele, supra; Clancy v. Byrne, 56 N. Y. 129; Whalen v. Gloucester, 4 Hun, 24; Fleischner v. Citizens, etc. Co., 25 Oreg. 119. A proper qualification of the above rule is, that the owner is not liable until the knowledge of the existence of the nuisance has been brought home to him, or under the circumstances he should have known of its existence (Borman v. Sandgrein, 37 Ill. App. 160), and in the case of a devisee it has been held that he must have been requested to abate it. Ahern v. Steele, supra.

Liability of Owner for Nuisance Existing Before Lease Made.—If an owner leases premises with a nuisance thereon he is liable to third parties sustaining injury therefrom, since he is held to contemplate that the premises shall remain as he left them. Clifford v. Atlantic C. Mills, 146 Mass. 47; Denver v. Solman, 2 Colo. App. 534; Union, etc. Co. v. Lindsay, 10 Ill. App. 583; Gordon v. Peltzer, 56 Mo. App. 599; McGrath v. Walker, 64 Hun, 179; Timlin v. Standard Oil Co., 126 N. Y. 514; Lufkin v. Zane, supra; Ahern v. Steele, supra. If the nuisance consists of a hidden defect, his liability depends upon whether he knew or should have known of the existence of the defect when the lease was made. State v. Boyce, 73 Md. 469. When the lessee has contracted to make necessary repairs, the owner's liability is disputed where the injury has ensued from the failure to make such repairs. Clifford v. Atlantic C. Mills, 146 Mass. 47; Fellows v. Gilhuber, 82 Wis. 639.

Liability of Owner, When the Use is a Nuisance.—When the owner leases his premises for a purpose, which in the very nature of things will become a nuisance, he is liable to third persons for injuries sustained by them from such use. Union, etc. Co. v. Lindsay, 10 Ill. App. 583; Fleischner v. Citizens, etc. Co., 25 Oreg. 119; Ahern v. Steele, supra. If, however, the premises can be used in the manner intended by the landlord, either as shown by the construction of the premises or by other evidence, without becoming a prisance, the owner is not liable for the act or neg-

lect of the tenant, which creates the nuisance. Lufkin v. Zane, supra. The mere fact that there is a manifest possibility that the premises may be so used is not sufficient to render the owner liable. Clifford v. Atlantic C. Mills, 146 Mass. 47.

S. S. MERRILL.

CORRESPONDENCE.

INTEREST OF INFANT IN PARTNERSHIP PROPERTY.

To the Editor of the Central Law Journal:

In 1864 A and B were partners in business in the town of S. They also owned the lot and store building in partnership. The same year (1864) A entered in the service of his country and died, leaving a widow and an infant child. There is nothing in the records of the county to show as to the settling up of the partnership affairs by B, the surviving partner. widow of A is still living, and says she joined with B in transferring the property to one C, which is shown in the records. The widow of A realized some \$400 or \$500 for her supposed share in the partnership property after it was sold. The infant never realized anything. In 1874 the infant had a guardian appointed. At the age of 15 years said infant daughter married one D. The property is now very valuable, and the question I want to ask is this: Has the infant an interest in the property, or has she been barred? Could she not bring action to quiet title to her part or interest in the said property? Cannot she recover rents, interest, etc., on her part, and back to what time? Who would be proper parties defendants, the property having been transferred several times?

BOOKS RECEIVED.

Life and Speeches of Thomas Corwin, Orator, Lawyer and Statesman. Edited by Josiah Morrow. Cincinnati: W. H. Anderson & Co. 1896.

A Treatise on the American Law of Attachment and Garnishment, a Complete Statement of the General Principles Applied by Courts of Review, and of the Common Rules Governing the Practice Under all Statutes. By Roswell Shinn, Member of the Chicago Bar, and Author of Shinn's Pleading and Practice. In Two Volumes. Indianapolis and Kansas City: The Bowen-Merrill Company. 1896.

The American Corporation Legal Manual, a Compilation of the Essential Features of the Statutory Law Regulating the Formation, Management and Dissolution of General Business Corporations in America (North, Central and South), and Other Countries of the World, With Special Digest of the United States Street Railway Laws; also Treatise on Receiverships; also Synopses of the Patent, Trade-mark and Copyright Laws of the World. Prepared Expressly for this Work by Members of the Bar, etc., in the Different Localities. For the Use of Attorneys, Officers of Corporations, Investors and Business Men. Vol. IV-1896. (To January 1, 1896.) Edited by Charles L. Borgmeyer, Member of the New Jersey Bar, Newark, N. J. 1896. Plainfield, N. J., U. S. A. Honeyman & Co., Publishers. London, Eng.: Jordan & Sons, 120 Chancery Lane.



WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Fail or Commented upon in our Notes of Recent Decisions.

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1 ADJOINING TANDOWNERS Totage Commont Dom

- 1. ADJOINING LANDOWNERS—Lateral Support—Damages.—The defendant made an excavation on his land, which caused the soil of the adjoining land of the plaintiff to fall late it: Held, following Schultz v. Bower (Minn.), 59 N. W. Rep. 63l, that the measure of the plaintiff's damages is not the depreciation of her land by reason of the existence of the excavation on the defendant's land, but the diminution of the value of the plaintiff's land by reason of the falling, caving, or washing of the soil of her land as the natural result of removing its lateral support.—SCHULTZ v. BOWER, Minn., 66 N. W. Rep. 139.
- 2. ADMINISTRATOR'S ACCOUNTS Decree to Married Woman.—The distributive share of a married woman as heir should be decreed to her in her own name, and not to herself and husband for her use.—King v. Brown, Ala., 18 South. Rep. 985.
- 3. ADVERSE POSSESSION Bunning of Statute.—Defendant received a quitclaim deed to the land in suit from an occupant whom he knew had no title, under the belief that it was government land, and that, on termination of the litigation between plaintiff's grantor and the government, he would be able to secure title thereto. Defendant did not pay taxes on the land, record his deed, or claim title thereunder until the litigation was decided in favor of plaintiff's grantor: Held, that defendant's possession prior thereto was not adverse.—LITCHFIELD v. SEWELL, Iowa, 66 N. W. Rep. 104.
- 4. ALTERATION OF NOTE—Materiality.—When a note is given by a corporation, payable to the manager's wife, for money due him for salary, and for expenditures made in behalf of the company out of funds represented by him to have belonged in part to the wife, an alteration of the note so as to make it payable to the manager himself is a material one.—SNEED v. SABINAL MINING & MILLING CO., U. S. C. C. of App., 71 Fed. Rep. 493.
- 5. Assault with Intent to Kill.—A conviction of assault with intent to murder will not be reversed because the court charged as to self-defense where there

- was no evidence requiring such a charge, it not appearing that defendant was prejudiced.—MCMILLARV. STATE, Tex., 33 S. W. Rep. 970.
- 6. Assignment for Benefit of Creditors.—Where a mortgage executed for the exclusive preferment of one creditor is declared a general assignment for the benefit of all creditors, as provided for in Code, § 1737, and the mortgagee proves its demand, and shares with the other creditors, the compensation of the solicitors of the original complainants is chargeable on the aggregate fund, and the mortgagee must bear its proportionate share.—Anniston Loan & Trust Co. v. Ward, Ala., 18 South. Rep. 987.
- 7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Fraudulent Preferences.—Where a deed of trust is given to secure several creditors, the fact that the preference of one of the claims is fraudulent will avoid the deed only as to the fraudulent claim, where the other creditors have not participated in the fraud.—BLOCH v. SPRUANCE, Tex., 38 S. W. Rep. 1002.
- 8. ATTACHMENT—Dealing in Futures.—Under Code, 1832, § 129, subd. 9, one who has within six months made contracts in his own name for cotton "futures," in one case at least, furnishing his own money, is subject to attachment by his creditors, although he may have been acting as agent for another, such fact not having been disclosed in the transactions.—DILLARD V. BREMMER, Miss., 18 South. Rep. 938.
- 9. ATTACHMENT—Bights of Third Persons.—In the absence of statutory provision to the contrary, the lien of an attachment does not affect rights in third persons outstanding at the time it is acquired.—GATES IRON WORKS V. COHEN, Colo., 43 Pac. Rep. 667.
- 10. ATTORNEY—Disbarment on Conviction on Libel.—Libel is a mitdemeanor involving moral turpitude, within Code, § 1047, authorizing the removal or suspension of an attorney on his conviction of a felony or "misdemeanor involving moral turpitude."—STATE v. MASON, Oreg., 43 Pac. Rep. 651.
- 11. ATTORNEY—Release of Debtor.—An attorney employed to collect a debt has not, by virtue of his general employment, authority to release a debtor except upon payment of the full amount of the debt in money.
 —SMITH V. JONES, Neb., 66 N. W. Rep. 19.
- 12. Carrier Delay in Transportation.—The fact that the destruction of a shipment by fire occurred during a negligent delay on the part of carrier in forwarding it, does not render such delay the proximate cause of the loss.—Thomas v. Lancaster Mills Of Clinton, Mass., U. S. C. C. of App., 71 Fed. Rep.
- 18. CARRIBES—Live-stock Shipments Negligence.—One who ships cattle, and undertakes, upon a pass given him for that purpose, to accompany and care for his stock in transit, does so under the implied conditions that he will submit to whatever inconveniences are necessarily incident to his undertaking.—OMAHA & R. V. RY. CO. V. CROW, Neb., 66 N. W. Rep. 21.
- 14. CARRIERS Live-stock Shipment.—Where, in an action to recover for damages to a shipment of cattle, the petition alleges several sources of damage, it is error to charge that, if the jury find certain allegations named to be true, plaintiff will be entitled to recover the damages done by any or all of the said means, "or by any other means that are charged in the petition."—TEXAS & P. RY. CO. v. BIRCHFIELD, Tex., 33 S. W. Bed. 1022.
- 15. CARRIERS—Round Trip Ticket—Time Limit.—In an action for ejecting a passenger riding on an overdue return ticket, where the issue was as to whether the return trip could be made within 30 days, as claimed by plaintiff, under oral agreement with the agent before the purchase, or had to be made within 10 days, as recited in the ticket, a charge to find for defendant if 10 days was found to be a reasonable time was errone-ous.—Gulf, C. & S. F. RY. CO. V. HALBROOK, Tex., 53 S. W. Rep. 1028.
- 16. CHATTEL MORTGAGE—Parol Evidence.—A bill of sale absolute on its face may, in an action by the



vendee for possession of the property, be shown by parol to have been given as security.—PINCH v. WILLARD, Mich., 66 N. W. Rep. 42.

17. CONTEMPT—Failure to Pay Alimony.—A distinction exists, upon principle and authority, between that class of contempt proceedings wherein it is sought to vindicate the authority and dignity of the court, or where the contempt consists in the doing of a forbidden act injurious to the opposite party, wherein the process is criminal in its nature, and wherein conviction is followed by a penalty of fine or imprisonment or both, which is merely punitive, and that other class of contempts where the proceeding is remedial in its nature and is intended for the benefit or advantage of the opposite party, to compel the doing, or omission to do, an act necessary to the administration of justice in enforcing some private right in a civil proceeding.—Snow v. Snow, Utah, 43 Pac. Rep. 620.

18. CONTRACT—Assignment — Construction.—R & W, being engaged as contractors in the construction of a public building for D county, executed an assignment as follows: "To the Board of County Commissioners: For value received, we hereby assign all our interest in warrants or vouchers due us from said county to the Bank of Commerce, and hereby authorize said bank to receipt for said warrants or vouchers in our name, and to pay all warrants or vouchers to the Bank of Commerce." Held, not to include money subsequently earned by R&W in the performance of their contract with the county.—RYAN V. DOUGLAS COUNTY, Neb., 66 N. W. Rep. 30.

19. CONTRACT FOR BENEFIT OF THIRD PERSON.—One who, on dissolution of partnership, agrees that a chattel mortgage previously executed by his partner te a third person shall be satisfied out of certain property left in such partner's possession for that purpose, will be personally liable to the mortgagee if he appropriates the property to his own use, though the mortgagee was not a party to the agreement.—JOHNSON V. PATTERSON, Tex., 33 S. W. Rep. 1838.

20. CONTRACT—Performance.—A contract to make the excavation for a building under the instructions of an architect is performed, if the work is done as required by the architect, and to his approval, whether in conformity to the drawings made or not.—SMITH v. FARMBER' TRUST CO., Iowa, 66 N. W. Rep. 84.

21. CONTRACT—Rescission.—A contract cannot be rescinded in part on account of fraud, and ratified in part. It is the duty of the injured party in such case to rescind the contract as a whole or not at all.—BAUM IRON CO. V. BERG, Neb., 66 N. W. Rep. 8.

22. CONTRACT—Validity — Public Policy.—A contract whereby one party, for certain commissions, is to attend meetings of persons solicited to buy real estate from the other party, and persuade them to become purchasers, representing himself to them as a purchaser by subscribing for lots, which the owner is to take off his hands if he does not wish to retain them,— concealing from the intending buyers his arrangement with such owner,—is against public policy, and cannot be enforced.—McDonnell v. Rigney, Mich., 66 N. W. Rep. 52.

21. CONTRACTS — Laborer.—One who contracted to build a house for a fixed price, and who employed others to work under him, though he did part of the work himself, is not a laborer, within Code 1892, § 1963, exempting a certain sum from the wages of "every laborer or person working for wages."—HEARD V. CRUM, Miss., 18 South. Rep. 984.

24. CONSTITUTIONAL LAW — Jurisdiction of County Court.—Const. art. 5, § 22, authorizing the legislature to change the civil and criminal jurisdiction of county courts, is broad enough to empower the legislature to confer jurisdiction on such courts to establish county boundaries, the proceedings in which may become judicial in character.—KAUFMAN COUNTY V. Mc GAUGHEY, Tex., 58 S. W. Rep. 1020.

38. CORPORATIONS—Authority of President—Power to Confess Judgment.—Though the president of a corpo-

ration had no authority to bind it by the execution of a power of attorney to confess judgment, still equity will not intervene to set aside a judgment taken pursuant to it; the claim under the judgment, if not a legal one, being just and equitable.—FORD v. HILL, Wis., 66 N. W. Rep. 115.

26. CORPORATIONS—Directors—De Jure and De Facto.
—Under Civ. Code, § 205, providing that directors of a corporation must be stockholders, a person owning no stock in the corporation, elected a director without his knowledge, does not become a director, either de jure or de facto, so as to prevent his purchasing corporate property at a judicial sale, though a share of stock was, subsequently to his election, issued and delivered to him, which he retained; he never having acted as a director or been called upon to do so until 10 years after his election, when he repudiated his office.—BOZECRANS MIN. CO. v. MOREY, Cal., 43 Pac. Rep. 585.

27. CORPORATIONS — Officers—Term of Office.—Rev. St. § 1776, providing that directors of a corporation shall be elected annually, does not limit the term of office of an attorney, appointed by the directors, to one year, it being also provided, in such section, that the terms of other officers may be prescribed by the articles of incorporation or the by-laws.—Germania Spar & Bau Verein v. Flynn, Wis., 68 N. W. Rep. 109.

28. COUNTY—Indebtedness—Election.—An election to validate certain outstanding indebtedness was not void because the board of county commissioners, in its resolution calling for the election, did not provide that notice of said election should be given, and did not designate a newspaper in which such notice should be published, where the notice was actually given in a newspaper having the largest circulation in the county.—RICHARDS V. KLICKITAT COUNTY, Wash., 48 Pac. Rep. 647.

29. ORIMINAL EVIDENCE—Res Gestæ.—Where, in the course of a quarrel, defendant said to deceased, "Don't kick me," and deceased said, "I did not kick you; but I can kick you, or do anything else with you I please," and defendant thereupon shot deceased, declarations made by deceased, immediately after he was shot, that defendant shot him without cause, and that he would not recover, are admissible as res gesta.—NORFLEET V. COMMONWEALTH, Ky., 33 S. W. Rep. 938.

60. ORIMINAL LAW—Bail Bond.—A bail bond, conditioned that defendant shall appear in the police court in a certain town, on a day named, and render himself amenable to the orders of such court in the prosecution of a charge of unlawfully selling liquor in another county, is void.—COMMONWEALTH V. NICHOLS. Ky., 38 S. W. Rep. 946.

31. CRIMINAL LAW—Change of Venue — Local Prejudice.—Under the statute of New Mexico requiring that in a criminal case a defendant's "affidavit" for change of venue shall be supported by the "oath" of two "disinterested" persons that they believe the facts therein stated are true, the court may require defendant to produce in court persons who have made such an affidavit, to be orally examined under oath.—Territory v. Leary, N. Mex., 48 Pac. Rep. 688.

52. CRIMINAL LAW — Entry of Nol. Pros.—There are three stages in a criminal prosecution, viz.: First. The inauguration or preliminary stage, where the indictment is absolutely under the control of the prosecuting officer. Second. The trial of the cause and its incidents, during which the court has control and the power of the prosecuting officer is suspended. Third. The period between the verdict of the jury and sentence by the court, when the pardoning power supervenes.—BUTLER v. MOISE, La., 18 South. Rep. 948.

33. CRIMINAL LAW—Entry of Nol. Pros.—The powers

33. CRIMINAL LAW—Entry of Nol. Pros.—The powers of the district attorney to enter a nolle prosequé are subject to certain limitations: First. After the jury has been empaneled and the charge read, he cannot discontinue if the defendant insists upon a verdict. Second. After verdict and refusal to grant a motion for a

new trial, he is without authority to dismiss the prosecution without the authority of the court.—BIER V. KLOCK, La., 18 South. Rep. 942.

- 84. ORIMINAL LAW Evidence of Former Conviction.

 —A conviction will be reversed, where the court fails to limit evidence of defendant's former conviction of another offense to the question of defendant's credibility.—HUTTON V. STATE, Tex., 83 S. W. Rep. 969.
- 85. CRIMINAL LAW-Indictment—Registered Pharmacist.—Laws 1898, ch. 89, § 1, providing that it shall be unlawful for any person not a registered pharmacist to conduct any pharmacy, as proprietor, unless he shall have in his employ a registered pharmacist who shall have charge of such business as requires pharmaceutical skill, etc., "provided," that nothing in this section shall apply to prevent a physician from supplying to his patients such articles as may seem proper, etc., does not incorporate the exception with the description of the offense, and an indictment charging a violation of the act need not negative the exception.—VILLINES V. STATE, Tenn., 33 S. W. Rep. 992.
- 86. CRIMINAL LAW-Presumption of Innocence.—On a criminal trial it is error to refuse to instruct that the law presumes every man innocent, and a conviction cannot be had if any juror has a reasonable doubt of the defendant's guilt, though an instruction has been given that they could not convict unless the evidence left no reasonable doubt of defendant's guilt.—FRANK-LIN V. STATE, Wis., 86 N. W. Rep. 107.
- 37. DEATH BY WRONGFUL ACT Limitations.—Where an administratrix knew that her intestate was killed while in defendant's employ, the running of limitations against the claim for damages was not interrupted by defendant's representations that it was in no manner to blame for deceased's death, nor by its concealment of the facts concerning the accident which caused his death.—McBride v. Burlington, C. R. & N. RY. Oo., lowa, 65 N. W. Rep. 78.
- 88. DECEIT Fraud Representations Recklesely Made.—A grantee is not precluded from recovery for a fraudulent representation by the grantor as to the number of square feet in an irregularly shaped lot, alleged to have been based on the estimate of a surveyor, on the ground that the means of ascertaining the area was as much within the knowledge of the grantee, who saw the lot.—CAWSTON V. STURGIS, Oreg., 48 Pac. Rep. 656.
- 89. DEED-Description—High-water Mark.—The term "high-water mark," when applied to a non-tidal river, means the highest limit reached by the water when the river is unaffected by freshets and contains its natural and usual flow.—MORRISON V. FIRST NAT. BANK OF SKOWHEGAN, Me., 38 Atl. Rep. 781.
- 40. DEED Easement.—A deed conveying "a road and right of way over and across" land, "to be forever appurtenant to" adjoining land of the grantee, and providing that neither party shall, "nor shall his successors in interest, grant or give to any other person a right of way over said road," conveys only an easement for a right of way, and not a fee-simple title.—Peterson v. Machado, Cal., 48 Pac. Rep. 611.
- 41. DEED OF INCOMPETENT UNDER GUARDIANSHIP.—
 The deed of an insane person not under guardianship is voidable only, but while he is under actual and subsisting guardianship he is conclusively presumed incompetent to make a valid deed concerning his estate, though he is in fact sane at the time he attempt to do so. If, however, at the time he made the deed, he was in fact of sound mind, and the contract fair, and the guardianship had been practically abandoned, the deed is valid, though the guardian had not been formally discharged by the court.—Thorpe v. Hanscom, Minn., 66 N. W. Rep. 1.
- 42. DIVORCE Desertion Condonation.—If a wife deserts her husband and remains away from him for the full period of three consecutive years, and during all that time continuously and unreasonably refuses to return, his right to a divorce is complete, and can-

- not be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.—Dam-FORTH v. DANFORTH, Me., 38 Atl. Rep. 781.
- 43. DIVORCE—Non-resident Defendant—Cross Bill.—How. Ann. St. § 6231, provides that no divorce shall be granted when the cause therefor occurred without the State, unless the complainant or defendant have resided in the State two years immediately preceding the suit: Held that, where the complainant has resided in the State the full statutory period, and defendant is a non-resident, the defendant may make her answer a cross bill for divorce and alimony.—CLUTTON v. CLUTTON, Mich., 66 N. W. Rep. 52.
- 44. EJECTMENT—Title to Support.—A person not having the legal title to land and a present right of possession under it cannot recover possession thereof in ejectment.—RUSSELL V. ALLMOND, Va., 28 S. E. Rep. 895.
- 45. EMINENT DOMAIN—Compensation.—Where three blocks are used in connection with an elevator for one common purpose, and as one property, and the elevator cannot be operated successfully without the use of all of the blocks, two of which are used for storing cars, in estimating the damages for the appropriation of a portion of one block for the right of way for a rall-way it is proper to estimate the damages to the property as a whole, though the blocks are separated by streets across which the owner has laid tracks without permission of the city.—Union Elevator Co. v. Karsas City Suburban Belt Ry. Co., Mo., 38 S. W. Rep. 226.
- 46. EQUITABLE MORTGAGE Evidence.—It appeared that the land in question once belonged to defendant; that it was sold to plaintiff under a mortgage foreclosure sale; that plaintiff agreed that if no redemption were made the land might be sold on such terms as would reimburse it for all claims—the balance, if any, to go to defendant; that defendant abandoned a design to redeem, and permitted the premises to go to a deed; that defendant remained in possession of the land as a tenant; and that written leases were entered into by the parties for several successive years: Held, that the evidence failed to show an equitable mortgage as claimed by defendant.—IOWA STATE SAV. BARK V. COONROD, IOWA, 66 N. W. Rep. 78.
- 47. ESTOPPEL.—Where, in an action to foreclose a vendor's lien on land, defendant pleads an estoppel because of the silence of plaintiff's agent as to the existence of the lien note when a former purchaser bought the land, defendant could not show an estoppel arising out of a statement by plaintiff's agent to another purchaser that the note had been paid.—MCGREGOR V. SIMA, Tex., 53 S. W. Rep. 1014.
- 48. ESTOPPEL—Insolvent Corporations Contract.—That a creditor of an insolvent corporation did not present a claim for breach of contract by the corporation, against the receivers, by intervention, or otherwise urge it against them, and did not call the attention of the reorganization committee to such claim, though the creditor did present another claim, which was paid, does not estop him to assert such claim against the corporation on reorganization, after the property has passed out of the hands of the receivers, to the corporation, without a sale.—DIAMOND STATE IRON CO. V. SAN AMTONIO & A. P. RY. CO., Tex., \$5 8. W. Rep. 987.
- 49. EVIDENCE—Parol to Add to Writing.—Where a written memorandum of the leasing of premises, signed by the parties, specified only the obligations of the tenants, they may show by parol that the landlord had previously promised to place the premises ingood repair, and that he represented at the time the memorandum was signed that he had done so.—Hines v. Wilcox, Tenn., 33 S. W. Rep. 914.
- 50. EVIDENCE—Proof of Signature.—Papers containing defendant's signatures, but which are not otherwise relevant to the case, are not admissible as the basis for comparison to prove the genuineness of defendant's signature to a note which is not of ancient

date.-Cook v. First Nat. Bank of Granbury, Tex., 23 S. W. Rep. 998.

- 51. FRAUDS—Statute of Frauds—Discharge of Sureties.—A promise of A to indemnify C against loss by becoming responsible for D's faithful performance of his duty to E is not within the statute of frauds.—FIDELITY & CASUALTY OO. OF NEW YORK V. LAWLOE, Minn., 66 N. W. Rep. 143.
- 52. FRAUDS Statute of Interest in Lands. An agreement by plaintiff to take down a barn on her premises, and, after the lumber shall have been drawn to defendant's premises, to re-erect it there for a valuable consideration, is not a contract for the sale of an interest in lands.—SCALES v. WILEY, Vt., 83 Atl. Rep. 71.
- 53. FRAUDULENT CONVEYANCES—Sufficiency of Consideration.—Held, in an action brought to set aside, as a fraud upon creditors, certain conveyances and transfers of real and personal property by a father to his sons, that certain findings of fact—in effect, that the conveyances and transfers were made in pursuance of a previously made and valid oral agreement, in good faith, and without any intent to hinder, delay, or defraud the father's creditors—were supported by the evidence, and justified the conclusions of law.—LEQVE V. STOPPEL, Minn., 66 N. W. Rep. 124.
- 54. FEDERAL COURTS—State and Federal Courts—Following State Decisions.—Held, further, that this court is not bound to yield its own opinion to a contrary decision of the State court of last resort, rendered, upon the same transaction, after the argument and before the decision of the case before this court; such decision appearing to be in plain conflict with the weight of authority on the subject, and distinctly inconsistent with the previous decisions of the State court, and the question presented appearing to this court not to be balanced with doubt, but clearly to require a decision contrary to that of the State court.—FORSYTH V. CITY OF HAMMOND, U. S. C. C. of App., 71 Fed. Rep. 443.
- 55. FEDERAL OFFENSE—Improper Use of Mails—Obscene Matters.—The right of the accused to be informed of the nature and cause of the accused to with reasonable certainty is not infringed by the omission from the indictment of indecent and obscene matter, alleged not to be proper to be spread upon the record of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge.—ROSEN V. UNITED STATES, U. S. S. C., 16 S. C. Rep. 434.
- 56. Homestead—Deed Void as to the Wife.—Where a hasband and wife execute a deed of community property which constitutes their homestead, and such deed is void as to the wife because her signature thereto was procured by her husband's fraud, of which the grantee had notice, it is, nevertheless, effective as a conveyance of the title of the husband after the property ceases to be the wife's homestead, the wife in the meantime being protected in its full enjoyment.—STALLINGS V. HULLUM, Tex., 83 S. W. Rep. 1083.
- 57. Homestead Payment of Mortgage. Where a homestead belonging to the wife is mortgaged to secure a debt of the husband, the proceeds of which had gone into his business, and were in no way connected with the acquisition or improvement of the homestead, the payment of such debt out of his own resources does not place unsecured creditors in place of the mortgagee.—Wells v. Anderson, lowa, 66 N. W. Rep. 122.
- 88. HUSBAND AND WIFE—Life Insurance Payable.— 84. §634, providing that a policy of insurance made payable to any married woman, or to any person in trust for her, shall inure to her separate use and that of her children, independently of her husband or his creditors, or the creditors of the person procuring the insurance, is not intended to enlarge the rights of the wife or children beyond those secured to them by the contract itself, and does not give children a legal interest in a policy payable to their mother.—WIRGMAN V. MILLER, Ky., 33 S. W. Rep. 387.

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- 59. INJUNCTION—Effect of Appeal—Supersedeas.—An appeal from an injunction ordering the removal of trade-signs, and prohibiting the future use of the trade-name thereon, stays proceedings as to the mandatory portion of the injunction, so that a failure to remove such signs could not, pending appeal, be punished as contempt.—SCHWARTZ V. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 43 Pac. Rep. 530.
- 60. INSURANCE—Effect of Representations.—A representation by a fire insurance agent that the taking of a certain policy will not conflict with the carrying of other insurance is a representation, not of a fact, but of a conclusion of law, and is not binding on the insurer.—UNION NAT. BANK OF OSHKOSH V. GERMAN INS. CO. OF FREEPORT, U. S. C. C. of App., 71 Fed. Rep. 478.
- 61. INSURANCE—Forfeiture—Waiver.—After a loss on a fire insurance policy, which was subject to forfeiture for a breach of a condition therein against incumbering the property, the defendant, by its adjusters, without knowledge of such breach, took possession of and sold the salvage by virtue of a claim under the policy; but after learning, on the next day after the sale of the breach, it took no steps at any time to rescind the sale, or to provide for the payment of the purchase price to the assured, or to do any act to restore to him what it took from him under the policy: Held, that it thereby waived its right to treat the policy as forfeited.—FIRE NAT. BANK OF DEVILS LAKE V. MANCHESTER FIRE ASSUR. CO., Minn., 66 N. W. Rep. 186.
- 62. INSURANCE—Misrepresentations.—A representation in an application for insurance that no other insurance existed on the property is not to be deemed false, in such a sense as to invalidate the insurance obtained on such application, merely because a former owner of the property, after having parted with his title, effected other insurance thereon in his own favor.—STATE INS. CO. V. NEW HAMPSHIRE TRUST CO., Neb., 66 N. W. Rep. 9.
- 63. INSURANCE—Sale of Insured Property.—A sale and conveyance of the insured property terminates and avoids a policy which contains the following stipulation: "If the property be sold or transferred, or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon, then, and in every such case, this policy shall be void."—RICHMOND v. PHOENIX ASSUR. CO., Me., 33 Atl. Rep. 786.
- 64. INSURANCE Total Loss—Constitutional Law.—Though Sayles' Clv. St. art. 2971, providing that a fire insurance policy shall in case of total loss be a liquidated claim against the company for the full amount thereof, prevents a contract to the contrary, it does not impair the obligation of contracts in the case of foreign insurance companies which voluntarily dobusiness in the State.—PHOENIX INS. CO. V. LEVY, Tex., 33 S. W. Rep. 992.
- 65. LANDLORD AND TENANT—Lien on Crops for Rent.—A landlord who authorizes the tenant to remove cotton raised on the premises, and sell it in open market, waives his lien for rent.—GILLIAM v. SMITHER, Tex., 33 S. W. Rep. 984.
- 66. LIBEL—Publication.—The sending of a libelous letter through the mail, which, on receipt by the party libeled, is shown to third persons, is not a publication.—SILVIS V. MILLER, Tenn., 38 S. W. Rep. 921.
- 67. LIMITATION OF ACTIONS—Judgments.—An action on a judgment is not an action on a contract (Code, 1880, § 2688), and therefore the bar of the statute of limitations is not removed by a promise or acknowledgment of liability.—Berrson v. Cox, Miss., 18 South. Rep. 934.
- 68. LIMITATIONS Damages to Abutting Property Owner.—Limitations did not begin to run to an action to recover damages for the construction of an approach to an embankment leading to a railway crossing, which approach extended to and abutted on plaintiff's premises, from the time the embankment was made, though the approach may have been a part of its plan; a right of action accruing to plaintiff only

from the construction of the part abutting on his property.—KELLEHER V. CHICAGO, St. P. & K. O. Rt. Co., Iowa, 66 N. W. Rep. 94.

- 69. LIMITATIONS—Married Women.—The statute of limitations against action for recovery of land, the separate property of a feme covert, does not run during coverture.—Mckneeley v. Terry, Ark., 88 S. W. Rep. 968.
- 70. LIMITATIONS—When Begins to Run.—Where one is employed for an indefinite period at a specified sum per month, and continues in the service of his employer for a number of years without interruption, receiving partial payments during the time, the contract of employment will be treated as continuous, and limitations will not begin to run until the service ends.—AH HOW V. FURTH, Wash., 48 Pac. Rep. 639.
- 71. MANDAMUS TO CANVASSING BOARD—Election.—Where a canvassing board improperly performs its duty, mandamus will lie to compel it to recanvass the votes.—STEELE v. MEADE, Ky., 88 S. W. Rep. 944.
- 72. Mandamus—When Lies.—2 Hill's Ann. Code, § 786, provides that the writ of mandamus shall not issue in any case where there is any other plain and adequate remedy at law. 1 Hill's Ann. Code, § 776, par. 9, provides for an appeal within thirty days, to the superintendent of public instruction, from the decision of the county board of examiners refusing to issue a teacher's certificate: Held, that mandamus would not lie to compel the board to issue such certificate.—STATE v. HITT, Wash., 43 Pac. Rep. 638.
- 78. MARRIED WOMAN—Deed—Construction.—A deed to a married woman, to her "only use and behoof," created in her an equitable separate estate.—MILLER v. MILLER'S ADMR., Va., 23 S. E. Rep. 891.
- 74. MARRIED WOMAN—Separate Estate.—A married woman, having power to deal with her separate estate, has also power to create debts to be paid out of it.—PRICE V. PLANTERS' NAT. BANK, Va., 23 S. E. Rep. 887.
- 75. MECHANICS' LIENS—Contractor's Bond.—The sureties on a bond to secure the performance of contract for the erection of a building for a county, which provided that the contractor should obtain a certificate to the effect that no mechanics' liens or other claims are chargeable to the county, are not liable for claims against the contractor for materials furnished for which the material men have no claim or lien against the county.—HUNT V. KING, IOWA, 66 N. W. Rep. 71.
- 76. MECHANIC'S LIEN—Non-completion of Contract.—Failure of contractors to complete a building according to contract will not prevent a lien from attaching in their favor for so much of the work as was actually performed according to the contract, where such failure to complete was due to an act of the owner.—JUSTICE V. ELWERT, Oreg., 43 Pac. Rep. 649.
- 77. MINING PARTNERSHIP—What Constitutes.—A contract providing that the one party should have a certain undivided interest in all ores extracted from certain mines, and should bear a proportionate share of the expense of extracting the same, the other parties to have remaining interest in the ore, and to bear the balance of the expense, and also that the first party should furnish a mill for concentrating the ore, the expense of concentrating and rental of the mill to be divided among the parties, renders them partners in the extraction of the ore.—ASHENFELTER V. WILLIAM, Colo., 43 Pac. Rep. 664.
- 78. MORTGAGE—Appointment of Receiver.—In an action to foreclose a mortgage, the insolvency of the mortgagor, the inadequacy of the security, and the failure to apply the rents of the mortgaged premises in keeping up the security, by paying delinquent taxes and interest past due on the prior mortgage, is a sufficient ground for the appointment of a receiver pendente litte to collect the rents and so apply them.—FARMERS' NAT. BANK OF OWATONNA V. BACKUS, Minn., 66 N. W. Rep. 5.
- 79. MORTGAGE—Lien—Record as Notice.—The constructive notice imported by the record of an instru-

- ment is strictly limited to that which is set forth on its face; and if, in a deed or mortgage as recorded, the particular land in controversy is not so described as to identify it with reasonable certainty, the record is not notice to subsequent bona fide purchasers or judgment creditors.—Bank of ADA v. Gullikson, Minn., 66 N. W. Rep. 181.
- 80. MORTGAGE Redemption.—Mortgage was foreclosed, decree of sale awarded, and land sold by virtue thereof, certificate of sale issued to purchaser. Purchaser, on expiration of time allowed for redemption, demands a deed. Sheriff refuses to execute deed on the ground that the legislature has extended the time for redemption: Held, that the act of the legislature extending time of redemption does not affect sales under foreclosure of mortgages, where the same were executed and recorded prior to the passage of the act. —WILDER V. CAMPBELL, Idaho, 48 Pac. Rep. 677.
- 81. MORTGAGES—Payment.—The purchaser of land subject to a mortgage, the payment of which his grantor had assumed, cannot, on purchase of the mortgage and note secured thereby, after maturity, to protect his equity, either by himself or through his assignee, compel the mortgagor to answer back as an obligor on the mortgage, as such purchase, as against the mortgagor, is a payment of the mortgage.—NORTEWESTERN NAT. BANK V. SLOAN, IOWA, 66 N. W. Rep. 91.
- 82. MUNICIPAL CORPORATIONS—Defective Streets.—Where a city assumes control and care of a walk, that the fee of the soil over which the walk is constructed is in another will not prevent the city from being liable for personal injuries caused by a defect in the walk.—Well v. Village of Mendon, Mich., 66 N. W. Rep. 58.
- 83. MUNICIPAL CORPORATION Eminent Domain Right to Take Depot Grounds.—Under Code, § 1270, authorizing cities and incorporated towns to take private property for streets, a town may extend a street across the depot grounds of a railway company, where such taking, though it interferes with, does not deprive the railroad company of, the right to operate its road.—CHICAGO, M. & St. P. RY. CO. V. STARKWEATHER, IOWA, 66 N. W. Rep. 87.
- 84. MUNICIPAL CORPORATIONS—Salary of Policeman.—A city ordinance provided for the appointment of officers in the police department, and fixed their salaries. Afterwards, by an amendment of the city charter, control of the police department was transferred to a board of police commissioners, but the power to fix salaries still remained in the city council: Held, that the provisions of the ordinance as to salaries remained in force and applied to officers appointed by the police commissioners.—RUELL V. CITY OF ALPENA, Mich., 66 N. W. Rep. 49.
- 85. MUNICIPAL CORPORATION—Surface Water—Damage Caused by Paving.—Surface water which, before a street was paved, was absorbed by it after the paving thereof, without any cesspools or other means to allow it to escape, flowed to the part of the street where the grade was lowest, and collecting overflowed the sidewalks and flooded a basement: Held, that the city was liable for the damage.—STANFORD V. CITY AND COUNTY OF SAM FRANCISCO, Cal., 48 Pac. Rep. 606.
- 86. NATIONAL BANKS—Dissolution—Appointment of Receiver.—The appointment of a receiver for an insolvent national bank, under Act Congress June 20, 1876, § 1, which authorizes the comptroller to appoint a receiver to close up the association and enforce the personal liability of its stockholders, does not dissolve the corporation so as to psevent the recovery of a judgment against it on a valid claim.—CHEMICAL NAT. BANK OF CHICAGO V. HARTFORD DEPOSIT CO., U. S. S. C., 16 S. C. Rep. 489.
- 87. NEGLIGENCE—Electric Companies—Injuries from Wires.—In an action against a telegraph company and electric street car company for death by a shock from a current conducted from the railroad's feed wires through a wild wire hanging from the telegraph company's poles, where there is evidence that the wild

wire had been hanging across the feed wire for at least two weeks, rubbing against the insulation, that such rubbing would render the insulation defective, and no evidence of any way by which the wild wire could be charged other than by the feed wire, it is proper to refuse to instruct, at request of either defendant, that no evidence has been produced to show that the death was caused by its negligence.—WESTERN UNION TEL. CO. OF BALTIMORE CITY V. STATE, Md., 33 Atl. Rep. 763.

- 88. NEGLIGENCE Fast Driving Violation of City Ordinance.—In an action for injuries due to fast driving, a city ordinance prohibiting fast driving is admissible to show negligence.—JOHNSON V. THOMAS, Cal., 43 Pac. Rep. 578.
- 89. NEGLIGENCE Independent Contractor. The owner of an old building, which had become dangerous by reason of decay, engaged an independent contractor to tear it down. The work was dangerous, and the contractor was incompetent personally to superintend the same, all of which the owner knew when he let the contract. By reason of the contractor's incompetency, his servant was injured while employed in the work: Held, the owner is not liable to the servant.—SCHIP v. PABST BREWING CO., Minn., 66 N. W. Rep. 3.
- 90. NEGOTIABLE INSTRUMENT—Note—Contribution.—An obligor in a note who pays a sum, in excess of his prorata share, to the obligee, in consideration of his full discharge, is entitled to contribution from each of his co-obligors, of their prorata share of the excess so paid.—MERCHANTS' NAT. BANK V. MCANULTY, Tex., 38 8. W. Rep. 963.
- 91. NEGOTIABLE INSTRUMENT Validity of Note—IllegallConsideration.—A note given in part in consideration of an agreement to refrain from bidding at a public sale of goods by a statutory assignee is invalid, except in the hands of an innocent purchaser.—ATLAS NAT. BANK V. HOLM, U. S. C. C. of App., 71 Fed. Rep. 499.
- 92. NEGOTIABLE INSTRUMENTS—Liability of Surety.— Where the principal maker of a note, payable to a person named or bearer, delivers it to another than the payee, it is void as to the surety.—BATTLE V. CUSH. MAR, Tex., 33 S. W. Rep. 1037.
- 33. NEW TRIAL—Power of Equity to Grant.—Where there has been a trial and judgment at law, and the right of appeal has been cut off by the death of the presiding judge before signing the bill of exceptions, if such judgment be unjust and oppressive a court of equity has power to grant relief against it by awarding the judgment defendant a new trial.—Kansas & A. V. Ry. Co. v. Fizzhugh, Ark., 33 S. W. Rep. 960.
- 94. Partition—Sale—Non-compliance with Bid.—An order in a partition suit that the property be resold, at the risk of the purchaser at the first sale who refused to comply with his bid, is binding on him, it being recited that he had notice and was represented by counsel. If such recital were untrue, he should have moved to vacate or modify the order, and, on refusal of his motion, have apppealed.—Hammowd, Jr., v. Cailleand, Cal., 43 Pac. Rep. 607.
- 36. PLEDGE—Conversion.—Where the pledgee sells the absolute property in the pledge to a bona fide purchaser, the purchaser is entitled to retain the pledge until the pledger discharges the debt for which it was pledged.—WILLIAMS V. ASHE, Cal., 48 Pac. Rep. 595.
- 96. Power of Attorney—Principal and Agent.—A power of attorney to act for the principal in all matters pertaining to the appointment of a receiver for a corporation, "and in all other matters connected with the affairs of said company in which I have an interest as a stockholder," does not authorize the attorney to sign his principal's name as surety on a bond to release the corporate property from attachment in a suit not commenced or contemplated at the time the power is given.—SMITH V. LYNCH, Colo., 43 Pac. Rep.

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- 97. PRINCIPAL AND AGENT Ratification of Agent's Contract.-Plaintiff wrote defendant that he had a contract for the sale of fruit, signed in defendant's name, "By W, Agent," and wanted to know if W was in fact defendant's agent, and if the contract was correct. Defendant's manager replied that W had bought some apricots "on our advice, but we are not aware he bought them in our name. We will handle them, however, and think there is no question on the money part of the transaction," adding that the writer would be in plaintiff's neighborhood shortly, and would arrange the matter. A few days later, and before plaintiff shipped the fruit to defendant, the manager visited plaintiff's locality, but made no effort to see him: Held, that defendant was estopped from repudiating the contract.-POPE V. J. K. ARMSBY Co., Cal., 48 Pac. Rep. 589.
- 98. Public Land—Homestead—Bona Fide Purchaser.
 —Where land so apparently divested of its homestead qualities is sold for a debt contracted prior to the issuance of the patent to the creditor who purchased in good faith, that the conveyance by the patentee was with intent to defraud his creditors subsequent to the issuance of the patent does not, as to the patentee or his grantees, affect such purchaser's title.—DE LANY V. KNAPP, Cal., 43 Pac. Rep. 598.
- 99. RAILROAD COMPANY—Right to Appropriate Railroad Property.—Under Code Civ. Proc. § 1240, providing that property appropriated for a public use shall not be taken unless for a more necessary public use than that to which it has already been appropriated, plaintiff railroad company had the right to appropriate part of a street which was purchased by defendant railroad company, subject to the right of the public for highway purposes, and on which it had laid its tracks; such appropriation being necessary for the constuction of plaintiff's road, but not materially curtailing defendant's right to operate its road.—Southern Pac. R. Co. v. Southern Cal. Ry. Co., Cal., 48 Pac. Rep. 602.
- 100. RAILROAD COMPANIES—Condemnation Service of Notice.—Under 3 How. Ann. St. § 3332, relating to service of notice in condemnation proceedings on a non-resident landowner, and providing that, if he has an agent within the State, service may be made on such agent, or upon him personally, out of or within the State, the notice may be served on him personally without the State, though he has an agent within the State.—SAGINAW, T. & H. R. Co. v. BORDNER, Mich., 66 N. W. Rep. 62.
- 101. RAILROAD COMPANIES—Deed for Pumping Station.—Where a deed conveys to a railroad company land on which to erect pumping stations temporarily until it can establish permanent ones, in consideration that the company fills a tank for the gravitor once a week, and provides that the land and privilege shall revert on default of the company to fill the tank, pump houses and machinery erected thereon are movable fixtures, which, on forfeiture of the land, belong to and may be removed by the company.—GUFF, C. & S. F. RY. CO. V. DUNMAN, Tex., 33 S. W. Rep. 1024.
- 102. RAILEOAD COMPANIES Injury to Persons on Track.—Where from 50 to 100 people, daily, for four or five years, use a railway track for foot travel, with the acquiescence of the railroad company, such acquiescence creates a right, which imposes on the company a duty of ordinary diligence to avoid injury to persons so using the track.—ROTH v. UNION DEPOT CO., Wash., 48 Pac. Rep. 641.
- 103. RECEIVERS—Appointment by Stipulation.—Code, \$2903, providing for the appointment of a receiver, under certain conditions, in foreclosure actions, during the pendency of the action, does not prevent the appointment of a receiver under stipulation of the parties during the period for redemption.—HUBBELL v. AVENUE INV. Co., Iowa, 66 N. W. Rep. 85.
- 104. RECEIVERS—For Property of Debtor.—A court of equity will not appoint a receiver for the property of a

debtor on the application of general creditors whose claims have not been reduced to judgment, and who have obtained no lien on such property.—CAHN v. JOHNSON, Tex., 38 S. W. Rep. 1000.

105. RECEIVERS — Interference with Possession.—A court of equity may enter a rule requiring one to show cause why he should not surrender to a receiver appointed by it certain real estate, and may on the hearing determine and enforce the rights of the receiver against the party accused of interference with his possession or management, unless the answer should set up some right or title of which a trial by jury is claimed.—Sullivan v. Colby, U. S. C. C. of App., 71 Fed. Rep. 460.

106. REFERENCE—Action on Contract.—Where a complaint for conversion does not allege lit its have been wrongful or unlawful, the action is on contract, and therefore referable.—CASGRAIN V. HAMILTON, Wis., 66 N. W. Rep. 118.

107. SALE — Delivery.—Where payment for property offered at public sale was to be made by approved paper, and it was some days thereafter before a bidder and the seller agreed as to an acceptable note, at which time the property was turned over to the buyer, delivery and payment were concurrent acts, and the property remained the 'seller's until actually surrendered.—CHALMERS V. MCAULEY, Vt., 33 Atl. Rep. 767.

108. SALES — Buying through Broker.—One buying through his broker, who examines, accepts, and agrees to the price to be paid for goods, is estopped, in an action for the price by the shipper, from claiming that the quality was not what he bargained for.—KILLOUGH v. CLEVELAND, Tex., 33 S. W. Rep. 1040.

109. SLANDER—Complaint.—A complaint for slander which fails to allege the particular defamatory words spoken is insufficient.—SCHUBERT v. RICHTER, Wis., 66 N. W. Rep. 107.

110. SPECIFIC PERFORMANCE — Contract — Statute of Frauds.—Plaintiff and the owner of certain real estate went together to a lawyer and had a contract prepared for the sale of it to plaintiff, but such contract was never signed by either party. Nearly a year afterwards the owner of the land died, making a will shortly before in which he expressed the desire that the land should be sold to the plaintiff, "according to an understanding between us:" Held, that the will did not refer to the unsigned agreement with such certainty as would authorize their being read together to make a contract, within the statute of frauds, which would be specifically enforced.—Darling v. Cumming, Va., 28 S. E. Rep. 880.

111. STATUTES—Repeal.—One act will not be construed as repealing by implication another act passed at the same session, unless they are irreconcilably repugnant.—CONGDON V. BUTTE CONSOLIDATED RY. Co., Mont., 43 Pac. Rep. 629.

112. TAX DEED—Cloud on Title — Pleading.—Where the statute makes a tax deed prima facie evidence of title, in an action to remove a cloud created by a tax deed an allegation in the complaint that the tax deed is regular on its face sufficiently shows its apparent validity.—DAY V. SCHNIDER, Oreg., 48 Pac. Rep. 650.

113. TAXATION—Merchant's Privilege Tax—Contract.—Code, §§ 3890, 3401, impose an annual privilege tax on merchants, and provide that "all contracts made with any person who shall violate the provisions of this chapter in reference to the business carried on in disregard thereof, shall be null and void so far only as any person shall base any claim on them:" Held, that a policy of insurance on the stock of goods of a merchant is a contract with reference to his business, within such statute.—American Fire Ins. Co. v. First Nat. Bank of Vicksburg, Miss., 18 South. Rep. 931.

114. TELEGRAPH COMPANY — Negligence—Damages.— Negligence of one, before sending a telegram, in delaying the taking of steps to provide water for his cattie, will not prevent recovery of the telegraph company for losses by its negligent delay in delivering the telegram, to the extent that such delay prevented him from saving losses to the cattle by obtaining water for them.—MITCHELL V. WESTERN UNION TEL. CO., Tex., 83 S. W. Rep. 1016.

115. TRIAL — Charge on Weight of Evidence.—An instruction that as a general rule the statements of a witness as to verbal admissions of a party should be received with caution, as that kind of evidence is subject to much imperfection and mistake, is erroneous, as a comment on the weight of evidence.—Knowles v. Nixon, Mont., 43 Pac. Rep. 628.

116. VENDOR AND PURCHASER—Adverse Possession.—Where a party, by his title bond, covenants to sell a tract of land with general warranty, describing it as containing a certain number of acres, and the wendee executes to him his bonds for the purchase money, one of which is assigned to a third party, and it is subsequently ascertained that there is a material deficiency in the quantity of the land, and it further appears that the vendor is insolvent, a court of equity will not require such vendee to complete his purchase by paying his said single bill, and to rely upon the hazard of recovering the money so paid from his insolvent vendor.—HEAVMER V. MORGAN, W. Va., 23 S. E. Rep. 874.

117. VENDOR AND PURCHASER — Contract of Sale.—Where a vendor waives the forfeiture of a contract of sale by extending the time of payment to the purchaser after maturity, such action does not vest title to the property in the purchaser, nor authorize a decree of specific performance, requiring its conveyance to him without payment being first made in full. The contract remains executory and binding on both parties.—Herman v. Gieseke, Tex., 33 S. W. Rep. 1006.

118. WATERS—Fishways—Duty to Maintain.—Persons erecting and maintaining dams for milling purposes, in the streams of this State, do so with the implied obligation to maintain adequate fishways for the passage of fish from the lower to the higher level of such streams and their tributaries.—WEST POINT WATER POWER & LAND IMP. CO. V. STATE, Neb., 66 N. W. Rep. 6.

119. WILLS—Construction—Estate Conveyed.—Under a will providing that "I will and bequeath to my wife my brick store building and the proceeds arising therefrom, and all the loose property, at her death it goes to her daughter, A," the wife takes only a life estate in the house.—RICE v. MOYER, Iowa, 66 N. W. Rep. 94.

120. WILLS — Construction — Limitation of Title.—A will, after dividing certain of the testator's real estate and other property between his children, specifically, provided that the residue of his estate, at the end of a year, should be equally divided between his children, and that "if either should die before the division, or without an heir, the estate of such an one to be equally divided amongst all my living children above mentioned:" Held, that the latter clause applied only to the residuary portion of the estate, and that under the former provisions, making specific devises and bequests, the children took a fee-simple estate in the realty devised, and an absolute title to the personalty bequeathed, at once on the death of the testator.—GASKINS v. HUNTON, Va., 23 S. E. Rep. 895.

121. WILLS — Testamentary Capacity.—One under guardianship for insanity is, prima facie, incapable of making a wiil.—In RE FENTON'S WILL, Iowa, 66 N. W. Rep. 99.

122. WITNESS — Facts Equally within Decedent's Knowledge.—In an action by an administrator on a note, plaintiff having introduced testimony that it was signed by defendant, in the presence of intestate, at a certain time and place, defendant, in support of his plea that he did not execute it, may testify that he never signed it, and that at the time mentioned he was at another place; this not being within the rule prohibiting a party from testifying to transactions with decedents, the facts testified to not being equally within the knowledge of deceased.—PILLARD v. DUBS, Mich., 66 N. W. Rep. 45.

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The question arose recently before the United States District Court of California, in Re Wong Kim Ark whether a person born within the United States, whose father and mother were both persons of Chinese descent, and subjects of the emperor of China, but at the time of the birth were both domiciled residents of the United States, is a citizen, within the meaning of that part of the fourteenth amendment of the constitution which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." On the part of those denying citizenship, under such circumstances, it was contended with much reasoning and plausibility that the doctrine of international law as to citizenship exists in the United States, and not that of the common law; that the citizenship clause of the fourteenth amendment is in consonance with the international rule, and should be so interpreted; and that, therefore, birth within the United States does not confer the right of citizenship. On the part of the United States it was maintained that the words "subject to the jurisdiction thereof," mean subject to the political jurisdiction of the United States; that is to say, that the petitioner in the case, though born within the United States, was not born subject to the political jurisdiction of the general government, for the reason that his father and mother were and are Chinese subjects, and that, according to the rule of international law, the political status of the child follows that of the father, and that of the mother when the child is illegitimate. It was urged, therefore, that the mere fact of birth in this country does not, ipso facto, confer any right of citizenship. The position contended for assumes, practically, that the provision of the fourteenth amendment under consideration intended to follow and adopt the rule of international law, citing in support thereof the remarks of Mr. Justice Story in Shanks v. Dupont, 3 Pet. 243, to the effect that "political rights do not stand upon the mere doctrines of munic-Vol. 42-No. 15.

ipal law, applicable to ordinary transactions. but stand upon the more general principle of the law of nations." It was contended further that the common-law doctrine does not govern the determination of the question of citizenship, for the reason that there is no com mon law proper of the United States; citing Wheaton v. Peters, 8 Pet. 658; Kendall v. U. S., 12 Pet. 524; Lorman v. Clarke, 2 Mc-Lean, 568; U. S. v. New Bedford Bridge, 1 Woodb. & M. 401, People v. Folsom, 5 Cal. 373; In re Barry, 42 Fed. Rep. 113. Finally it was maintained that the United States Supreme Court, in interpreting the first clause of the fourteenth amendment, now in question, in the Slaughterhouse Cases, 16 Wall. 36, adopted, to all intents and purposes, the rule of international law when it said, through Mr. Justice Miller, that "the phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." On the other hand, counsel for the petitioner contended that what the supreme court said in the Slaughterhouse Cases is but mere dictum, and that, outside of a few scattered observations of this character, that tribunal has never directly passed upon the question presented for decision in this matter, viz: whether a person born in this country of foreign parents is a citizen. The claim was also made on behalf of the petitioner that the question had been adjudicated, favorably to him, in two cases in that circuit, viz: In re Look Tin Sing, 10 Sawy. 358; Gee Fook Sing v. U. S., 49 Fed. Rep. 146. Attention [was also called to the case of Lynch v. Clarke, 1 Sand. Ch. 583, decided in 1844.

After an exhaustive consideration of the questions involved and the cases cited, the court held that the petitioner was a citizen of the United States within the meaning of the constitution. This conclusion was thought to be in accord with the cases above noted heretofore decided in that circuit and was not in substance opposed by the decision of the supreme court in the Slaughterhouse Cases.

Counsel for the United States in this case, argued with much force against the common-law rule and its recognition, as being illogical, and likely to lead to perplexing, and perhaps serious, in-

ternational conflicts. if followed in cases. But these observations are, obviously, as the court here says, addressed to the policy of the rule, and not to its interpretation. The doctrine of the law of nations, that the child follows the nationality of the parents, and that citizenship does not depend upen mere accidental place of birth, is undoubtedly more logical, reasonable, and satisfactory, but this consideration will not justify a court in declaring it to be the law against controlling judicial authority. It may be that the executive departments of the government are at liberty to follow this international rule in dealing with questions of citizenship which arise between this and other countries, but that fact does not establish the law for the courts in dealing with persons within our own territory.

NOTES OF RECENT DECISIONS.

FEDERAL OFFENSE-POSTAL LAWS-MAIL-ING OBSCENE MATTER.—The Supreme Court of the United States decide, in Rosen v. United States, that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him, entitles him to insist at the outset, by demurrer or by motion to quash, and after verdict by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; that this right is not infringed by the omission from the indictment of indecent and obscene matter alleged, which is not proper to be considered upon the records of the courts, provided the crime charged, however general the language used, is so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that in such case the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd and lascivious, which motion will be granted or refused, as the court, in the exercise of sound, legal discretion, may find necessary to the ends of justice. In this case, the indictment sufficiently informed the accused of the nature and cause of the accusation against him. The inquiry under the statute is, whether the paper charged to have been obscene, lewd, etc., was, in fact, of that character, and if it was of that character, and was deposited in the mail by one who knew, or had notice at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. The fact that the paper alleged to have been mailed was sent in response to a decoy letter, is no defense to an indictment for mailing such prohibited publications. It was competent for the court below in its discretion, and even if it had been inclined to regard the paper as obscene, lewd and lascivious, to submit to the jury the general question of the nature of the paper, accompanied by instructions indicating the principles or rules by which they should be guided in determining what was an obscene, lewd or lascivious paper within the contemplation of the statute, under which the indictment was framed.

CARRIERS OF PASSENGERS — FAILURE TO SUPPLY TRAIN — EXEMPLARY DAMAGES.—In Hansley v. Jamesville & W. R. R. Co., 23 S. E. Rep. 443, decided by the Supreme Court of North Carolina, it was held that exemplary damages will not be awarded against a railway company because, when by reason of a breaking down of a defective engine, it failed to carry a passenger to whom it had sold an excursion ticket back to his starting point, though the company's equipments were inadequate, as the passenger's action is ex contractu and not in tort, no personal injury or indignity being inflicted on him. Clark, J., dissented in a vigorous opinion.

CRIMINAL LAW—VOID JUDGMENT—COLLAT-ERAL ATTACK — EXCESSIVE SENTENCE.—The Supreme Court of Louisiana decide in State v. Klock, that if a judgment is void it may be assailed collaterally, but if the error is not of such a character as to render it absolutely void, the defendant cannot be relieved on the writ of habeas corpus. They say also that the prevailing rule is that a whole sentence is not illegal and void because of an excess, and that where the period of imprisonment is a separate portion of a sentence, complete in itself, the defendant is not entitled to discharge on habeas corpus. The court says:

The court, in the case of State of Louisiana v. Numa Dudoussat, entered judgment upon the verdict, condemning him to imprisonment in the State penitentiary, at hard labor for three years. On appeal to this court the sentence and judgment were affirmed. 17 South. Rep. 685. Under the statute the penalty is imprisonment at hard labor during a period of not less than one year and not more than five years, and a fine of not less than \$50 and not more than \$5,000. The complaint of the relator is that the error of the trial judge, in not having imposed a fine as part of the sentence, vitiates the proceedings of both the trial and and appellate courts, and makes them void ab initio. He prays for the writ of habeas corpus, that nullity be pronounced, and that he be released from custody.

Three propositions suggest themselves, for the purpose of the discussion, as covering the principles which concern us here: (1) That the whole sentence is not void because of an excess; that it is invalid only as to the excess. (2) That, if the sentence is below the minimum, it is not a good ground, in se, for releasing the prisoner on a habeas corpus. (3) That if the period of imprisonment is a separate portion of the sentence, complete in itself, and valid, the prisoner is not entitled to discharge on habeas corpus.

The first proposition is supported by the decision in U. S. v. Pridgeon, 153 U. S. 48, 63, 14 Sup. Ct. Rep. 746. In the cited case the defendant applied to be discharged from custody because the sentence imposed was beyond the power and jurisdiction of the court and therefore void. The imposition of the sentence was in excess of what the law permits, and, none the less, the court held that the sentence was legal, so far as the power of the court extended, and was only illegal as to the excess. The decision received the unanimous approval of all the members of that exalted tribunal; citing approvingly a number of its own decisions, as well as decisions of appellate courts of a number of States. In another case (In re Swan, 150 U. S. 637, 653, 14 Sup. Ct. Rep. 225), that court held, even if the court had exceeded its authority, yet the prisoner could not be discharged on habeas corpus until he had served the sentence it was within the power of the court to impose. The relator relies upon Ex parte Lange, 18 Wall. 168, to which our attention was directed. In that case it is announced that "the error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void." The punishment, under the statute, was imprisonment for not more than one year, or a fine of not less "than ten dollars, nor more than two hundred dollars." The judge sentenced Lange, under the conviction, to one year's imprisonment, and to pay \$200 fine. The defendant paid the fine, and filed a petition praying for a writ of habeas corpus. The judgment of the court had been rendered and carried into execution; yet an attempt was made (by the court on habeas corpus) to vacate the judgment, and render another for one year's imprisonment in compliance with the terms of the statute. The defendant had been punished. The supreme court applied the principle of law, on the application for habeas corpus, that no one can be twice punished for the same crime at the same time, and announced, in substance, that a defendant is not entitled to a discharge where a portion of the sentence is legal, but that the court cannot, even during the term, amend a sentence which has been executed in part without in-

vading the right of an accused not to be twice vexed or punished for the same offense. There is considerable distinction between a void judgment, apparent on an application for a writ of habeas corpus and those judgments which are void in a direct proceeding instituted for the purpose of vacating them, setting them aside, or reversing them. A void judgment is as nothing. Upon this subject, Mr. Justice Miller, speaking for the court, said: "An imprisonment under a judgment cannot be unlawful unless the judgment is an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." In re Coy, 127 U. S. 731-757, 8 Sup. Ct. Rep. 1268. Here the court had general jurisdiction of the subject. By the same court (In re Swan, 150 U. S. 637, 14 Sup. Ct. Rep. 225), it was stated, if the udgment was in excess, yet the defendant cannot be discharged on habeas corpus until he has served the sentence within the power of the court to impose. In re Graham, 188 U.S. 461-468. 11 Sup. Ct. Rep. 363, Justice Field said, in regard to a similar question, the defendant was condemned to serve in excess of the time presented; that the prisoner should not have been sentenced, as he was, for a time exceeding 10 years. "When the ten years have expired, it is probable the court will order the prissoner's discharge, but until then he has no right to ask the annulment of the entire judgment." In Ex parte Van Hagan, 25 Ohio St. 426, 432, the supreme court of that State held: "The punishment inflicted by the sentence in excess of that prescribed by the law in force was erroneous and voidable, but not absolutely void. The excess can be held void and disregarded." People v. Baker, 89 N. Y. 460. In California a defendant had been sentenced to serve three years. The law's limit was six months. He was discharged at the end of the six months on an application for habeas corpus. Ex parte Bulger, 60 Cal. 438. In Texas it was decided a prisoner held in custody under judicial proceedings not void cannot obtain relief by habeas corpus. Ex parte Boland, 11 Tex. App. 159. Our immediate predecessors, in State v. Brannon, 34 La. Ann. 942, held on appeal that the whole sentence is not illegal and void because of the excess, and amended the judgment by decreeing it invalid only as to the excess, and the remaining sentence was decreed valid.

The authorities to which we have referred heretofore relate to penalties above the maximum. The error in those cases, if not corrected, would be prejudicial. Here the question relates to a sentence below the minimum, and the error, if not corrected, would not be prejudicial. It is an error really in defendant's favor, and is not to be viewed in the same light as the former. In Barada v. State, 13 Mo. 94-96,—not on application for habeas corpus, but on writ of error,-the court did not annul the sentence, imposing a fine less than the minimum limit, on the ground that it was not an injury to the defendants or to their prejudice. In Tennessee, again, on appeal in error, the holding that a party cannot assign for error that which is for his own advantage applies as well to criminal as to civil proceedings. The complaint was that his term of confinement was less than the minimum of the statute; that, instead of two years, it should have been three years. The error, it was held, was only formal. Wattingham v. State, 5 Sneed, 64, 65. It will be observed that in these last cases, having bearing here, the question came up on writ of error. We express no opinion, as there is no necessity, in regard to the correctness or incorrectness of thus holding at such a period of the case. We only cite

them as authority in support of the position that a party, on application for habeas corpus, has nothing to complain of upon the ground of deficiency in the punishment imposed. This court sustained that view in State v. Evans, 23 La. Ann. 525, and held that a judgment will not be reversed on appeal, though the judge a quo assessed a smaller fine on the accused than he was authorized. The interpretation was in favor with Mr. Bishop, as we read his work on Criminal Law (volume 1, p. 931). Mr. Church, on Habeas Corpus, says: "Where the sentence can be so divided, the invalid part may be disregarded, and the prisoner ought not to be discharged in habeas corpus until he has served out the valid portion of the sentence." Paragraph 853. The right on appeal is not limited as it is on an application for a writ of habeas corpus. The same court, without inconsistency, may on appeal remand a case on the ground here, for further proceeding, and might decline to release a prisoner on application for a writ of habeas corpus. Of the many cases we have examined, we have not, as we read them, found an authority sustaining the application here made. In case of a writ of error to the district court of the United States, the circuit court held that any variation either in character or extent of the punishment avoids the judgment. Woodruff v. U. S., 58 Fed. Rep. 766-768. In habeas corpus proceedings, a distinction is observed. We quote from the first decision before cited, i. e., the Pridgeon Case: ' In other words, the sound rule is that a sentence is legal so far as it is within the provisions of the law, and the jurisdiction of the court over the person and the offense, and only avoid as to the excess, when such excess is separable, and may be dealt without disturbing the valid portion of the sentence. Many well-considered authorities in England, as well as in this country, hold that, where there is jurisdiction of the person and of the offense, the excess in the sentense of the court beyond the provisions of law is only voidable in proceeding upon writ of error." (The italics are ours.) The court, in that case, cites in support of the principle announced. Ex parte Lange, 18 Wall. 163; Sennott's Case, 146 Mass. 489-493, 16 N. E. Rep. 448; People v. Kelly, 97 N. Y. 212; People v. Liscomb, 60 N. Y. 559; People v. Jacobs, 66 N. Y. 8; Ex parte Shaw, 7 Ohio St. 81; Ex parte Van Hagan, 25 Ohio St. 426; In re Graham, 74 Wis. 450, 43 N. W. Rep. 148; Elsner v. Shrigley, 80 Iowa, 30, 45 N. W. Rep. 893; Ex parte Max, 44 Cal. 579.

BOOKS OF ACCOUNT AS EVIDENCE.

By provision of the common law, entries which had been made in the usual and ordinary course of business, by a person whose duty it was to make them, were admissible in evidence, for the reason that, having been made during the usual and ordinary routine of business transactions, they had become established as a part of the res gestæ. The principle involved has been generally respected in all of the United States, although special limitations and restrictions have been imposed and adopted in certain instances as matters of precaution and against undue ad-

vantage and fraud. It has very frequently become a serious question to determine what books answer the legal requirements of books of account. Every book which a person keeps containing a charge or memorandum, is by no means such a book of account, entitled to be admitted in evidence of the facts therein contained. For instance, it has been well and repeatedly held that a book of account cannot be used as a witness of money lent. In a very early case decided by the New York court of appeals, which has not been changed or modified by subsequent adjudication, it was held that the private entry of the party in his favor is not available to sustain a charge for cash lent, but only those entries which are made in the regular and usual course of business.1 The account offered in evidence showed a long list of items composed of charges for articles of merchandise, excepting two items specifying a cash loan. Clearly, then, loans had not been made in the usual and ordinary routine of business, as prescribed by the law; and the court properly held that the book containing the charges was not admissible in evidence. The same rule has been elsewhere followed. A payment or loaning of money must come within the ordinary business of the party who offers his books to prove them. Neither can small sums of cash be proved by this means.2 To entitle books of account to be properly admissible in evidence, it is necessary to show that there has been a delivery of all or of some part of the articles for which charge has been made, that the books are the account books of the party who makes the claim under them, and that they clearly exhibit honest and fair accounts, which fact must be evidenced by the testimony of persons who have had dealings and settlements with the party in whose favor the books are invoked. Provided these restrictions are observed, books of account may rise to the dignity of evidence and be allowed to speak in favor of the person who claims that his interests are established by them. The charges should be original entries contemporaneous, or as nearly so as is usual; prices should be stated and appear in the course of business, not on the last page of a book with blank

1 Low v. Payne, 4 N. Y. 247; Case v. Potter, 8 Johns. 211.

² Veiths v. Hagge, 8 Iowa, 163; Lyman v. Betchile, 55 Iowa, 437.



leaves intervening between it and other accounts, but dated at the same time as they.³ But the entry need not be made on the same day, and it has even been held that an entry made of two or three days' service at one time was proper and competent.⁴ This rule, however, is not unchallenged and in Missouri it has been lately held that in order to render an account book legitimate evidence, it must be proved that the entries therein were made at the times of the transactions to which they respectively refer.⁵

Where the plaintiffs had clerks, the books were not considered his general books of daily account, and where the charges were for something done under a supposed special contract, but which afterwards became a matter of account by operation of law in consequence of a rescission of the contract, check-rolls to show the number of days men employed by plaintiff had worked, were held inadmissible as books of account. Plaintiffs' books will not be excluded on the ground that no clerk was kept during the time of the dealings, where plaintiffs testified that during such time a regular clerk was not kept but sometimes persons were employed to help them for a short time, and other persons were also employed to assist temporarily in posting the books, and that all entries by others were made under plaintiffs' supervision in their presence and at their suggestion, although, they stated, that they could not say that they were always present when the charges in the books were made, or that they gave directions as to every charge. However, not every entry made even in the ordinary and usual course of business, is admissible as evidence. This exception is quite fully referred to in a late case in Arkansas, where the testimony showed that certain entries had been made in the usual business routine, but by an absent person whose place of residence was unknown. There being no proof that the maker of the entries could not be found, the court held that the books were inadmissible.8 It is also to be here observed that it has never been the policy of the courts to enlarge the operations

of the rule permitting the introduction of this class of evidence. Neither inference nor latitude is allowed to enable the party to prove by a book of account facts which should legally be shown by other, better and more satisfactory evidence. The rule admitting account books of a party in his own favor in any case was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity, which, to a greater or less extent, attends the manual transfer of tangible articles of property, on the rendition of services and the knowledge which third persons may have of the transactions to which the entries relate.9 It is not competent to show that a person is a stockholder in a corporation by offering in evidence entries in a cash book showing certain payments of assessments.10 Entries made in the books of a firm, showing the ownership of stock deposited with it upon which it had borrowed money made after its assignment for the benefit of creditors, are not competent in evidence as admissions against interest. In an action, by the administrator of the owner of the stock against the assignee and pledgee, to recover the balance of the proceeds of a sale thereof, after payment of the loan, the person who made the entries was alive and testified that he knew nothing about them except that they were copied by him directly, or called off to him from memoranda.11 The legal requirements for the admission of secondary evidence were not fulfilled. In an action by an administrator to enforce a mechanic's lien, defendant offered in evidence decedent's declarations that the debt had been paid. Plaintiff then produced decedent's account book containing an entry of payment of another account, which account plaintiff had alleged had been referred to by decedent in his declarations. The court held, that the entry was merely a declaration of the deceased, and that therefore, the books could not be properly admitted.12 A further condition imposed before

³ Wilson v. Wilson, 6 N. J. L. 95; Hagaman v. Case, 4 N. J. L. 370.

⁴ Bay v. Cook, 22 N. J. L. 343.

Martin v. Nicholas, 54 Mo. App. 594.

Merril v. I. R. Co., 16 Wend. (N. Y.) 587.

¹ Atwood v. Barney, 29 N. Y. S. 810.

St. Louis, I. M. & S. Ry. Co. v. Henderson (Ark.),
 W. Rep. 878.

⁹ Smith v. Rentz, 181 N. Y. 169.

¹⁰ Glenn v. Leggett, 47 Fed. Rep. 472.

¹¹ Powers v. Sarin, 28 Abb. N. C. 468.

¹² Bowers v. Overfield, 10 Pa. Co. Ct. R. 278.

books of account or written memoranda can be received in evidence, is, that it must affirmatively appear that the witnesses cannot speak from memory without the aid of the written statement. It is as an auxiliary to, and not as a substitute for, the oral testimony of the witnesses that the writing is admissible. It is the duty of the court, in all such cases, before receiving the memorandum in evidence, to insist that it appear that the writing was made not only at or about the time of the transaction to which it relates, or that its accuracy is duly certified by the oath of the witnesses, but also that there exists a necessity for its introduction on account of the inability of the witnesses to recollect the facts. 18 Therefore, where plaintiff testified that he had other means than the items set forth in his book of account to show that certain goods had been sold and delivered, and certain labor had been performed, the court on appeal held, that the necessary preliminaries had not been sufficiently observed to entitle the books to be received in evidence. Such evidence, at best, is merely secondary and is only admitted as a matter of necessity. Where a witness has distinct recollection of the essential facts to which the entries relate, the primary common law proof may be furnished. The necessity for the secondary evidence does not arise, and it is therefore, clearly incompetent.14 This qualified right to introduce such secondary evidence is the better rule in view of the opportunity, which, otherwise might exist to superadd a written memorandum to the evidence of a witness, which, it cannot be said, would not sometimes improperly be made available to strengthen the testimony with a court or jury.15 There may arise, however, a case where the only evidence to sustain the action or defense may exist in books not in the possession of the party and outside of the jurisdiction of the court. Hence, where the books of a distillery, which showed the quality of whisky made, were beyond the courts jurisdiction, and in charge of an internal revenue collector, who refuses to deliver them to the inspector, the government storekeeper who kept the books may testify concerning the quality of

13 Russell v. Railroad Co., 17 N. Y. 134-140.

the whisky made there by referring to a duplicate set of books kept at the distillery.16 In Pennsylvania it has been held, in a long list of authorities, that books of account are not competent to prove any collateral matter, as that a third party assumes to pay, or that a certain person was a partner in a house charged, or to prove an agency or delivery of goods under a special contract. While generally such evidence is not received to establish a collateral matter, yet there are pertinent exceptions in cases where the books formed the very best evidence.17 In New Hampshire, to show the character and extent of an injury to a wagon-wheel alleged to have been caused by a collision with the defendant's locomotive, plaintiff proved that several spokes had been broken as though by a blow, and that a person since deceased had repaired the wheel. The account book of the deceased person was offered in evidence. It showed a charge against the plaintiff for sixteen spokes, together with a stated price. The court held that the evidence was admissible to show that the injuries were caused by the collision. 18 But written memoranda of charges, made by a party making the claim were never conclusive. Hence, statements in books of account making charges against a particular person, are not conclusive that the credit was given to that person. There must be other and primary evidence to conclusively establish that fact. 19 Under these restrictions such evidence has generally been received in nearly all of the States. Still, there are some exceptions where the rule itself has either been challenged, or the evidence has been admitted not generally but in connection with other evidence for a specific and limited purpose. In Arkansas, original books of entry have been held inadmissible in a merchant's favor.20 Plaintiff's books of account in which he has charged the items on which he sues, are not competent evidence in Indiana.21 Likewise, entries in private books made in the usual and ordinary course of business have there been held

²⁰ Bun v. Byers, 10 Ark. 398.

¹⁴ The National Ulster Co. (Bank v. Madden, 114 N. Y. 280.

¹⁵ Mecham v. Pell, 51 Barb. 65; Driggs v. Smith, 4 J. & S. 283; Russell v. H. R. R. Co., 17 N. Y. 134.

<sup>Maxwell v. Hofheimer, 30 N. Y. Supp. 1090.
Murphy v. Ceress, 2 Whart. 298; Eskleman v.</sup> Hamish, 76 Pa. St. 97; Phillips v. Tapper, 2 Pa. St. 323; Fitler v. Eyre, 14 Pa. St. 892.

¹⁸ Lassone v. Boston & L. R. Co., 24 Atl. Rep. 902.

¹⁹ Fiske v. Allen, 40 Sup. Ct. N. Y. 76; Peck v. Van Kellar, 70 N. Y. 604.

²¹ De Camp v. Faudergrift, 4 Blackf. 272.

inadmissible, not being public records or res gestæ. 22 Unless there is a distinct issue of fraud or collusion between a merchant and his debtor, the merchant's books, in Louisiana, cannot be received in evidence, either in his favor or in favor of his creditors,28 and, in Missouri, books of original entry were first held inadmissible, although the rule there has since been modified.24 Likewise, in North Carolina, generally book entries of a party are inadmissible in his favor.25 It is conceded that the entries offered must be free from apparent alteration, interlineation or obliteration. If such defects exist, only the strongest testimony in explanation will be sufficient to secure the admission of the books. Entries of physician's calls, which were undecipherable and obscure, caused the rejection of the entire book.26 And the entire account has been held inadmissible where some entries were incompetent and undistinguishable from others. 27 Where a book produced showed many erasures and alterations, although explained, credit of the book was properly left to the jury.28 But, in many instances, owing to fraudulent appearances, such as material and gross alterations, false additions, or an apparent juggling of figures, the book of account will be inadmissible for any purpose.29 Usually. however, plaintiff may offer explanations on the sufficiency of which the question of competency will depend. 80 Anything upon or in which an account or memorandum can be intelligently kept may fairly be the subject of such evidence. Entries made on a slate, if transferred within a reasonable time, are original entries.81 In some instances the time specified in which such reasonable transfer should be made has been extended to two, three and sometimes four weeks, circumstances showing that there was no necessity for the transfer to be sooner made. Scraps of paper containing items of charges, or abbreviations conveying information to the

2 Pittsburg R. Co. v. Noll, 77 Ind. 110.

maker concerning charges, have been held to be subject to the same general rule.82 But, in Pennsylvania, accounts kept on scraps of paper must not contain various other memoranda.88 The items must be connected and made in the course of the usual and ordinary business routine. This principle has even been so far extended that a stick containing notches indicating charges, has been held to be a book for the purposes of evidence. And entries made upon a shingle or chalk scores drawn upon the side of a cart have been extended the same privileges.³⁴ In several of the States there are special statutes in reference to the admission of testimony of this character, and while there exist some differences, the general principle involved is substantially admitted. It will be fairly acknowledged in conclusion, that the courts have wisely hesitated to weaken or to extend the provisions of the rule for the admission of this class of secondary evidence, for it is apparent to every observer that more latitude would be more than likely to furnish an incentive for fraudulent schemes and practices, and to result in the grossest impositions upon the credulity of the court and jury.

Albany, N. Y. GEORGE LAWYER.

SALE—BREACH BY VENDOR — EXTRAORDI NARY PROFITS—DAMAGES.

111 Terson Bot.p.195

GUETZKOW BROS. CO. V. ANDREWS.

Supreme Court of Wisconsin, January 28, 1896.

- 1. Where goods as specially ordered by a vendee have no established market value, and the vendor, knowing that they were purchased by the vendee to enable him to fulfill his contracts with third persons, delivers goods not according to contract, whereby the vendee receives a less price than his contracts called for, the measure of damages is the difference between the price actually received, and a price which would yield him a reasonable profit, which would be the price such third person had contracted to pay, unless such price would yield an extraordinary profit, in which case it would control only if the vendor, when contracting, had knowledge of it.
- An order refusing to set aside a referee's findings of fact will not be reviewed, unless the findings were clearly against the preponderance of evidence.

MARSHALL, J.: This case was brought by plaintiff to recover \$1,978, alleged to be due from

² Porche v. Le Blanc, 12 La. Ann. 778.

Hinrich v. McPherson, 20 Mo. 210.

^{≈ 65} N. Car. 872.

^{*} Gorman's Est., W. N. C. Pa. 192.

Wenning v. Hacker, 2 Hill (S. Car.), 584.

Sergeant v. Pettibone, 1 Ark. St. 855.

Caldwell v. McDermitt, 17 Cal. 464.

^{*} Churchman v. Smith, 6 Whart. (Pa.) 146; Kline v. Gundman, 11 Pa. St. 249.

a Landis v. Turner, 14 Col. 578.

³² Hooper v. Taylor, 39 Me. 229.

⁸⁸ Hough v. Doyle, 4 Rawle (Pa.), 29.

Mendall v. Weld, 14 Me. 230; Davison v. Powell, 14 How. Pr. 467; Smith v. Sandford, 12 Pick. (Mass.) 139.

the defendants for show cases and other articles manufactured for them, which articles they had contracted to furnish exhibitors at the World's Fair. The answer of defendants contained a denial of liability, and set up as a defense that the articles were not constructed or furnished according to the contract, and were not reasonably worth the contract price, or as much as the payments that had been made. They counterclaimed for the amount of the overpayments, and also for damages, claiming as such damages the loss of profits they would have made if plaintiff had fully complied with the contract, and placing such damages at the difference between the price they agreed to pay plaintiff, and the amount they were to receive from the exhibitors; the advance being from 100 to 150 per cent. The case was tried by a referee, who found that the goods were all manufactured and furnished substantially in accordance with the contract, except in some small particulars, for which a rebate of the purchase price was allowed. The evidence shows that the goods were manufactured for a special purpose, that there was no market price for such goods, and that plaintiff knew, when it contracted with defendants, that they were under contract to furnish the goods to exhibitors at the World's Fair, and that the contract was made by them with plaintiff to enable them to carry out the contract previously made by them with such exhibitors. The findings of the referee were confirmed by the court, and judgment was entered in plaintiff's favor, from which this appeal was taken.

There is no controversy but that the findings of fact warrant the judgment that was entered, and it seems clear that, waiving the question of whether they are supported by the evidence, in respect to the determination that the contract between the parties was substantially complied with, appellants are not entitled to prevail on this appeal, unless the rule for which they contendthat is, that they are entitled to recover the loss of profits, amounting to from 100 to 150 per cent. -should have been adopted by the trial court. The evidence was taken on appellants' theory, but at the close of the trial was stricken out; the referee holding that the rule contended for would not be applied to the case. He said: "The decided weight of authority is in favor of the exclusion from consideration, on the question of damages, the profits the original contractor might have made under his contract; that such damages-possible profits-are uncertain, speculative, and too remote to affect the plaintiff, and the testimony in relation to the same should be excluded." Looking at this ruling in the light of the evidence and appellants' contention, we assume the court did not hold, or intend to hold, that lost profits are not recoverable in a proper case, but that the rule contended for by appellants could not be applied, and that the evidence did not tend to establish damages under any other rule. On this subject the learned counsel for appellant say: "We say, frankly, that if, in the

light of the facts of this case, the referee decided that proposition correctly, the judgment should be affirmed." So we may properly consider this subject at the outset in determining the case, and, in doing so, shall take into consideration the evidence that was stricken out. If, notwithstanding such evidence, the court could not, on the whole case, have allowed loss of profits as damages, then the error in striking out such evidence, if it was error, did not prejudice appellants; hence, does not constitute reversible error. There is no controversy but that the difference between the contract price for the goods to appellants and what they were to receive was unusually large. To say that such increased price to the exhibitors was extraordinary, in a superlative degree, would be fully justified. It also appears beyond controversy that respondent's officers knew, when the contract was made with appellants, that the goods were intended for a special purpose. They had reason to know that there was no established market price for such goods. They knew that defendants were under contract to furnish the goods to the exhibitors, but it does not appear that they had any notice of the contract price such exhibitors were to pay; and it is in the light of these facts that we must determine the question presented. As stated, in effect, by this court in Wright v. Mulvaney, 78 Wis. 89, 46 N. Y. 1045. it is sometimes difficult to determine when the rule of prospective profits should be applied, and when not, and such determination must be largely governed by the special circumstances in each particular case; and, as often said by this court, in terms or in effect, such profits are at best conjectural and uncertain, and, when allowed, are likely to, or necessarily do, operate unjustly and oppressively. Wright v. Mulvaney, supra; Milling Co. v. Howitt, 86 Wis. 270, 56 N. W. Rep. 784; Bierbach v. Rubber Co., 54 Wis. 208, 11 N. W. Rep. 514; Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214. Therefore, before the rule should be applied to any given case, such case should be brought clearly within the authorities on the subject, leaving no reasonable controversy in respect to it. To be sure, in this case, the element of uncertainty, as the term is commonly used, was in some respects not present, because the contract between the appellants and the exhibitors relieved it in a measure of that difficulty; but uncertainty still remained, quite prejudicial to respondent, in that it was not known to its officers. at the time of the making of the contract, that the price appellants were to obtain from the exhibitors would yield an extraordinary profit. Where there has been a previous sale, or where there has not, the fundamental principle to be observed is that the damages for the breach complained of must be confined to such as may be fairly considered to arise, according to the usual course of things, from such breach, or such as may reasonably be supposed to have been in contemplation of the parties at the time of making the contract as the probable result of the breach



of it. Hadley v. Baxendale, 9 Exch. 341; Cockburn v. Lumber Co., 54 Wis. 619, 12 N. W. Rep. 49. Hence, it is held that, in order to make applicable the special rule of damages,—that is, loss of profits,—it must be shown that the special circumstances, by reason of which the party invokes such application, were brought clearly home to the knowledge of both parties at the time the contract was made, and it is only applicable in so far as such circumstances were so brought home.

All rules for the assessment of damages for the breach of contracts are supposed to be founded upon principles of natural justice, the intention being to keep strictly within such principles. It is on that ground that the general rule established for the assessment of damages for the breach of an executory contract to sell and deliver property, i. e., the difference between the contract price and the market value at the time and place of the delivery, in order to work out natural justice in case of special circumstances, must necessarily be broadened out to fit such circumstances, but only when such special circumstances are shown to have been brought home to the knowledge of both parties at the making of the con-The leading case of Hadley v. Baxendale, supra, states the rule applicable to a case of this kind, and it has been repeatedly approved by this court. It is thus stated, in the language of Anderson, B.: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated; but, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great majority of cases, not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for a breach of contract by special terms as to the damages in that case." To the same effect are Borries v. Hutchinson, 18 C. B. (N. S.) 45; Messmore v. Lead Co., 40 N. Y. 422; Booth v. Mill Co., 60 N. Y. 487; McHose v. Fulmer, 73 Pa. St. 365; Poposkey v. Munkwitz, 68 Wis. 322,

32 N. W. Rep. 35; Cockburn v. Lumber Co., 54 Wis. 619, 12 N. W. Rep. 49, and substantially all the authorities on the subject; and if all were collated no more light could be thrown on the general principle involved.

But the question arises whether the price to the first vendee must be communicated to the second vendor in order that he may be charged with the special rule of damages at the suit of his vendee, in case of a breach on the part of such second vendor; and upon the precise point here presented the authorities are not numerous. In Cockburn y. Lumber Co., supra, Mr. Justice Lyon said: "To bind the defendant by a price stipulated for on a resale, he must have had notice of such resale when the contract was made, though, perhaps, not of the contract price." But it must be observed that, in the case then under consideration, the circumstance of extraordinary profits was not present; that is, the evidence did not disclose but that the profits were such as were reasonable, and might reasonably have been in contemplation by both parties to the transaction when the contract was made. The question has been many times considered in the courts of England, and may be said to have been long settled, that the second vendor is only bound by the terms of the contract with the second vendee, so far as communicated to him, or he had reasonable ground to know the same, by inference from facts brought to his knowledge. All of the cases refer to and are founded upon the general principle laid down in Hadley v. Baxendale, supra. In Borries v. Hutchinson these circumstances were present: There was a Russian contract between the plaintiff and a third person as his vendor. The fact of the contract was made known to defendant, but not its terms. He knew the goods were to be delivered in Russia, to be transferred there by rail. He was familiar with the fact that freight rates and insurance rates were higher there in winter than in summer. He agreed to deliver the goods in summer, but did not deliver till later, so that the winter rates of freight and insurance applied. It was held that he was bound to know, under the circumstances, at the time he made the contract, that the late delivery would necessitate a loss on the plaintiff, by reason of increased freight and insurance charges. Hence, he was charged with such loss, because so much of the contract was made known to him as charged him with knowledge that the loss, by increased freight and insurance rates, would naturally follow such late Plaintiff was lable to his Russian vendee for certain penalties for failure to deliver the goods at the time agreed upon; but defendant was not held liable for such penalties, because knowledge of the terms of the Russian contract in that regard was not brought home to him, nor facts that would reasonably have suggested that element of probable damages in case of a breach. To the same effect are Ellbinger Action-Gesellschafft v. Armstrong, L. R. 9 Q. B. 473; Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85. In this last

there was a contract between plaintiff and a third person, as his vendee, for goods of a particular kind, which contract was made known to him. The contract was the same as between plaintiff and defendant, except as to price. The latter contract was broken. There was no market price for the goods. There was no question but that the difference in price was no more than a reasonable profit. He was held liable for such profits as one of the natural consequences of the breach of so much of the contract as was made known to him. Brett, M. R., stated the rule thus: "It seems to me, according to what has been cited, that the original vendor in such a case is only liable, in case of a breach, for the natural consequences of so much of the subcontract as was made known to him. If he were told, for instance, that the contract was that, if I do not supply my purchaser with the goods which I ordered for him, my vendor, I shall have to pay my purchaser £4 a ton for every ton which I do not deliver; then if there be a breach of the contract, the original vendor would have to pay the £4 a ton. But, supposing there was the subcontract between myself and my purchaser, not only that I should pay £4 a ton, but besides that, I should be liable to a penalty of £5 a day; although this is a subcontract, yet if that part of it was not known to the original vendor, for that reason, and because it is not a natural consequence of his bargain, he would not be liable to pay the penalty of £5 a day. It seems to me that the case established that the original vendor is to be liable to so much of the subcontract as was made known to him, but only to that extent." To the same effect are the American authorities, all substantially adopting the rule of Hadley v. Baxendale. They are numerous, and is sufficient to refer to Poposkey v. Munkwitz, supra, and Cockburn v. Lumber Co., supra, in our own court. Difference may be found in the interpretations which courts have put on the rule of Hadley v. Baxendale; but they generally hold that the price in the first contract need not be communicated, as intimated in Cockburn v. Lumber Co., in this court. They proceed upon the principle, all of them, that knowledge of the first contract is sufficient to bring home to the second vendor, as an inference of fact, knowledge that the price in the first contract is sufficiently in advance of the price in the second contract to allow a reasonable profit to the second vendee. We venture to say that no case can be found, where the price was out of all proportion to anything that might be considered reasonable in order to give a fair profit, that the court has held that such unreasonable profits may be recovered as damages, where knowledge of such unreasonable profits, as a special circumstance, was not known to both parties at the time of the making of the contract. The most that is held in Booth v. Mill Co., 60 N. Y. 487, eited with confidence by appellants, is that the second vendor is bound by the price his vendee is to receive, unless it is shown that such price is extrav-

agant, or of an unusual or exceptional character. That is as far as the New York courts have gone. Church, C. J., said: "There is considerable reason for the position that, where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a previous contract. and he knows there is no market price for the article, he assumes the risk of being bound by the price named in such previous contract, whatever it may be." But no such rule was adopted, and no case was there cited to support such a rule, and we are unable to see wherein such reason exists. It could only be consistent with the theory that the law aims at complete compensation for all losses, including gains prevented as well as losses sustained, without the important condition, requisite to give the rule the basic foundation upon which all rules for the assessment of damages are supposed to rest, that of natural justice, which condition must always be considered in order that the true rule may be correctly stated. That is, that the damages must be such as can be fairly supposed to have entered into the contemplation of both parties.

Further discussion of the subject might be interesting, but is not necessary to a decision of this case; and the only excuse for extending it thus far is the fact that it does not appear that the precise question here presented has heretofore been decided by this court. We state the conclusion arrived at thus: When the vendor is informed that the purchase is made to enable the vendee to fulfill a contract which he has theretofore made with a third person, and such vender furnishes the goods, but not according to contract, and there is no market price for such goods, and the purchaser furnishes such goods to such third person, but is not able to recover of him the price stipulated in the contract with such third person, by reason of the breach of contract committed by such vendor, in determining the damages for such breach, such vendor is bound by the price his vendee was to receive from such third person, whether such price was communicated to him at the time of the making of the contract with his vendee, or not, unless the price was such as to yield an extraordinary and unusual profit, which could not reasonably have been presumed to have been in contemplation by him at the time he made his contract. In such a case he would not be bound beyond such sum as would yield a reasonable and fair profit to his vendee. Ordinarily, the price to the first vendee would, presumptively, be held to be a reasonable price; but if the facts in any given case are such as to show such price to yield an extravagant or extraordinary profit, the second vendor will not be bound by such price, in the absence of evidence of previous knowledge, as before stated; and, in order to assess the damages, the court must be put in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction. It follows from the foregoing that there was no

evidence before the referee by which he could have assessed in plaintiff's favor damages for loss of profits for the breach of the contract between it and the defendant, if there was a breach.

After a careful examination of the evidence, we are unable to conclude that the trial court erred in refusing to set aside the referee's findings of fact on the question of whether the contract was substantially complied with or not. Under repeated decisions of this court, to warrant setting aside findings of fact as against evidence, it must appear that they are against the clear preponderance of the evidence. Briggs v. Hiles, 87 Wis. 438, 58 N. W. Rep. 752; Bacon v. Bacon, 33 Wis. 147; Lord v. Devendorf, 54 Wis. 491, 11 N. W. Rep. 903; Messersmith v. Devendorf, 54 Wis. 498, 11 N. W. Rep. 906. Moreover, it is doubtful whether the bill of exceptions is sufficiently certified to enable the court to review the question of whether the evidence supports the findings or not. It follows, from the foregoing, that the judgment of the superior court should be affirmed. The judgment of the superior court is affirmed.

Note.—The principal case involves only a discussion of the liability for damages arising from a breach of contract, which is less extensive than that for a tort. The distinction between general and special damages, as developed in the leading English case of Hadley v. Baxendale, and sustained by the weight of American cases, is sharply maintained in this case. It is said, in that case, "that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable." "Damages arising out of the usual course, but from peculiar circumstances, are too remote, unless the special circumstances were known to the defendant at the time of the breach, in which case the damages, which are the natural result of the default, are held to have been in view of the parties to the contract, and are not too remote." In other words: General damages are such as the law implies or presumes to have occurred from the wrong complained of, and they need not be pleaded. Special damages are such as really took place, and are not implied by law. They are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act not actionable in itself, but injurious only in its consequences. The facts must be stated in the petition or complaint with a reasonable degree of particularity, and it must appear that the damage is the natural, though not necessary, consequence of the wrong. 1 Chit. Pl. (16th Am. ed.) pp. 411, 414; 2 Sedgw. on Dam. (7th ed.) 606n; 3 Sutherland on Dam. 426; Bliss on Code Pl. (2d ed.) § 297b; O'Leary v. Rowan, 31 Mo. 119; State to use v. Blackman, 51 Mo. 820; Brown v. Railroad, 99 Mo. 310. It is impossible to lay down any rule of damages for breach of contract that can be justly applied to all cases of any particular class. Each case, in a great measure, must be determined upon equitable principles resting upon the particular facts by which it is attended, the controlling principle being that one who suffers from the breach should be fully compensated for all lesses by him sustained. The many rules which have been applied in the various cases are simply aids to that end.

As a general rule, where there is an express contract, the contract itself will furnish the basis for estimating the damages for a breach of it, if they can be ascertained with sufficient certainty. In all contracts the profits the parties expect to realize from its performance is the inducement for making it, and they become a part and parcel of the contract itself, and are, in general, the measure of damages recoverable for a breach of the contract. In a certain class of contracts the contract price, when the contract is performed, is the measure of damages, but if the contract be terminated or performance prevented by the other party, so that no part of it is performed and no expense is incurred on account of it, all that can justly be demanded would be the loss of the profits which could have been realized, which would be ascertained by deducting what it would have cost to do the work from the contract price. If the contract price is less than the cost of doing the work, the contractor would make nothing by his contract, and cannot reasonably claim anything on account of its breach. Myers v. Railroad, 2 Curtis C. C. 28; Railroad v. Howard, 13 How. 844; Park v. Kichen, 1 Mo. App. 357; Friedlander v. Pugh, 43 Miss. 111; Polsley v. Anderson, 7 W. Va. 202; Doolittle v. McCullough, 12 Ohio St. 360; Atkinson v. Morse, 68 Mich. 276; Fitzgerald v. Hayward, 50 Mo. 517; 2 Sedg. on Dam. p. 522; 1 Sedg. on Dam. §§ 25-84; Masterton v. Mayor, 7 Hill, 68; Devlin v. Mayor, 63 N. Y. 24; Green v. Cole, 127 Mo. 587. But under some circumstances this rule would not give adequate compensation for the losses sustained from a breach of a contract. True, the damages must be such only as the parties may fairly be supposed to have contemplated when they made the contract, and which result naturally and proximately from the alleged breach. But there may be special circumstances, by reason of which peculiar or special or consequential damages may accrue from the breach of a contract to the obligee therein, and in such case the peculiar facts or situation must be known to the obligor, or be communicated to him at the time of making the contract, that he may be advised as to the probable effect of his conduct, in order to charge him with a liability for such special damages. To illustrate this rule, we may suppose that R is operating a mill in the City of S; that he bought in the City of St. Louis a large quantity of mill machinery, essential for the running of a flour mill, and directed it to be shipped to him by rail; the machinery was delivered to the carrier in St. Louis properly addressed to him at S, and by the ordinary course of business said articles would have reached their destination in eight days; that the carrier negligently billed the goods to A, a point far distant from S, and by reason of this mistake the goods were not delivered to R until thirty days after shipment. R sued the carrier and claimed damages for the rental value of the mill while it was lying idle, the average profit of grinding wheat while it was so idle, pay of miller during the delay, and to other employees during said time, upon the ground that the machinery so shipped was for immediate use, and was essential for the running of the mill, and he was deprived of the use of the mill during said time at a heavy expense, etc. The plaintiff was not allowed to recover these special damages because there was no evidence that the carrier defendant had notice at or prior to the date of the shipment that the articles were essential to the running of the mill, and that such peculiar damages would ensue from the delay, and therefore such damages could not be regarded as fairly within the contemplation of the parties to the contract. Hadley v. Baxendale, 9 Exch. 341; Abeles v. Tel. Co., 37 Mo. App. 554, 556; Connoble v. Clark, 38 Mo. App. 478, 482; Rogan v. Railroad, 51 Mo. App. 665. Or suppose H and

distinct of the strains.

B are both contractors and builders of railroads, and they enter into a contract by which H agrees to grade for B five miles of railroad at ten cents per yard, and that the work would be ready for Hat a specified time, and that H moves his men, wagons, teams and implements to the place the work was to be done, and was ready to commence according to contract; that B neglected to get the work ready for H at any time, and in that respect violated his contract. H sued B for a breach of the contract, and claimed special damages on the ground that defendant kept plaintiff's whole outfit there in idleness for thirty days at great expense and cost to plaintiff, such as the wages of teams and of employees, personal expenses, etc. The profits which the plaintiff could have made on the contract, in the circumstances of this case, would not give the full measure of plaintiff's damages. If, at the end of the thirty days' delay, he could have gone to work and completed the contract he would have received the profits, but he would have lost by the delay whatever be could have earned on that contract during the time he was kept idle, and to that extent the damages, by way of profits, would have fallen short of full compensation.

Hence, the law is, that when the contractor has incurred expenses, in preparation for the performance of the contract, he is entitled to recover, not only the loss of profits, but also the necessary damages resulting to him from such expenses, if caused by the default of his employer. 1 Sedg. on Dam. 457, note; Darkee v. Mott, 8 Barb. 423; Allphin v. Working, 24 N. E. Rep. 54; Williams v. Oliphant, 3 Ind. 272; Pond v. Harris, 113 Mass. 114; Moore v. Mountcastle, 72 Mo. 606; Hammond v. Beeson, 112 Mo. 190. Such damages are reasonably within the contemplation of the parties who are familiar with the nature of the work

and the situation of the parties.

Building and Other Contracts.-When there is a breach of an agreement by a contractor to erect a building within a stipulated time, the value of the use of the building, while the owner is delayed in its occupancy by the fault of the contractor, is recoverable as lamages. Ruff v. Rinaldo, 55 N. Y. 664; Dengler v. Auer, 55 Mo. App. 548. And where the builder contracts with the knowledge that the building is designed for a particular purpose, he will be liable for the actual rental value of the building to the owner as adapted to its particular use, and not merely for its rental value for general business purposes. Clifford v. Richardson, 18 Vt. 620; Snell v. Cottingham, 72 Ill. 161; Cochran v. The People's Ry. Co., 113 Mo. 359. So where the action is to recover damages for an injury to personal property which is in actual use, the damages is the difference in the value of the thing immediately before and after the injury, and a reasonable sum for the loss of the use of the article for such time as would be reasonably necessary to repair or replace the same. Hoffman v. Metropolitan St. Ry. Co., 51 Mo. App. 273. But where plaintiff's homestead was mortgaged, and by reason of the levy on the corn growing thereon, he could not use it to raise money to pay the mortgage, which was foreclosed and he lost his homestead, the measure of damages was the value of the corn and not the value of the homestead. The loss of the homestead is too far removed from the real cause, which was the non payment of the debt. State v. Springer, 45 Mo. App. 252. So, where a tenant agreed to pay the taxes as a part of the rental, and neglected to do so, and the property was sold for taxes and the landlord lost the title, the proper measure of damages was held to be the amount of the taxes unpaid with interest thereon, and not the loss

of the land which is too remote a consequence of defendant's act to constitute an element of damages in such case. Fountaine v. Schulenburg & Boeckler Lumber Co., 109 Mo. 55. But where money is furnished to an agent to pay taxes and the agent fails to pay them, or where one agrees to discharge an incumbrance and fails by reason of which the land is lost, the measure of damages may be the money furnished, with interest, or the value of the land, according to circumstances. If the landowner is informed of his agentle failure to pay the taxes, his damages will be the money furnished with interest, but if be has no such knowledge and the land is lost, the agent will be liable for the value of the land. Blood v. Wilkins, 43 Iowa, 565; Chinn v. Wagoner, 26 Mo. App. 678. The party prevented from performing his contract is entitled to recover the contract price for the work actually performed; and, as to the residue, in the absence of other damages, the difference between the agreed price and what it would cost to complete performance of the contract. Gabriel v. Aikinsville Press Brick Co., 57 Mo. App. 520. In an action by A to recover damages for a breach of the warranty of a jack purchased for breeding purposes, it was claimed that if the jack had been as represented his earnings would have amounted to a large sum. It was held that the profits sought to be recovered were contingent, uncertain and speculative, and could not be allowed. Connoble v. Clark, 38 Mo. App. 476; Calaway Mining, etc., Co. v. Clark, 32 Mo. 305.

As between Vendor and Vendee.-In an action by a vendor against a vendee for refusal to receive the goods sold, the measure of damages is the difference between the contract and its market price at or within a reasonable time after the date of delivery. Anderson v. Frank, 45 Mo. App. 482; Vanstone v. Hopkins, 49 Mo. App. 386; Cobb v. Whitsett, 51 Mo. App. 146. The vendor may resell at the time and place or within a reasonable time, and the price received will be taken as the market value. Rickey v. Tenbroeck, 63 Mo. 564; Northrup v. Cook, 89 Mo. 208. But if there is no market for the article at the place of delivery, the market price at the nearest and most available market would determine the measure of damages, less the expense of transportation to such place. Ibid. Where goods have been manufactured for a special purpose, on the buyer's order, the seller may tender the goods and sue for the entire contract price. Gordon v. Norris, 49 N. H. 383; Ballantine v. Robinson, 46 Pa. St. 177; Goddard v. Binney, 115 Mass. 450; Shawhan v. Van Nest, 25 Ohio St. 490. So if goods have been procured for the buyer, and are of a kind not salable in market, the seller may tender them, and sue for the price. Allen v. Jarvis, 20 Conn. 38; Thorndike v. Locke, 98 Mass. 340; Bookwalter v. Clark, 11 Biss. (U. S.) 126; Canada v. Wick, 100 N. Y. 127; Biack River Lum. Co. v. Warner, 93 Mo. 374. A thing may have a market value, and yet not so general and certain a value as to be a true guide in all cases. Black River Lumber Co. v. Warner, 93 Mo. 374. Where the subject matter of a contract is a specific article to be manufactured by the vendor, for the vendee, and the vendor has completed his contract and performed all that the contract requires bim to do, it is but just and fair that his damages, in case of a refusal of the vendee to accept the article, should be the contract price. Having tendered the property, he will of course hold it for the vendee, and subject to his order. 3 Pars. Cont. (5 ed.) 209; Field on Dam., sec. 299; Sedg. on Dam. (6 ed.) 337; Shawhan v. Van Nest, 25 Ohio St. 490; Ballentine v. Robinson, 46 Pa. St. 177; Smith v.

Wheeler, 7 Oregon, 49. If the defendant refuses to accept or receive the property manufactured for him under his contract, this will dispense with a tender. A tender under such circumstances, might be a costly, as well as an idle ceremony, which the law does not require. Johnson v. Powell, 9 Ind. 556; Deichman v. Deichman, 49 Mo. 107; West Lake v. St. Louis, 77 Mo. 49: Canada v. Wick, 100 N. Y. 127. But when the contract is not performed by the fault of the defendant, the measure of damages would be the difference between the contract price and the cost of manufacturing the article and freight to place of delivery. Hinckley v. Pittsburg Street Car Co., 121 U. S. 272; Railroad v. Howard, 13 How. (U. S.) 307. The object of the law is to put the party in the same condition that he would have been, if the contract had been performed so that the contract price, and not the market value, less the cost of producing the article is the true measure of damages in some cases. Hale v. Trout, 35 Cal. 229; Railroad v. Shirley, 45 Tex. 355; Eckenrode v. Chemical Co., 55 Md. 51; Masterton v. Mayor, 42 Am. Dec. 38, and notes.

Buyer against Seller.-In general, if the vendor fails to deliver the goods according to contract, the measure of damages is the difference between the contract price and the market price, at the place where and the time when they should have been delivered. If there is no market at the place of delivery, the nearest and most suitable market at which they can be had with the cost of transportation, may be looked to, to ascertain the value of the goods. Capon v. De Steiger Glass Co., 105 Ill. 185. But if they cannot be purchased for want of a market, their value must be estimated in some other way. If there has been a contract to resell them, the price at which the contract was made will be evidence of their value. If the buyer has a contract for resale at a higher price his damages will not be increased thereby, unless the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill the contract in which case the profits may be said to have entered into the contemplation of the parties in making the contract. Carpenter v. First Nat. Bank, 119 Ill. 354; Wetmore v. Pattison, 45 Mich. 439. If a vendor knows that his vendee has a contract to resell he will be liable for the loss of the profit on such resale if he fails to deliver the article. 5 Am. & Eng. Ency. of Law, p. 15, and notes. If the vendor does not know the price for which the vendee has contracted the article, but does know that it is purchased for the purpose of filling a contract of sale already made it may be supposed that he knew that a reasonable profit would be made by the purchaser, and in that case he would be liable at least for a reasonable advance in the price, such as is realized in the sale of property of that kind in the usual course of trade. The principal case, with authorities cited, amply sustains this proposition.

St. Joseph, Mo. H. S. KELLEY.

CORRESPONDENCE.

HOLDER OF NOTE FOR PRE-EXISTING DEBT IN MINNESOTA.

To the Editor of the Central Law Journal:

Judge Conaway's "summary of the holdings of the different courts on the subject of whether one who takes negotiable paper as collateral security for a pre-existing debt is a bona fide holder for value," contained in Vol. 42, No. 9, of the CENTRAL LAW JOURAL, is incorrect as to the holding of the Supreme Court of Minnesota. It is included among the courts

which hold that such a person "is not a holder for value cutting off undisclosed equities," citing Becker v. Bank, 1 Minn. 311. No such question was involved in that case, as will be found upon examination, although after deciding the case in favor of the respondent, Sherburne, J., indulges in some obiter remarks criticising the opinion of Judge Story in Swift v. Tyson, 16 Peters, 1, and indicating that his opinion or impression was the other way. But the very first time the question arose the supreme court of this State, after a full review of the authorities on both sides squarely held that an endorsee of negotiable paper before maturity and in good faith as collateral security for an antecedent debt takes it free from any defenses or equities existing in favor of the maker against the payee. See Rosemond v. Graham, 54 Minn. 323. LEX.

INTEREST OF INFANT IN PARTNERSHIP PROPERTY.

To the Editor of the Central Law Journal:

If the real estate mentioned in P. A's communication published in the last number of your JOURNAL on page 291, belonged to A and B in equal parts, as partners, and it was not required to make assets to satisfy the partnership debts, why did not the interest of the deceased partner (if he died intestate) descend to his widow and infant child, and if this is so, and the child's interest has not been legally closed out, why can she not obtain her right in a partition proceeding against the present claimant? W. H. B.

BOOKS RECEIVED.

Digest of Insurance Cases, Embracing all Decisions of the United States Supreme, Appellate and Circuit Courts, and of the Appellate Courts of the Various States and Foreign Countries, in any Manner Affecting Insurance Companies, Upon Whatever Plan their Business May be Conducted, also References to Annotations and to Leading Articles on Insurance in Law Journals. Vol. VIII. For the year ending October 31, 1895. By John A. Finch, of the Indianapolis Bar: Indianapolis and Kansas City: The Bowen-Merrill Company. 1896.

A Treatise on Pleading, Practice, Procedure and Precedents, in Actions at Law and Suits in Equity Together With the Law and Forms Relating to Jurisdiction, Summons and the Service Thereof Change of Venue, Preparation for Trial, Continuance and How to Obtain it, Trial of Issues of Facts by a Jury, Trials by the Court Without a Jury, Attachment and Garnishment, Certiorari, Creditors' Bills, Proceedings in Aid of Execution, Divorce and Alimony, Entitling Pleadings, Motions, Etc., Process, Forcible Entry and Detainer, Foreclosure of Mortgages in Equity, Foreclosure of Mechanics' Liens, Foreclosure of Vendors' Liens, Foreclosure of Chattel Mortgages and Pledges, Habeas Corpus, Hearing in Courts of Equity, Hearing in Equity Cases Under the Code System and Modern Statutes, Injunctions, Interpleader, Intervention, Mandamus, Prohibition, Quo Warranto, Receivers, Referees, Removal of Causes, Replevin, Record and Complete Record, Revivor of Actions, Security for Costs, Proceedings in the Trial Court to Vacate or Modify its Own Judgments, Bill of Exceptions, Transcript, Review of Causes on Appeal, Review of Causes by Proceedings in Error. By Samuel Maxwell, for Twenty-one Years One of the Judges of the Supreme Court of Nebraska. Sixth Edition. Revised and Enlarged. Lincoln, Neb.: Journal Company, Law Publishers. 1896.

WEEKLY DIGEST

of ALL two Current Opinions of ALL the State and Territorial Couris of Last Resert, and of the Supreme, Circuit and District Couris of the United States, except those that are Published in Equi or Commented upon in our Notes of Recent Decisions.

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- 1. ACTION—Abatement.—Where a former action is pending at the time of the institution of a second action, the dismissal of the former action before the interposition of a plea in abatement in the new suit removes the cause of abatement.—COALDALE BRICK & TILE CO. V. SOUTHERN CONST. CO. OF KENTUCKY, Ala., 19 South. Rep. 45.
- 2. ADMINISTRATOR—Failure to Invest Funds—Interest.—An administrator having funds of the estate, which he used in his private business without attempting to invest them for the benefit of the estate, though he could have realized a profit thereon greater than 6 per cent., was properly charged with interest at 6 per cent. on the average amount while it was in his hands, though the will, in providing that no distribution should be made until the youngest legatee attained majority, did not direct that the funds should be invested, and though the administrator's report showed that the moneys were not invested, it did not show that he was using them for his own profit.—In RE YOUNG'S ESTATE, Iowa, 66 N. W. Rep. 163.
- 8. ADMIRALTY—Limitation of Liability.—A court of admiralty, in which is pending a proceeding for the limitation of the liability of a shipowner, under Rev. St. § 4282 et seq., may enjoin the prosecution of suits in State courts against such shipowner; and the prohibition in Rev. St. § 720, does not apply to such injunctions.—In RE WHITELAW, U. S. D. C. (Cal.), 71 Fed. Rep. 783.
- 4. ADMIRALTY—Maritime Liens.—A State statute giving a lien for master's wages (Code Ala. § 3064), will not be enforced by a federal court in favor of a master who is also a part owner, or where the services were not rendered upon the credit of the vessel.—The Lena Mowbray, U. S. D. C. (Ala.), 71 Fed. Rep. 720.
- 5. APPEAL BOND—Signing by Sureties Only.—An appeal bond not signed by the appellant, though binding on the sureties signing it, does not bind him.—SUPREME

COUNCIL OF CATHOLIC BENEVOLENT LEGION V. BOYLE, Ind., 42 N. E. Rep. 827.

- 6. Assignment for Benefit of Creditors.—A transfer by a debtor of all his accounts and choses in action to a creditor, to secure payment of an indebtedness, any surplus remaining after the debt is paid to go to the debtor, and the execution of chattel mortgages by such debtor to secure other indebtedness to the same creditor, do not constitute a voluntary assignment for the benefit of creditors, though their effect be to give the particular creditor a preference.—Brown-Chapin Lumber Co. v. Umion Nat. Bank of Chicago, Ill., 42 N. E. Rep. 967.
- 7. ASSIGNMENT OF ACCOUNTS—Indorsement in Writing.—In an action by an assignee of an account indorsed in writing, it appeared that the contract out of which it arose was an oral one for the sale of goods, and the assignor had not been made a defendant. Rev. St. 1894, § 277 (Rev. St. 1881, § 276), provides that, when an action is brought by the assignee of "a claim arising out of contract, and not assigned by indorsement in writing," the assignor shall be made a defendant, and § 7515 (§ 5501, Rev. St. 1881), makes notes and other contracts signed by any person who promises to pay money or to do any particular thing, negotiable: Held, that the statutes contemplate the assignment only of contracts which have been reduced to writing, and that therefore the assignor was a necessary party.—Stewart v. Fralich, Ind., 42 N. E. Rep. 951.
- 8. ATTACHMENT-Right to Open and Close.—Under Sand. & H. Dig. §§ 2927, 2928, 8820, providing that the party on whom rests the burden of proof shall open and close, and that the burden of proof lies on the party who would be defeated if no evidence were given, plaintiff in attachment, as against intervener, has the right to open and close where he admits the possession of and sale to intervener by defendant prior to the attachment.—MANSUR-TIBBETTS IMP. CO. v. DAVIS, Ark., 83 S. W. Rep. 1074.
- 9. ATTACHMENT Wrongful Attachment.—Instructions as to wrongful attachment need not state that if plaintiff knew when suing out the attachment that the grounds alleged therefor were false, he would be chargeable with malice in suing out the writ; there being no evidence that he had such knowledge.—HAMILTON V. THOEN, IOWA, 66 N. W. Bep. 166.
- 10. BAIL—Invalidity of Bond.—Under Cr. Code, §§ 51, 66, authorizing a magistrate to examine charges and commit to jail or hold to ball the person charged with its commission, a magistrate cannot hold to ball a person not charged with an offense, and who has had no trial.—Commonwealth v. Thompson, Ky., 33 S. W. Rep. 1103.
- 11. Banks and Banking—Deposit.—On an issue as to whether a bank purchased or received for deposit from a vendor a draft, with bill of lading attached, drawn on the vendee for the price, statements by the vendor, when delivering the draft, as to releasing the lumber without receiving payment, are, as part of the res gestæ, relevant.—Bank of Guntersville v. Webb, Ala., 19 South. Rep. 14.
- 12. Banks and Banking—Discounting.—Where money, is loaned by a bank at a usurious rate of interest, and notes taken for the amount of the principal and interest, payable at a future day, the transaction is not a discounting, within the meaning of Code, § 4140, prohibiting the discounting of any note at a greater rate of interest than 8 per cent.—Planters' & Merchants' Bank v. Goetter, Ala., 19 South. Rep. 54.
- 18. BILL OF EXCEPTIONS—Refusal of Judge to Sign.—A party who presents to the judge a proper bill of exceptions, within the time allowed, cannot be deprived of his rights thereunder by the failure or refusal of the judge to sign the same, providing the party takes the proper measures to secure his rights thereunder.—SMITH V. STATE, Ind., 42 N. E. Rep. 913.

- 14. BUILDING AND LOAN ASSOCIATIONS—Foreign Corporation.—Where a foreign building and loan corporation fails to comply with statutory provisions requiring certain statements to be filed with the auditor, it may lend money in the State, and sue to foreclose a mortgage securing the loan, but its recovery will be restricted to principal and interest thereon, and taxes paid to protect its lien; and bonus, premiums and other dues allowed under its by-laws, cannot be collected.—MAINE GUARANTEE CO. v. COX, Ind., 42 N. E. Rep. 915.
- 15. CARRIER—Damages for Non-shipment of Freight.—Damages cannot be recovered from a common carrier on account of the non-shipment of certain freight because of the failure of the defendant to provide facilities, without proof that the freight in question was offered for shipment.—LITTLE ROCK & FT. S. RY. Co. V. CONATSER, Ark., 38 S. W. Rep. 1057.
- 16. CARRIERS—Interstate Commerce Act—Indictment.
 —Under section 2 of the interstate commerce act, which
 makes it unlawful for carriers to receive greater or
 less compensation from one shipper than from another
 for whom the carrier renders like service, an indictment which states that a carrier gave a rebate to one
 shipper without stating any instance in which the carrier refused a like rebate to any other shipper is defective, as not showing discrimination.—UNITED
 STATES V. HANLEY, U. S. D. C. (Ill.), 71 Fed. Rep. 672.
- 17. CARRIERS—Passenger.—One who enters a passenger car of a railway company in a train which is made up for its usual run, and when the cars are prepared for the reception of passengers (though not drawn up to the station platform), intending to ride in such car to another station, and having the money with which to pay his fare to the conductor, which he may legally do, and intends to do, is a passenger.—Missouri, K. & T. Ry. Co. OF Texas v. Simmons, Tex., 38 S. W. Rep. 1095.
- 18. CARRIERS Passenger Negligence.—The questions whether the place was a proper one to eject a passenger, having reasonable regard for his safety, how drunk deceased was, and whether the conductor knew of his condition, are for the jury.—LOUISVILLE & N. E. CO. V. JOHNSON, Ala., 19 South. Rep. 51.
- 19. CARRIERS OF PASSENGERS—Connecting Lines.—A carrier contracting for passage over its own and a connecting line, having agreed to reserve a stateroom on such connecting line, is liable in compensatory damages to the purchaser of a through ticket who was unable to secure his stateroom by reason of the fact that more tickets were sold than there were staterooms reserved.—Bussman v. Western Transit Co., U. S. D. C. (N. Y.), 71 Fed. Rep. 864.
- 20. CHATTEL MORTGAGES—Foreclosure.—In a suit to foreclose a chattel mortgage, which purports on its face to have been executed by defendant mortgagor, "of Marion county," where there are several defendants, a paragraph of a complaint which alleges that plaintiff had such mortgage recorded in "Carroll county," where "defendant" lived, fails to allege that it was recorded where "mortgagor" lived.—STENGEL v. BOYCE, Ind., 42 N. E. Rep. 305.
- 21. Constitution—Amendment—Removal of Seat of Government.—Const. 1875, art. 4, § 56, prohibits the general assembly from removing the seat of government from Jefferson City. Article 15, §§ 1, 2, provide that the general assembly may propose such amendments to the constitution as a majority of each house "shall deem expedient:" Held, that the courts have no power to enjoin the submission to the people of an amendment providing for a change of the seat of government to Sedalia on the ground that, besides a provision for submission to the people as required by Const. art. 15, § 2, it contained conditions that some person or persons should grant land for the new site, or deposit with the governor sufficient securities to guaranty the erection of the buildings; that such person should be paid from bonds to be issued by the

- county of Pettis and the township of Sedalia, therein; and that the buildings were to be subject to the approval of a commission.—EDWARDS V. LESUBUR, Mo., 83 S. W. Rep. 1180.
- 22. Constitutional Law—Assessment for Street Improvements.—The enforcement of a local assessment for improvements to a street, where the person from whom the tax is exacted has had no opportunity to appear and contest the assessment before it is finally determined upon, and a lien fixed on his property, is the taking of the property without due process of law; and a statute authorizing such procedure, without requiring notice and opportunity to be heard to be given the property owner, is in conflict with the fourteenth amendment to the federal constitution.—VIOLETT'S HEIRS V. CITY COUNCIL OF ALEXANDRIA, Va., 28 S. E. Rep. 909.
- 28. CONSTITUTIONAL LAW—Coal Mining—Weighing.—Act March 2, 1891, requires coal mined under contracts providing for payment by specified quantity to be weighed before being screened, and the full weight credited to the miner, provided that the payment for impurities loaded with or among the coal shall not thereby be compelled; and section 7 provides the penalty: Held, that a conviction for failure to weigh before screening was improper where the evidence for the prosecution showed that the coal mined was of such a nature that it was impossible to weigh the coal before screening, and credit the miner with the weight, without giving him credit for impurities among the coal.—MARTIN V. STATE, Ind., 42 N. E. Rep. 911.
- 24. Constitutional Law-Interstate Commerce-License to Sell Goods.—Act 1889-90, p. 217, § 82, requiring the payment of a license by peddlers, but providing that a manufacturer within this State who has been assessed and paid up on the capital employed by him may peddle articles manufactured by him, is unconstitutional, as a discrimination against the products and citizens of other States.—Commonwealth v. Myer, Va., 28 S. E. Rep. 915.
- 25. CONTRACT—Reformation—Parol.—Reformation of an instrument leasing property with privilege to purchase during the term at a certain price, and open only to the construction that rent should not apply on purchase price, cannot be reformed to allow such application; the parties knowing that the words which would permit it were omitted, and consent of the lessee to their omission having been given on the parol assurance of the lessor that it should make no difference.—Braun v. Wisconsin Rendering Co., Wis., 66 N. W. Rep. 196.
- 26. CONTRACTS-Restraint of Trade.-Plaintiff's declaration alleged that he was engaged in conducting a coal and fish business at a dock on a navigable river, and was the owner of adjoining land, with riparian rights, suitable for carrying on a similar business; that he sold such land and riparian rights to defendant, and defendant in consideration of such sale agreed not to buy or sell coal or traffic in the buying or selling of fish, and not to do anything that would conflict with the coal or fish business of plaintiff; yet that defendant, since the execution of such agreement, had leased the premises purchased from plaintiff to a firm of coal merchants, for the purpose of carrying on a coal and fish business, in competition with that of plaintiff, to his damage: Held, that it could not be adjudged that the contract, as alleged, was contrary to public policy, as being in restraint of trade, and that, upon such declaration, it appeared that the plaintiff had a good cause of action.—Anthony v. Hitchcock, U. S. C. C. (Mich.), 71 Fed. Rep. 659.
- 27. CORPORATIONS—Charters.—When a corporation is chartered with the right to manufacture and sell gas, the right to charge a reasonable rate for all gas furnished is implied, and forms a part of its contract with the State, which cannot be impaired by legislation.—CLEVELAND GASLIGHT & COKE CO. V. CITY OF CLEVELAND, U. S. C. C. (Ohio), 71 Fed. Rep. 610.

- 28. CORPORATION Gaming Nuisance.—A corporation cannot be indicted for keeping a tenement for gaming, unless it is shown that the gaming amounted to a nuisance, within Rev. 8t. 1894, § 1970 (Rev. St. 1881, § 1897), allowing a corporation to be prosecuted for "erecting, continuing or maintaining a public nuisance." STATE V. SULLIVAN COUNTY AGRICULTURAL SOC., Ind., 42 N. E. Rep. 963.
- 29. CORPORATIONS—National Banks.—Banks created under the national banking act of the United States are not within 8t. § 571, providing that "all corporations, except foreign insurance companies, formed under the laws of this or any other State," shall at all times have a place of business in the State, and that no corporation shall carry on any business in the State, till it shall have filed a statement giving the location of its office and the name of its agent.—First NAT. BANK OF OWENSBORD V. COMMONWEALTH, Ky., 38 S. W. Rep. 1106.
- 30. CORPORATION—Receiver.—After a party has recovered judgment against a corporation, as such, and obtained the appointment of a receiver therefor, he cannot in the same suit deny its corporate entity and seek to hold the stockholders thereof liable as partners.—First Nat. Bank of Crawfordsville v. Dovetall Body & Gear Co., Ind., 42 N. E. Rep. 924.
- 31. CORPORATIONS Stockholders.—One who holds stock as collateral may sue directors of a corporation for misappropriation of its property, where it appears that his security has been impaired thereby.—GREEN V. HEDENBERG, Ill., 42 N. E. Rep. 851.
- 82. COURTS—Plea to Jurisdiction.—An allegation in the complaint that a sufficiently large amount is involved will give the circuit court jurisdiction of the action, prima_facie, and its jurisdiction cannot afterwards be attacked on the ground that the constitutional amount is not involved, except by a special plea to the jurisdiction, or a charge in the answer that such allegation was made in bad faith.—NEALE V. SMITH, Ark., 88 S. W. Rep. 1058.
- 33. COVENANTS—By whom Enforceable.—The owner of land platted it into lots of various sizes, the plat showing no intention on his part to impose any restrictions whatever on purchasers in reference to the use of their respective lots. No deed by the owner to any lot contained any covenant on his part that in the sale of the other lots restrictions would be imposed on the purchasers. In the sale of lots different restrictions were imposed, and in the sale of some no restrictions at all were imposed: Held, that a purchaser of one lot could not enforce the restrictions imposed on the purchaser of another lot.—CLARE v. McGEE, Ill., 42 N. E. Rep. 965.
- 84. CRIMINAL EVIDENCE Homicide.—Testimony of physicians who attended deceased soon after he was shot, as to an experiment made by them to determine the relative positions of deceased and accused at the time the fatal shot was fired, is not rendered inadmissible because the experiment was made in the absence of and without notice to accused.—MOORE v. STATE, Tenn., St S. W. Rep. 1046.
- 85. CRIMINAL LAW-Appeal.—A conviction of burglary, based on circumstantial evidence, which excluded all reasonable hypotheses except that of defendant's guilt, will not be disturbed.—BARRETT v. STATE, Tex., 38 S. W. Rep. 1085.
- 36. CRIMINAL LAW—Carrying Weapons.—A conviction for carrying a pistol on the person cannot be sustained where the only proof that defendant was off his own premises was testimony of a declaration made by defendant himself, and which only showed by inference that he had been away.—OLIVER v. STATE, Tex., 33 S. W. Rep. 1077.
- 87. CRIMINAL LAW-Embezzlement.—Under Rev. St. 1889, § 5550, providing for the punishment of any officer embezzling any evidence of debts belonging to his corporation "negotiable by delivery only," a conviction cannot be had for converting to his own use, be-

- fore issuance by the corporation, a note of the corporation payable to his order.—STATE V. STEBBINS, Mo., 88 S. W. Rep. 1147.
- 88. CRIMINAL LAW Fraudulent Voting.—An indictment under Rev. St. 1889, § 8746 (making it an offense either to "vote more than once" or to "knowingly cast more than one ballot" at the same election), charging that defendant, after once legally voting, subsequently, under another name, fraudulently and feloniously applied for, received, and handed in another ballot, with the intent that it should be placed in the ballot box, and did then and there fraudulently and feloniously procure the ballot to be marked, numbered, and put into the ballot box as a lawful and legal ballot, is insufficient, since it charges neither offense.—State v. MILLER, Mo., 33 S. W. Rep. 1149.
- 89. CRIMINAL LAW—Homicide.—An instruction that where one intentionally kills another with a deadly weapon the law presumes that it was maliciously done, and with formed design to take life, unless the evidence which proves the killing shows the excuse, is not erroneous.—MILLER V. STATE, Ala., 19 South. Rep. 87.
- 40. CRIMINAL LAW-Homicide Resisting Arrest.—Defendant cannot justify killing an officer who attempted to arrest him by showing that deceased failed to inform him of the warrant, or of the Intent to arrest.—APPLETON v. STATE, Ark., 38 S. W. Rep. 1066.
- 41. CRIMINAL LAW—Incest Indictment.—An indictment for incest, under section 22, ch. 149, Code, 1891, is not bad because it does not state that the man charged knew the relationship of the woman to him.—STATE v. PENNINGTON, W. Va., 23 S. E. Rep. 918.
- 42. CRIMINAL LAW—Indictment Exception in Statute.—An indictment charging a sale of liquor in Bell county, under a statute making its sale in that county an offense is not defective because it does not charge that such sale was made outside the corporata limits of Middiesborough, which, by a subsequent statute, was authorized to license the sale of liquor.—HOWARD V. COMMONWEALTH, Ky., 38 S. W. Rep. 1115.
- 43. CRIMINAL LAW—New Trial Disqualification of Juror.—In a criminal case, it appeared that a juror, some eight years before the trial, had been confined in an insane asylum, and discharged as improved; that, after the jury was sworn, both the prosecuting attorney and judge advised defendant's attorney that such juror had at one time been considered a "little off," etc., and that defendant made no objection to the juror. On a motion for a new trial, defendant showed that he had no notice of the specific facts relating to the inquest, the confinement, and the discharge of such juror. On appeal, the record contained no evidence of the examination of the juror as to his qualification: Held, that the record disclosed no available error in the refusal of a new trial.—Douthitt v. State, Ind., 42 N. E. Rep. 907.
- 44. ORIMINAL LAW—Oral Instructions.—Under Practice Act, § 52, declaring that no judge shall instruct the jury, in any case, unless the instructions are in writing, it is reversible error for the court, in a murder case, after giving a written charge in which nothing was said as to the nature or extent of the punishment, to orally instruct the jury that, should they find defendant guilty, they must fix the penalty, which "may be death, or it may be imprisonment in the penitentary for any period not less than fourteen years," etc.—Ellis v. Prople, Ill., 42 N. E. Rep. 873.
- 45. CRIMINAL LAW—Perjury.—Where, in a prosecution, there is a total failure of proof warranting a conviction of the accused, a witness falsely denying having testified to certain facts before the grand jury, when questioned for the purpose of impeaching his testimony, cannot be convicted of perjury, such denial being immaterial.—LEAK v. STATE, Ark., 33 S. W. Eep. 1067
- 46. CRIMINAL PRACTICE Indictment—Description of Offense—Plural Used.—Under Burns' Rev. St. 1894, § 2089 (Rev. St. 1881, § 2002), making it a criminal offense

for a man to associate "with females known or reputed as prostitutes," an indictment which charges a defendant with associating with one female known and reputed as a prostitute is sufficient.—JESSOP V. STATE, Ind., 42 N. E. Rep. 950.

47. DEED—Delivery in Escrow.—Delivery of a deed to the grantee, though purporting to be in escrow, is an absolute delivery thereof.—BAKER v. BAKER, Ill., 42 N. E. Rep. 867.

48. DEED — Description.—A deed conveying the land south of a "railway cut" conveys only the land south of the upper and outer edge of the cut.—NEWION v. LOUISVILLE & N. R. CO., Ala., 19 South. Rep. 19.

49. DOWER-Assignment before Admeasurement.—A consummate right of dower, although still unmeasured, is assignable; and, under the Code, the assignee may maintain an action in his own name for its admeasurement.—DOBBERSTEIN V. MURPHY, Minn., 66 N. W. Rep. 204.

50. EQUITY PRACTICE-Ancillary Receiverships.-Receivers of a Missouri corporation were, appointed by the circuit court for the southern district of New York, at the suit of a New York corporation. The same persons were appointed ancillary receivers by the circuit court in Missouri, where the principal part of the business of the corporation had been transacted; the order for their appointment containing a direction to appoint an agent in Missouri to receive service of process, notices, etc., with which the receivers complied. Subsequently, a creditor residing in Missouri applied to the circuit court there to determine the existence and amount of a claim against the insolvent corporation, arising out of transactions which took place in Missouri: Held that, although the New York court was the court of primary jurisdiction, and was the proper tribunal to pass upon the distribution of the fund in the receiver's hands, the Missouri court would not dismiss the creditor's application, but would entertain it, at least so far as to determine the existence and amount of his claim, without requiring him to resort to a foreign jurisdiction to prove the same.—NEW YORK SECURITY & TRUST CO. v. EQUITABLE MORTGAGE Co., U. S. O. C. (Mo.), 71 Fed. Rep. 556.

51. EVIDENCE—Action against Surviving Husband on Wife's Note.—In an action against a surviving husband, on his wife's note, it is proper to admit, in evidence, the verbal promise of the husband, made after her death, to pay the note to be followed by further evidence that he has appropriated her estate without administration.—LEIPIRD v. STOTLER, IOWA, 66 N. W. Rep. 150.

52. FEDERAL COURTS — Depositions Taken in State Court.—Depositions taken to be used in an action in a state court, which has been discontinued, cannot be used in an action afterwards brought in a federal court between the same parties for the same cause of action, although the State practice allows depositions taken in a pending suit to be used in a renewed suit between the same parties for the same cause.—SEELEY V. KANSAS CITY STAR CO., U. S. C. C. (MO.), 71 Fed. Rep. 554.

53. FRAUDS, STATUTE OF — Contract Relating to Land.—An action at law for recovery of rent under a written lease cannot be defended by showing part performance of a subsequent verbal lease, which would, in equity, take the case out of the statute of frauds.—

LEAVITT V. STERN, Ill., 42 N. E. Rep. 869.

54. FRAUDULENT CONVEYANCES — Consideration.—
Where a conveyance is partly voluntary, courts will, in favor of creditors, often set it aside, so far as it is without consideration, but let it stand as security for the consideration actually paid. But although, in this case, the contract between the father and son was more favorable to the latter than the former would have made with a stranger, the facts do not make a case for the application of this rule of partial interference, especially as there was no gross disparity between the value of the land conveyed and the value of the services rendered.—LEQVE V. STOPPEL, Minn., 66 N. W.

55. FRAUDULERT CONVEYANCES — Insolvent Debtors.
—An insolvent debtor may, by sale made in good faith, devote his entire property to the payment of one creditor, to the exclusion of the others.—GOETTER v. NORMAN, Ala., 19 South. Rep. 56.

56. FRAUDULENT CONVEYANCES—Marriage as a Consideration.—Marriage is a valuable consideration, sufficient to sustain a conveyance made with intent on the part of the grantor to defraud his creditors, unless knowledge on the part of the grantee of such fraudulent intent is alleged and proven.—STATE v. OSBORNE, Ind., 42 N. E. Rep. 921.

57. FRAUDULENT CONVEYANCES—Valuable Consideration—Burden of Proof.—In a suit to set aside a conveyance as in fraud of creditors, the burden of proving a valuable consideration is on the grantee, who may show the payment of money to the grantor, payment of his debts to third persons, or the discharge of equitable liabilities.—MILLER V. ROWAN, Ala., 19 South. Rep. 9.

58. GUARANTY — Construction of Contract.—A guaranty that a firm shall pay a corporation for all coal it may thereafter sell to such firm applies to sales of coal thereafter made to such firm through the receiver of the corporation, since the appointment of a receiver for property Ly a court of chancery does not transfer title to the property.—PHILADELPHIA&R. COAL & IROM CO. V. DAUBE U. S. C. C. (III.), 71 Fed. Rep. 588.

59. HOMESTEAD — Mortgage—Building and Loan Association.—As Const. art. 16, § 50, declares that no mortgage on the homestead shall be valid, except for the purchase money therefor or improvements made thereon, a mortgage thereon to secure a loan is invalid, even though part of the money loaned was used in improving the property, and part was used to take up an outstanding vendor's lien note held by the mortgagee.—Building & Loan Ass'n of Dakota v. Logan, Tex., 33 S. W. Rep. 1088.

60. HOMESTEAD — Selection.—Where one claiming a homestead exemption from a town lot so selects it as to almost surround the portion of the lot remaining, and shuts it off from any opening on a public street, to the great loss of creditors, and without any corresponding benefit to himself, such selection will be set aside as capricious and arbitrary.—SPARKS V. DAY, Ark., 38 S. W. Rep. 1078.

61. INJUNCTION—Surface Water — Drainage.—Injunction will lie to restrain the wrongful maintenance of a drain, whereby an unusual amount of surface water is cast on plaintiff's premises, though defendant is fully responsible financially.—Holmes v. Calhoun County, Iowa, 66 N. W. Rep. 145.

62. INSURANCE—Actions on Policy.—Where a policy taken out by the insured on his life, and payable to the wife, contains a provision that he may change the beneficiary therein at will, his admission in regard to a forfeiture of the policy for non-payment of premiums is admissible in evidence|sgainst the wife, in an action thereon by her.—Fidelity Mut. Life Ass'n v. Winn, Tenn., 33 S. W. Rep. 1945.

63. Insurance — Appraisers.—Where a policy of fire insurance provides that, in case of loss and a failure of parties to agree on the amount thereof, appraisers shall be chosen, the insurer cannot demand an appraisal, and at the same time deny its liability under the policy.—Hickerson v. German-American Ins. Co., Tenn., 38 S. W. Rep. 1041.

64. INSURANCE — Conditions—Mortgage.—A policy on personalty conditioned that it should be void if "the subject of insurance" be incumbered by a chattel mortgage was not avoided by a chattel mortgage on one of the articles covered by the policy.—North British & MERCANTILE INS. Co. v. FREEMAN, Tex., 33 S. W. Rep. 1091.

65. INSURANCE — Condition as to Additional Insurance.—A policy providing that it should be void if the insured had or should thereafter procure "any other insurance, whether valid or not," was avoided by afterwards procuring another policy, which, by

reason of a similar clause therein, was void, and never attached.—Wilson v. Ætna Ins. Co., Tex., 58 S. W. Rep. 1085.

- 66. INSURANCE—Conditions of Policy—Other Insurance.—Where a fire insurance policy provides that it shall be void if the assured contracts other insurance on the property without consent in writing indorsed on the policy by the company, and the assured procures additional insurance without such indorsement, the policy is void.—O'LEARY V. MERCHANTS' & BANKERS' MUT. INS. CO., IOWA, 66 N. W. Rep. 175.
- 67. INTOXICATING LIQUORS—Local Option Law.—An indictment for violating the local option law should allege that an order for election was duly made and published; that an election adopting the provisions of said law was held, in accordance with the laws of the State, within the district where the alleged offense was committed, and that the result was declared by the commissioners' court.—STEWART V. STATE, Tex., 38 S. W. Red. 1081.
- 68. JUDGMENTS-Collateral Attack.-When a collateral attack is made on the validity of judicial proceedings, the question whether the court whose order or judgment is attacked could, under any state of facts, have had jurisdiction, is always open to examination; but if it appears that such court had jurisdiction over the general subject-matter, and the question is whether it had the right to proceed in the particular case brought before it, such right being dependent upon the existence of certain facts, the court, by proceeding, adjudges that it has jurisdiction in the particular case, and thereby adjudges the existence of the necessary facts; and this adjudication, being within its power to make, is, when made, binding upon all parties, unless reversed in a proper and direct proceedlng, and is not open to collateral attack.—GRAFF v. Louis, U. S. C. C. (Neb.), 71 Fed. Rep. 591.
- 69. LIBEL-Privilege-Pleadings.—In a suit by an agent against his principal for an accounting and recovery for services rendered, an allegation in the answer that plaintiff embezzled from defendant is privileged.—ASH V. ZWIETISCH, Ill., 42 N. E. Rep. 884.
- 70. LIFE INSURANCE—Construction of Policy.—An application for life insurance stated that the death of assured by his own hand was a risk not assumed by the company, and the policy declared that a claim thereunder by death occurring two or more years after its date would be "incontestable, except for fraud" in procuring it: Held, that the company was liable in case of death by suicide occurring after two years from the date of the policy.—Goodwin v. Provident Sav. Life Assur. Soc. of New York, Iowa, 66 N. W. Rep. 157.
- 71. LIFE INSURANCE Forfeiture—Waiver.—Though the insured had been notified that the premium on his policy was due on a certain date, or within 10 days thereafter, a circular, issued by the insurance company and sent by one of its agent to the insured, reciting the liberality of the company in extending the time in which to pay premiums—30 days on tontine policies and 10 days on all others—is admissible to prove waiver of a condition providing that the policy should become void if the premium was not paid when due, the insured being justified in believing that his policy, designated by the company as a "limited tontine," was in fact a "tontine"—UNITED STATES LIFE INS. Co. v. Ross, Iil., 42 N. E. Rep. 859.
- 72. LIFE INSURANCE—Semi-tontine Policy—Bill for Accounting.—The relation between the holder of a matured semi-tontine policy and the insurance company is that of debtor and creditor merely, and involves no trust relation; and a policy holder who is dissatisfied with the amount of the surplus which is apportioned to him by the company, pursuant to the terms of the policy, cannot maintain a bill for accounting and discovery when there are no sufficient allegations of fraud.—Everson v. Equitable Life Assur. Soc. of the United States, U. S. C. C. of App., 71 Fed. Rep. 570.

- 78. LIMITATIONS OF ACTIONS—Running of Statute.— Limitations begin to run against an action to recover a balance alleged to be due from property turned over to defendant to secure him from liability as accommodation indorser for plaintiff, from the time plaintiff is aware that defendant claims to have accounted in full therefor, and it is barred in five years, under Code, § 2529, subd. 4.—WOLF V. WOLF, Iowa, 66 N. W. Rep. 170.
- 74. MASTER AND SERVANT—Defective Car Coupling—Negligence.—In an action for personal injuries, it appeared that plaintiff was required to uncouple defendant's train, and that, owing to a defective drawbar, his hand was mangled; that the conductor in charge, as well as the one who turned the train over to him, knew of the defective car, but that plaintiff did not; that the car was apparently sound, and that the defect was not discernible by ordinary observation: Held, that plaintiff was not chargeable with negligence.—LOUIS-VILLE & N. R. CO. V. REAGAN, Tenn., 35 S. W. Rep. 1050.
- 75. MASTER AND SERVANT-Injury-Contributory Negligence.-In an action to recover damages for the death of plaintiff's intestate, it appeared that decedent was 22 years old, and had been in defendant's employ for six months as brakeman on a freight train; that near Columbia City defendant maintained a water plug so near its track that a person descending a passing car on that side could not avoid it: that decedent was familiar with its location, and had passed it almost daily during his employment; that it was a part of his duty to go to the top of his train while passing through a station; that after having passed through Columbia City he walked to the rear of a car, with his back to the plug, while within 200 feet of it, and without looking around to ascertain the attendant danger began to descend the car ladder, and was carried against the plug; that he had no orders to descend at that particular time, but attempted to do so of his own volition: Held, that decedent was chargeable with negligence .- PENNSYLVANIA CO. V. FINNEY, Ind., 42 N. E. Rep. 816.
- 76. MASTER AND SERVANT—Unsafe Piace—Defects.—In an action by a servant for injuries due to the falling of the roof of a coal mine where he was working, evidence of the condition of the roof for a year prior to the injury, when connected with evidence of the existence of the same condition until the injury, was admissible to show notice.—ISLAND COAL CO. V. NEAL, Ind., 42 N. E. Rep. 963.
- 77. MORTGAGES—Foreclosure—Notice of Sale.—That the notice of a foreclosure sale, under decree of court, failed to name as defendants persons made parties defendant after the commencement of the suit, the decree itself only naming the original parties, and requiring that they be named in the notice, does not invalidate the sale.—FIELD v. BROKAW, Ill., 42 N. E. Rep. 877.
- 78. MORTGAGES—Foreclosure—Sale.—The rule as to sale of mortgaged premises under foreclosure, in the inverse order of alienation by the mortgagor, will not be strictly applied where it would work injustice to any of the parties in interest.—PHILADELPHIA MORTGAGE & TRUST CO. V. NEEDHAM, U. S. C. C. (Neb.), 71 Fed. Rep. 597.
- 79. MORTGAGE—Foreclosure Decree—Collateral Attack.—The validity of a decree of foreclosure cannot be collaterally attacked by showing that the affidavit upon which service by publication was made was defective in that it did not allege that "upon diligent inquiry" the mortgagor's "place of residence could not be ascertained," where the decree recites that the mortgagor had due notice of the suit, by publication, and that upon due inquiry his place of residence was unknown.—Reedy v. Campield, Ill., 42 N. E. Rep. 588.
- 80. MORTGAGE BY WIFE TO SECURE HUSBAND'S DEST.

 —A wife cannot mortgage her separate property to secure her husband's debt.—GIDDENS v. POWELL, Ala., 19
 South. Rep. 21.
- 81. MUNICIPAL OFFICERS—Approval of Bonds—Mandamus.—The superintendent of waterworks who is to

hold his "office for one year" and give bond for the faithful performance of his duties is an officer of the city, though he is paid as city employees generally, and may be removed at the will of the board of public works; and he may, therefore, bring mandamus to compel the approval of his bond.—STATE v. SHANNON, Mo., 33 S. W. Rep. 1187.

- 82. NEGOTIABLE INSTRUMENT—Collateral Note—Pay. ment.—Where a note deposited by plaintiff with a bank as collateral security for a debt of less amount was delivered by the bank to the maker thereof, in exchange for another note, and the latter was taken in payment of the collateral note, the payment thereof operated also as payment of plaintiff's debt, and the bank was liable to plaintiff for the difference between the collateral note and the debt.—Post v. Union Nat. Bank, Ill., 42 N. E. Rep. 976.
- 88. NEGOTIABLE INSTRUMENT—Notes—Consideration.

 —The consideration for executing a note may move from another than the payee.—Moors v. Hubbard, Ind., 42 N. E. Rep. 962.
- 84. NEGOTIABLE INSTRUMENT—Notes—Provision for Attorney's Fees.—Where notes provided for attorney's fees in case of collection by attorney on default, the mere fact that attachments were sued out on such notes before maturity, there being no evidence as to the time of levy, on the ground that the maker was about to fraudulently dispose of his property, does not deprive the payee of the right to collect the fees in case of non-payment on maturity.—MUNN V. PLANTERS' & MERCHANTS' BANK, Ala., 19 South. Rep. 55.
- 55. NUISANCE—Indictment.—An indictment for a nuisance, where the facts stated constitute the offense charged, is not demurrable because it does not contain the words "to the common nuisance of all good citizens of the commonwealth residing in the neighborhood, or passing by," or any others of similar import.—COMMONWEALTH v. ENEIGHT, Ky., 33 8. W. Rep. 1111.
- 88. NUISANCE—Underdraining Cemetery into Stream.—The construction of a sewer by a cemetery association to underdrain ground used for burial purposes, and to discharge into a spring brook, will be enjoined at the suit of the owners of farm lands on the stream, below, where it it shown that the effect would be to so pollute the water as to render it unfit for use either by human beings or stock.—Barrett v. Mt. Greenwood Cemetery Ass'n, Ill., 42 N. E. Rep. 891.
- 87. PARTMERSHIP Power of Partner.—One partner has the same right to execute in the firm name a note in settlement of a claim arising out of the firm business as he would have to pay the amount due in cash out of the firm funds.—DICKSON v. DRYDEN, Iowa, 66 N. W. Rep. 148.
- 88. PLEADING—Covenant of Warranty.—An allegation in a complaint, that "there was and is a breach of the defendant's contract of warranty aforesaid," states a good cause of action, but defectively, and, unless objected to by demurrer, the defect is waived.—MIZELL V. RUFFIN, N. Car., 23 S. E. Rep. 927.
- 89. PRINCIPAL AND SURETY—Foreclosure of Mortgage Security.—Where a surety pays the debt of his principal, and, on foreclosure sale of a second mortgage, assigned to him as collateral, purchases for a price in excess of the debt, and does not pay such excess to the principal he will be liable to judgment creditors of his principal for such excess.—HOPKINS V. HEMM, Ill., 42 N. E. Rep. 848.
- 90. PRINCIPAL AND SURETY Official Bond.—A city charter provided that no person should be eligible as marshal who had not made a settlement with the city, and obtained a quictus: Held, that the sureties on the bond of a marshal were not released because, at the time he qualified, he had not settled with the city for collections made in his preceding term.—WADE 7. CITY OF MT. STERLING, Ky., 33 S. W. Rep. 1113.
- 91. QUIETING TITLE Parties.—An administrator is not a proper party to a suit to quiet title, the only con-

- troversy being what was included in the sale to a complainant from the administrator, where the proceeds of the sale were sufficient to pay intestate's debts, as any part of intestate's land not included in the sale descended to sher heirs.—BROMBERG V. YUKERS, Ala., 19 South. Rep. 49.
- 92. QUIETING TITLE—Re-enacting Statute.—Under Code Civ. Proc. § 2092, relative to actions to quiet title, one in possession claiming the fee cannot compel a suit to try title by one out of possession claiming only a remainder after a life estate conceded to plaintiff, without any further showing, the statute having, after such construction thereof by the supreme court, been re-enacted without any substantial change.—NORTHCUTT v. EAGER, Mo., 33 S. W. Rep. 1125.
- 93. RAILROAD COMPANIES—Contributory Negligence.

 —A railway company is not liable for the failure of its employees to discover a danger to which a person is exposed by his own negligence.—St. LOUIS, I. M. & S. RY. CO. v. Ross, Ark., 38 S. W. Rep. 1054.
- 94. RAILROAD COMPANY Contributory Negligence—Burden of Proof.—In an action for death of an intestate at a railroad crossing, it appeared that defendant operated a main track, running north and south, with parallel east and west side tracks about eight feet distant; that intestate and a companion walked over the west track, and upon the main line, where they stood waiting for the train on the east track, going south, to pass, when a train backing south on the main track struck them and killed the intestate; that they were not flooking for listening for an approaching train: Held, that intestate was, as a matter of law, guilty of contributory negligence.—St. Louis, I. M. & S. Ry. Co. v. Martin, Ark., 33 S. W. Rep. 1070.
- 95. RAILROAD COMPANY—Fires Negligence.—Judgment against a railroad for a fire which started 68 feet from its track cannot be sustained, the only evidence that it was set by an engine being that it was discovered 10 minutes after one passed that point, that a person passing that point a few minutes before the engine saw no fire, and that, a little distance beyond there, sparks were escaping from the engine; there being positive and uncontradicted testimony that the spark arrester was the most approved in general use, and was in good condition and repair.—LAKE ERIE & W. BY. CO. v. GOSSART, Ind., 42 N. E. Rep. 818.
- 96. RAILBOAD COMPANIES—Proof of Incorporation.—In a proceeding by a plaintiff claiming to be a railroad corporation, allegation and proof of a legislative charter, and of the performance of corporate acts and the exercise of corporate powers thereunder, are sufficient to establish, prima face, its corporate existence.—EAST ST. L. & C. RY. CO. V. BELLEVILLE CITY RY. CO., Ill., 42 N. E. Rep. 974.
- 97. RAILROAD RECEIVERS—Liability for Negligence.—
 Receivers having the full possession, control and operation of a railroad under the directions of a court are alone liable for the negligence or wrongdoing of their agents and employees in the operation of the road, a 'cothe railroad company itself is not liable to suit upon cause of action so arising.—CHAMBERLAIN v. NEW YORK, L. E. & W. R. Co., U. S. C. C. (Ohio), 71 Fed. Rep. 636.
- 98. RECEIVERS—Repudiation of Executory Contracts.

 —A pledge or assignment by an electric light company as security for borrowed money, of revenues to be earned in the future, and paid monthly, under a contract for lighting the streets and public buildings of a city, is an executory contract, which the receivers of such company have the right, in the interest of their trust, either to carry out or renounce, at their election; and the filing by them of a petition to enjoin the city from paying the money to the pledgees, is an election to renounce the contract.—UNITED ELECTRIC SECURITIES CO. V. LOUISIANA ELECTRIC LIGHT CO., La., 71 Fed. Rep. 615.
- 99. RES JUDICATA.—A corporation which assumes the defense of a patent infringement suit, brought agains

one who purchased the infringing articles from it, is estopped by the judgment to the same extent as if it had been a party.—Empire State Nail Co. v. American Solid Leather Button Co., U.S. C. C. (R. I.), 71 Fed. Rep. 588.

100. SALE — Fraud of Purchaser.—Whether representations as to his pecuniary circumstances, made by the purchaser to the seller of goods, at one time, in order to obtain credit, influenced the seller in making a like sale to the same party at a subsequent time, is a question of fact; and in such case it is competent for the seller to testify that they did. But the fact is to be determined by the jury, in view of all the circumstances; as, also, whether there was such fraud in the subsequent sale as to entitle the seller to recover the property, on the ground that the information given in the first instance was false.—GREVER v. TAYLOR, Ohio, 42 N. E. Rep. 829.

101. SALE—Interstate Commerce.—A sale in Alabama of books and abstract forms situated in Georgia, followed by delivery in Alabama, was a transaction of interstate commerce, subject to the regulation of congress.—CULBERSON V. AM. TRUST & BANKING CO., Ala., 19 South. Rep. 34.

102. SALE OF LUMBER-Lien.—A vendor of personalty has no lien for the unpaid purchase money after parting with possession, but must look to the personal responsibility of the vendee.—SLACK v. COLLINS, Ind., 42 N. E. Red., 910.

108. SET-OFF AND COUNTERCLAIM.—In an action for lumber sold it appeared that defendant had paid for a lot of wagon tongues which had not been delivered, defendant never having directed plaintiff where to ship them, he being ready to do so at any time when requested: Held, that defendant was not entitled to a credit for the money so paid.—OSGOOD V. GROSECLOSE, Ill., 42 N. E. Rep. 886.

104. STATUTES — Amendment.—Act April, 1895, entitled "An act to provide for the collection of assessments by the local improvement districts in cities of the first class," does not expressly amend any section of previous statutes, and whatever amendatory effect it had on them was by implication only: Held, that such act was not in conflict with Const. art. 5, § 23, providing that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length.—City of Little Rock v. QUINDLEY, Ark., 33 S. W. Rep. 1053.

105. Taxation — Manufacturer.—Under Code, § 816, providing that the average value of personal property held to increase the value thereof by manufacturing shall be listed for taxation, and that the value shall be estimated upon those materials only which enter into the manufactured product, the lessee of a creamery and its appliances is required to list for taxation the average value of the material used in making butter.—Dean v. Town of Solon, Iowa, 66 N. W. Rep. 152.

106. TAXATION—Sale.—That the purchaser at a tax sale, after receiving a deed to the land, conveyed to the person who was county treasurer at the time of the tax sale, and who was deputy treasurer at the time of the conveyance to him, does not show fraud in the issuance of the tax deed.—SHELLEY V. SMITH, Iowa, 66 N. W. Rep. 172.

107. TAXATION — Special Assessment.—Where a land-owner files no objection to a special assessment on account of irregularities in the proceeding by which it was levied, he cannot, on application by the county treasurer for judgment of sale, urge such irregularities.—KIRCLMAN V. PROPLE, Ill., 42 N. E. Rep. 884.

108. TELEGRAPH COMPANY — Delivery of Message.—When the agent of the company at the terminal office, instead of complying with a rule of the company by demanding payment or guaranty from the sender of charges for delivery beyond the established free-delivery limits, decides to have the message delivered,

and trusts to voluntary compensation by the addressee, he is bound to act without unnecessary delay, and deliver it with reasonable promptness.—WHITTEMORE v. WESTERN UNION TEL. CO., U. S. C. C. (Kan.), 71 Fed. Rep. 651.

109. TELEGRAPH COMPANIES — Error in Message.—A telegraph company sent an offer to buy cotton at 758 as an offer to buy at 8 1-2 cents per pound. The addressee, before discovering the error, purchased at 7 9-16 and 7 1-2 cents per pound: Held, that the company was only liable to the addressee for nominal damages for breach of contract to correctly transmit the message, since by selling to the sender at the price actually offered he would have lost nothing.—Western Union Tel. Co. v. Aubret, Ark., 33 S. W. Rep. 1063.

110. TRIAL — Impeaching Witness.—An impeaching witness cannot himself be impeached by showing that the statements of others, on which he testified that his knowledge of the reputation of the impeached person was based, were never made by them.—BROWER v. REAM, Ind., 42 N. E. Rep. 824.

111. TRUST — Resulting Trust—Construction of Deed.
—A deed reciting that the parties of the first part, in consideration of \$1,050, "five hundred of said sum the said parties of the first part give to their daughter, C, wife of the said J," party of the second part, and the other \$550 to them in hand paid, have granted, etc., unto the said J certain described land, does not create a resulting trust in favor of the grantee's wife, C.—MORRIS V. CLARE, MO., 33 S. W. Rep. 1128.

112. VENDOR AND VENDEE—Landlord's Lien.—Where a vendee, as part of the purchase price of land, agreed to pay a debt of the vendor, and, at his request, gave his note therefor to the creditor, reciting that it was for rent of the land, the creditor had not a landlord's lien on crops raised on the land by the vendee for its payment, it appearing that the recital that the note was for rent was untrue in fact.—SMITH v. MABEREY, Ark., 33 S. W. Rep. 1068.

113. WATERS — Accretions — Purchasers of Public Lands.—Where lands abutting on a river have been surveyed by the United States government in the usual manner, so that the lands fronting on the river are divided into 40-acre tracts or fractional lots, each purchaser of a lot or tract becomes a riparian owner of so much of the then river front as is included within the side boundary lines of his tract or lot, running to the river, and any accretions upon the river front between such lines belong to such purchaser, and are not required to be apportioned among the other riparian owners of adjacent tracts.—SMITH v. JOHNSON, Neb., 71 Fed. Rep. 647.

114. WATERS AND WATER COURSES — Injunction.—In an action by a mill owner against the owner of another mill, situated lower down on the same stream, to enjoin defendant from maintaining his dam at such a height as to damage plaintiff's property by backwater, where plaintiff does not show by a preponderance of the evidence that defendant's dam, as constructed at the time of the trial, interfered with plaintiff's legal rights, he is not entitled to an injunction.—MATTHEWS v. METCALF, Iowa, 65 N. W. Rep. 189.

115. WILL—Devise.—Where land was conveyed to an incorporated academy, and the grantor died before the dissolution of the corporation, the devisee of all the grantor's estate acquired no interest in said land by virtue of the will.—TRUSTERS OF PRESBYTERIAN CHURCH OF PARIS V. VENABLE, Ill., 42 N. E. Rep. 836.

116. WILL — Estate of Decedent — Sale by Legatee.—Where a legatee under a will sells his interest in the estate, in advance of its settlement, the proceeds received by him do not become assets of the estate, nor subject to the payment of its debts or expenses. The thing sold being merely a right to participate in the effects of the estate, its transfer in no manner predictes the rights of creditors, and the money received therefor is impressed with no trust in their favor.—RISTINE V. KURTZ, IOWA, 66 N. W. Rep. 185.



Central Law Journal.

ST. LOUIS, MO., APRIL 17, 1896.

The question as to the title of a finder of lost property does not often arise and therefore the recent decision of the court of chancery of New Jersey in Keron v. Cashman is of novel interest. It is most peculiar in its circumstances. There it appeared that one of a party of five boys found and picked up an old stocking in which something was tied up. He threw it away again and one of the others picked it up and began beating the others with it. It was passed from one to another, and finally, while the second boy was beating another with it, it broke open and was found to contain money. None of the boys had attempted to examine it or had suspected that it contained anything valuable. The father of one of the boys took charge of the money and tried to discover the former owner. terwards one of the boys claimed the money and the others a division of it. On a bill of interpleader, it was held, that the money was not found in a legal sense until the stocking had come into the common possession of all the boys as a plaything, and that it belonged to all of them and must be divided equally between them. In Durfee v. Jones, 11 R. I. 588, 23 Amer. Rep. 528, 35 Cent. L. J. 417, the bailee for sale of a safe, while examining it found a sum of lost money inside the casing and was held entitled to retain it as finder against the owner of the safe because the owner never had any conscious possession of the money. The cases of Bowen v. Sullivan, 62 Ind. 281 and Merry v. Green, 7 M. & W. 623, not cited by the court in the New Jersey case, are also in point. All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal finder of such property. In Goddard v. Winchell, 35 Cent. L. J. 365, the question arose before the Supreme Court of Iowa as to the ownership of an aerolite which had fallen from the sky. court held that it belonged to the owner of the land rather than to the person who saw it fall and secured it.

The case of Bratton v. Ralph, 42 N. E. Rep. 644, while establishing the law of Indiana, upon the liability of the land upon

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which any building subject to a mechanic's lien has been destroyed, to satisfy the claims of the lienor, does not, in any respect lessen the conflict of authority which exists upon the question or supply any means by which a true rule may be evolved. In that case a subcontractor sought to foreclose a mechanic's lien upon the appellant's land for work done and materials furnished in plastering a house in process of erection. Before its completion and before the notice of the lien was filed the building was destroyed by fire, and the question was presented to the court whether the right to the lien was lost with the building or continued against the land. The statute provided that "the entire land upon which any building, erection or other improvement is situated, including the portion not covered therewith, shall be subject to the lien;" and the court allowed the lienor to foreclose his lien and obtain satisfaction from the land, after the building had been demolished, upon the ground that the general purpose of the legislature in passing the statute was to protect laborers and material-men, and the lien should, therefore apply to the land directly, if a recovery from the building itself should become impossible.

As to the question here at issue, the authorities are at variance. Pennsylvania early led off with the holding that the lien was given largely because the land was benefited by the erection of the building, and the lien on the building was the principal thing, while that on the land was merely the incident, it being superadded by the legislature because it was essential to a full enforcement of the lien against the building which had become attached to and a part of the realty. Therefore it was held that, with the destruction of the building, the lien on the land was lost. This holding was also deemed more politic, as favoring future improvements. Other cases take the same view. Presbyterian Church v. Stettler, 26 Pa. St. 246; Wigton & Brooks' Appeal, 28 Pa. St. 161; Goodman v. Baerlocher (Wis.), 60 N. W. Rep. 415; Schukraft v. Ruck, 6 Daly, 1; Coddington v. Beebe, 31 N. J. Law, 477; Shine's Ex'x v. Heimburger, 60 Mo. App. 174. Other courts have been disposed to construe the law liberally in favor of the mechanics and material men, regarding their protection as the principal object of the law, and consid-

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ering the right to take the lien to apply equally to the land and building, special priorities of lien, however, being given as to the building by some statutes. Parker, 58 Iowa, 509, 12 N. W. Rep. 553; Freeman v. Carson, 27 Minn. 516, 8 N. W. Rep. 764; Steigleman v. McBride, 17 Ill. 300; Schwartz v. Saunders, 46 Ill. 18. The cases of Sontag v. Brennan, 75 Ill. 279, and McLaughlin v. Green, 48 Miss. 175, have also been looked upon as lending some support, although really but slight, to this position. In most, if not indeed in all, of this latter class of cases, it may be admitted that the statutes reserving the right of lien are quite capable of the interpretation placed upon them by the courts, if one is prepared to adopt the rule of construction which is applied by them. While no entirely harmonious rule may be possible, inasmuch as the right of lien in each State is dependent upon distinct legislative enactments, yet since the general object of such acts is the same, and, as the cases admit, the statutes are, in fact, conflicting in no material particulars, one would suppose that in such case as the one presented the courts would reach similar results. That under such circumstances one class of cases should reach a conclusion diametrically opposed to that reached by other courts would seem to indicate that a different rule of construction had been applied, some of the courts adopting a liberal and others a more strict construction of the

NOTES OF RECENT DECISIONS.

LIABILITY FOR INJURIES THROUGH ELECTRICAL APPLIANCES.—In Girardi v. Electric Imp. Co., 28 L. R. A. 596, decided by the Supreme Court of California, it was held that placing electric light wires over the metallic roof of a hotel where persons may come in contact with them, without running them high enough to prevent such contact, is sufficient proof of negligence in case of injury to a person by an electric shock from such wires; and that want of ordinary care of an employee of an hotel, in going out on the roof in a dark night with his employer to secure signs which were threatened during a heavy rain, and coming in contact with the

electric wires, which he knew were above the roof but which he may not have known to be dangerous, was a question for the jury. substantially similar case on the facts in New York is Ennis v. Gray, 87 Hun, 355. The plaintiff was a roofer by trade, and, while at work on the roof of a building was injured by coming in contact with electric wires put up and maintained by a corporation not the owner of such building, and it was held that such company was liable in damages. A case was recently reported in the newspapers in which an appellate court of a neighboring State affirmed a judgment for personal injuries sustained through coming in contact with electric wires, where the defense was that the wires were strung high enough for a person of ordinary height to pass under them, but that the plaintiff came in contact with them because he was an unusually tall man. It was held that the defendant had not exercised proper care for the protection of the public, . and that plaintiff's failure to observe extraordinary caution because of his unusual stature did not constitute contributory negligence.

Foreign Corporation — Statutory Requirements.—It is held by the Supreme Court of Oregon, in Commercial Bank v. Sherman, 43 Pac. Rep. 658, that a foreign corporation purchasing a note in the State, and having no purpose to do any other act in the State, is not transacting "business" in the State, within Hill's Ann. Laws, § 3276, providing that a foreign banking corporation, "before transacting business" in the State must record a power of attorney in each county, where it has "a resident agent," which, so long as the company has "places of business" in the State, shall be irrevocable. The following is from the opinion of the court:

The single inquiry presented by this record, therefore, is whether a foreign banking corporation purchasing a promissory note in this State, and with no purpose of doing any other act here, is "transacting business" in the State, within the meaning of the statute. It seems to us this question must be answered in the negative. In our opinion, the statute, when reasonably construed, was intended to prohibit certain foreign corporations coming into this State for the purpose of transacting their ordinary corporate business without first appointing some resident agent, upon whom service of summons could be had in case of litigation between them and citizens of the State, and was not designed or intended to prohibit the doing of one single isolated act of business by such a corporation, with no intention apparent to do any other act or engage in business here.

It will be noticed that the statute does not require the power of attorney to be recorded before "doing any business," but "before transacting business," and that it shall be filed in every county where the corporation has "a resident agent," and shall be irrevocable except by the substitution of another qualified person for the one named therein so long as the corporation shall have "places of business" in the State. These provisions would seem necessarily to indicate that the statute was intended to apply to a corporation whose actual or contemplated business in the State is such as to admit of its having resident agents or places of business therein; and, to have a resident agent or place of business, it must be carrying on, or intending to carry on, its ordinary corporate business; for a corporation doing but a single act of business, with no intention of doing more, could not, in the nature of things, be expected to have a resident agent or place of business. To require a foreign banking corporation to execute and file the power of attorney required by the statute as a prerequisite to its right to purchase a promissory note, or take a mortgage to secure a debt, or to do any other single act of business, when there was no purpose or intention to engage in banking here, would be a very narrow, harsh, and, we think, an unwarranted, construction of the statute. The following authorities, although under statutes differing in detail from ours, tend to support this conclusion: Murfree, Foreign Corp. § 65 et seq.; Manufacturing Co. v. Ferguson, 113 U., S. 727, 5 Sup. Ct. Rep. 739; Dry Goods Co. v. Lester, 60 Ark. 120, 29 S. W. Rep. 34; Potter v. Bank, 5 Hill, 490; Gilchrist v. Railroad Co., 47 Fed. Rep. 593. There is nothing in the former decisions of this court or of the federal court construing our statute which, in our opinion, conflicts with these views. In Semple v. Bank, Re Comstock, and Bank v. Page, supra, the bank was regularly engaged in the transaction of its corporate business in the State. The case of Hacheny v. Leary, supra, involved the construction of a statute of the then territory of Washington as applied to a contract made in the territory. That statute differed in many respects from the one now before us, and, besides, the case discloses that the corporation had an agent in Washington actually engaged in the business of soliciting and receiving applications for insurance. For these reasons, the case is distinguishable from the one under consideration.

CONFLICT OF LAWS—DRAFT PAYABLE IN ANOTHER STATE—ASSIGNMENT OF FUND.—The Supreme Court of Illinois decides, in Abt v. American Trust & Sav. Bank, 42 N. E. Rep. 856, that a draft drawn in Illinois on a New York bank and payable in New York is governed by the laws of New York and that such draft will not operate as an assignment pro tanto of the drawer's funds in said bank, though the action is brought in Illinois by the payees against the assignee of the drawers to recover the amount of said draft. The court says in part:

It is not, of course, denied that petitioners are creditors of the insolvent firm, and entitled to share with the other creditors in the assets of the estate, but petitioners insist that, by drawing in their favor the drafts on the bank in New York, Schaffner & Co.

assigned to them the funds so on deposit in the New York bank-in other words, set apart and appropriated said funds to or toward the payments of said drafts, and that the payees thereupon became entitled to it, and that it is the duty of the assignee to pay the same to the petitioners. It is settled law in this State that a check drawn for value by a depositor on a bank operates as an assignment pro tanto of the funds of the depositor on deposit in such bank in favor of the holder of the check. Brown v. Leckie, 43 Ill. 497; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212; National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. Rep. 401. But it was admitted on the trial, and the decisions of the courts of New York show, that the rule is otherwise in that State. Attorney General v. Continental Life Ins. Co., 71 N. Y. 325; Ætna Bank v. Fourth Nat. Bank, 46 N. Y. 82; People v. Merchants' & Mechanics' Bank, 78 N. Y. 269; Bank v. Clark, 134 N. Y. 368, 32 N. E. Rep. 38. The assignee, who is appellee here, contends that, as the funds on which the drafts were drawn were in New York, in the hands of the drawee there, the contract was to be performed in that State, and must be governed by its laws, and that by such laws there was no assignment or transfer of the funds to the holder of the drafts, and therefore that appellant did not, upon taking up such drafts, have any more right to such funds than the other creditors of the insolvent firm. In support of this contention, National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. Rep. 401, is cited. In that case it was held that a check drawn in Indiana on a bank in Illinois would operate to transfer the fund, on the ground that the law of the place where the contract was to be performed must govern-the law of Indiana being, as in New York, that checks do not operate to assign the deposit or a sufficient part to pay them. It is, however, insisted by appellants that as this is not a proceeding against the New York bank, but against the assignee to compel delivery to them of such funds in the hands of the assignee in this State, the laws of New York have no application. The case is doubtful on the facts. But be that as it may, we are of the opinion that the law is against the appellants. The drafts, though drawn in this State, were drawn on the New York bank, and were payable there. The contract was to be performed in New York, and it must be presumed that upon a question of this character the parties contracted with reference to the laws of the State where the contract was to be performed, rather than with reference to the laws of the State where the contract was made. Mason v. Dousay, 35 Ill. 424; Lewis v. Headley, 36 Ill. 483; Adams v. Robertson, 37 Ill. 45; Roundtree v. Baker, 52 Ill. 241; Davenport v. Karnes, 70 Ill. 465; Evans v. Anderson, 78 Ill. 558. Such being the law, and such being the contract we do not think that the payment of the funds by the New York bank to the assignee in this State, even if the facts showed such payment, would give appellant any right to the funds which he did not have before such payment.

CORPORATIONS—OFFICERS — AUTHORITY TO EXECUTE NOTES.—The Supreme Court of Arkansas holds, in City Electric St. Ry. Co. v. First Nat. Exch. Bank, that the authority of the president and secretary of a business corporation to execute promissory notes upon

its behalf, will not be presumed simply because they have prior thereto exercised the power. The court says in part:

Unless the authority is expressly conferred by the charter or given by the board of directors, it may be stated, as a general proposition, that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper. They have no inherent power to execute negotiable notes in the name of the corporation. Tied. Com. Paper, sec. 121; Cook, Stock, Stockh. & Corp. Law, sec. 716; McCullough v. Moss, 5 Denio, 567; 4 Thomp. Corp. sec. 4619; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend 31; Hyde v. Larkin, 35 Mo. App. 865; Pierce, R. R. 32-34; Walworth County Bank v. Farmers' Loan & Trust Co., 14 Wis. 325; 1 Mor. Priv. Corp., sec. 537; Titus v. Railroad Co., 37 N. J. Law, 98-102; Wait v. Association (N. H.), 23 Atl. Rep. 77, and authorities there cited; Bank v. Atkinson, 55 Fed. Rep. 465. Where the authority of the president and secretary to bind the corporation is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as a matter of law. Turnpike Co. v. Looney, 1 Metc. (Ky.) 550; Bacon v. Insurance Co., 31 Miss. 116; 4 Thomp. Corp. 4619; Craft v. Railroad Co., 150 Mass. 208, 22 N. E. Rep. 917; Bank v. Hogan, 47 Mo. 472; Dabney v. Stevens, 40 How. Prac. 341; 1 Wat. Corp. 445; Bank v. Hamlin, 14 Mass. 180; Railway Co. v. James, 22 Wis. 187; Bliss v. Irrigation Co., 65 Cal. 504. We are aware that there are authorities contra, and counsel for appellee bave cited us to American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, where it is held that, "if the president and secretary sign" a negotiable promissory note, "their authority is inferred from their official relation." This case is analogous, the question being presented (as in the case at bar) on demurrer to an answer which negatived the authority of the president and secretary to issue such paper. But the court, to sustain its position in that case, cited only two cases, viz.: Merchants' Bank v. State Bank, 10 Wall. 644; and Crowley v. Mining Co., 55 Cal. 273. In the case in 10 Wall. supra, the court use this language: "It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that the cashier had authority to bind the defendant." True, it is also said. "that if the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." But we submit that the broad dicta of the latter quotation, in view of the fact that there was a usage of other banks, and a usual course of dealing, with the knowledge and acquiescence of the directors shown, were unnecessary for the determination of the question before the court. It was the very language doubtless which caused the learned circuit judge in American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, to hold, as a matter of law, that the authority of the president and secretary would be presumed from the fact that they had exercised it. So, also, in the California case cited to support the ruling in 55 Fed. supra, it was admitted that the president, whose authority was being questioned, "was the superintendent and general managing agent, having full control of the business of the corporation."

The difference, therefore, between those cases and the one at bar, and the one in which they were cited. is too obvious for further notice. The facts of the case of Gelpcke v. City of Dubuque, 1 Wall. 175 (where the language above quoted from Judge Swayne in 10 Wall. was first used by him), and in Supervisors v. Schenck, 5 Wall. 772; City of Lexington v. Butler, 14 Wall. 296; Tod. v. Land Co., 57 Fed. Rep. 47-53, and Bank v. Young, 41 N. J. Eq. 531, 7 Atl. Rep. 488,-also cited by counsel for appellee, where this dictum has been repeated, did not justify such a sweeping declaration of law. For an examination of these will show that, in some of the cases, municipal or county bonds were in controversy, which showed upon their face authority for their issue; and in other cases, that the contracts or transactions made or performed by the agent of the corporation where such as had been frequently or usually made or performed by him before, in the course of the business of the corporation; or that the corporation had received some benefit from the unauthorized act. But the doctrine announced in American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, is unsound, and not supported by the weight of authority. Besides, the principle it seeks to establish is in conflict with the doctrine announced by the Supreme Court of the United States in Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. Rep. 572, where it was held "that the vicepresident of a bank, however general his powers, could not exercise such a power unless specially authorized so to do, and that persons dealing with the bank were presumed to know the general powers of the officers." Mr. Morawetz, in speaking of these dicta in those cases where they have been incautiously used, said: "They must be considered in view of the facts of the particular cases in which they were made, Taken alone as statement of a principle or rule of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle." 2 Mor. Priv. Corp. sec. 608. The rule that, "if the president and secretary sign, their authority is inferred from their official relation," provided they might have had power under any circumstances to issue such paper for the corporation, is begging the question where the authority itself is challenged. This rule, too, ignores a fundamental principle of the law of agency, whether applied to natural persons or corporations; for corporations can only act through agents. It is said by Mr. Mechem, in his work on Agency (section 289), that "every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority, nor to any mere presumption of authority by the agent." Judge Miller, of the Supreme Court of the United States, in the Floyd Acceptances, 7 Wall. 666, said: "The person dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts." And this applies to every person who takes the paper afterwards; for, said he, "it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was issued."

CHEMICAL EXPERTS—A TRIO OF IM-PORTANT FACTORS IN THE DETEC-TION OF CRIME.

As expert agencies in leading to the detection of a crime and in aiding the courts in meting out justice to offenders against the majesty of the law none are more important than chemistry; largely because of its scientific exactness. And this certainty of analysis aided by the power of the microscope, and the wonderful reproductive force of photography combined, have marked the destruction of many poor guilty wretches, and such scenes as that court scene described by Dr. Holland in his story of Seven Oaks, are not, in the light of modern science, to be regarded as miraculous. The darkened court room; the awed silence of the assembly; the intense mental strain on those more deeply interested; the awful force of the blow to the guilty man when he first beholds the evidence of his crime illumined by the light of scientific test. Forgery detected by chemical analysis, is not of such rare occurrence in modern times. The murderer, intent on his effort to avoid suspicion, or to throw off the scent of pursuit already hot on his tracks, yet forgets the little spot, almost infinitesimal, caught somewhere on his clothing in the deadly struggle with his victim. He is in the meshes of the law at last. But even then he is secure in his own mind. He knows there was no eve-witness to his crime. He has closed all avenues to detection. The officers of the law have done all they can do. They have faithfully followed every available clue which presented any chance for a solution of the mystery, and now they are at their wits end. The prisoner clamors for his liberty. In our country, as in all other well governed countries, liberty is one of the dearest rights constitutionally guaranteed. It must not be abridged without due process of law. The prison doors are about to open for this guilty wretch when the smallest evidence of his guilt is found. The chemical expert determines the small dark spot on the man's clothing to be human blood. He is held for trial. How is it to be known whether this dark spot is human blood, or the blood of some animal of the brute creation. Chemical science aided by microscopical observation has determined that the fluid of the blood contains a large number of corpuscles. They are counted, meas-

ured and photographed. The difference in size, form and condition of these corpuscles in the different members of the animal kingdom is carefully noted. Although the average diameter of the human red corpuscle is still a matter of discussion, the best authorities place it somewhere between 1-3200ths and 1-3500th of an inch in both male and female. These human corpuscles then are to be compared to the corpuscles of the brute creation which chemical experts of great learning have determined to range from 1-3540ths of an inch in a dog, to 1-6366ths of an inch in a Here then is the value of such agencies as science has produced. This evidence, although not infallably correct, is worthy of the greatest consideration by court and jury as being of the best of opinion evidence. Beginning with this slight, but terrible indication of guilt, step by step the awful revelation follows, and the guilty one is brought at last through the employment of scientific agencies. to the bar of justice. It will not do to give in detail instances of causes celebres in which these agencies played an important part, in a paper of the length to which this is limited. In many cases an historical importance is given them. It is proposed in this paper to avoid any extended general detail or discussion of the subject, and merely to collect together the case law under these three divisions of the subject: 1. Evidence as affected by opinions of chemical analysis. 2. Evidence as affected by the opinions of microscopists. 3. Evidence as affected by the opinions of photographers and photographic copies.

The practice of admitting the testimony of witnessess who have become qualified by application and experience to express opinions based upon special knowledge of the subject under inquiry is not of modern origin. persons as were by the Roman law artis periti were summoned into court at the discretion of the judge, so that he might have the advantage of their special knowledge. So the celebrated Criminal Code of the Emperor Charles V. contained an enactment requiring the opinion of medical experts to be taken in those cases when death was caused by vio-In the year 1553 Mr. Justice Saunders said in the case of Buckley v. Rice:1 "If matters arise in our law which concern

¹ 1 Plowden, 125.



other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns, which is an honorable and commendable thing in our law, for thereby it appears that we don't despise all other sciences but our own, but we approve of them, and encourage them as things worthy of commendation," and instances are recorded in the year books where the courts received the opinions of witnesses who were learned in special sciences and arts. rule permitting this opinion evidence is exceptional. No rule is better known to trial lawyers than that the opinions of witnesses ordinarily are inadmissible. It is facts, hard, cold facts such as were the groundwork of the philosophy of Thomas Gradgrind, which witnesses are in most cases expected to give. It is not always necessary that a witness should be an expert to give opinion evidence. But it is the province of the court to deterfrom surrounding circumstances whether or not he will receive other than the testimony of professional witnesses.

1. Evidence as Affected by Opinions of Analytical Chemists.—In the detection of poisons by experts the courts receive great help in these days. In England in the year 1530 we are told the offense of poisoning was made high treason, and the offender was denied the benefit of clergy and boiled to death. This terrible form of punishment was largely due to the difficulty in those days of bringing to justice such an offender because of the crude methods of testing by chemical analysis to determine the presence of the poison in the human body. At the present time however all poisons known may be detected by modern methods of scientific test. It has been decided by the Massachusetts court that a chemist who has made an analysis may testify as to what he finds.2 In these cases of poisoning a thorough chemical analysis of the contents of the stomach and bowles and other parts are deemed indispensable to a correct test for poison in the system. Symptoms of themselves without attendant circumstances are unreliable.8 In cases of suspected poisoning, the chemical analysis should if pos-

³ Joe v. State, 6 Fla. 591; People v. Milliard, 53 Mich. 74.

sible be made by a chemist of undoubted repute and experience, then in such cases where the testimony of such experts is to be received as to the contents of the stomach, care should be taken to show that the particular anatomical specimen under examination has not been tampered with or any chance interference, and such proof will be exacted.4 Physicians may give opinion evidence of this character as well as professional chemists.5 In the examination of blood spots chemists and microscopists may give testimony as to the fact of it being the blood of a human being or that of the brute animal.6 Such evidence has been received in numerous cases. and now is received without objection. In all these cases the court should require that all questions pointed towards an expert opinion are properly predicated upon facts shown. In the case of State v. Knight, supra, the court uses this language: "It would be very difficult for an expert of the most accurate and extensive observation, to exhibit in language, with precision, so as to be understood, those delicate appearances which are appreciable only by the sense of vision. Nothing short of an exact representation of the sight can give with certainty a perfectly correct idea to the mind. A diagram approximating in any degree to perfect representation, when exhibited by one qualified from knowledge and experience to give explanation, may do much to make clear his testimony without

4 The State v. Cook, 17 Kan. 394. See, also, the suggestion of court in People v. Milliard, 53 Mich. 69. ⁵ State v. Hinkle, 6 Iowa, 380. In this case the opinions of two practicing physicians were admitted. One of them stated in answer to a question that he was not a professional chemist but understood some of the practical details of chemistry; that portion which belonged to his profession; that he had no practical experience in the analysis of poisons until he analysed the contents of the stomach of the deceased; that he was previously acquainted with the means of detecting poisons, and had since then had some experience in that way. The other declared that he was not a practical chemist, but understood the chemical tests by which the presence of poisons could be detected; that he had never experimented with the view of detecting strychnine by chemical tests but that he had seen chemical tests by professors of chemistry and that there was one test much relied on, the trial of which he had witnessed. See for contra leaning, People v. Milliard, 53 Mich. 74. In a Michigan case it has been held (Peer v. Ryan, 54 Mich. 224), an expert's qualifications depend on his experience and not upon his profession.

6 Commonwealth v. Sturtivant, 117 Mass. 123, 124; State v. Knight, 43 Me. 1,133; Knoll v. State, 55 Wis. 249.

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² Commonwealth v. Hobbs, 140 Mass. 443; Commonwealth v. Kendrick, 147 Mass. 444. The admissibility of this testimony is very generally acknowledged by the other State courts.

danger of misleading." And so enlarged photographic copies may be used to assist chemical and microscopical observation, and to preserve the results of such observation. Ordinary witnesses may testify as to blood But such testimony is liable to suffer in a comparison with the technical knowledge of an expert chemist. It would seem that the ordinary witness testifying as to blood stains is not expected to state more than as to the mere fact of such spots being blood spots. He is not expected to give technical evidence such as an expert on the subject might give. The courts very generally agree in regarding the testimony of both as fit to go to the jury for their consid-But when it comes to the question whether the blood is human blood or that of the brute animal, legal science will require a resort to chemical experts to determine this point.8 It is important to determine by chemical analysis when blood spots are found on clothing, on which side of the clothing they were deposited. The ordinary witness could do but little here. To the expert, a chemical test reveals the position of the coloring matter of the blood, and he thus determines on which side of the garment the spot first touched.9 In the detection of forged writing, and the nature and compounding of inks, the age of handwriting, etc., chemical experts have played an important part, especially in these later days of perfected appliances. The test would, of course, be something more than mere observation. As in that case no scientific knowledge or skill is involved.

Micro-chemical examination of inks to determine age has been received in cases.

7 Dillard v. State, 58 Miss. 368-86; People v. Greenfield, 30 N. Y. Sup. Ct. 462, 85 N. Y. 75; People v. Deacons, 109 N. Y. 374.

And in all these tests much light appears to be thrown on the inquiry through the testimony and experiments of microscopists. The importance of such testimony is well known and is well illustrated in the case like that of Sheldon v. Warner. 10

Evidence as Affected by the Opinions of Microscopists.—Upon the question of whether or not a certain exhibit is human hair, the opinion of an expert microscopist would be received, and a witness possessing no special skill as a microscopist has been allowed to testify in this case. 11 In the famous Cronin case, but recently tried by a Chicago court, expert testimony on the subject of hair was received, and a number of microscopical experts gave testimony on both sides of the question. Some of these experts, notably Marshall D. Ewell,12 of the Northwestern University, claimed that there were no known means of determining human hair from any other kind of hair, while others claimed that they could tell by microscopical test. But whatever be the truth of this contested point, it is certain that such expert evidence is duly respected by the court, and the jury are left to determine where doctors disagree. Microscopical investigation plays an important part in detecting handwriting, forgeries, and alterations, and also in determining the nature of different inks. A holograph will, in which alterations and interlineations appeared, has been admitted to probate upon the testimony of such an expert, that in his opinion the alterations were written at the same time as the rest of the will.18 An expert accustomed to the use of the microscope after the examination of a note by the use of his appliances, has been allowed to testify that one word had been erased in the body of the note and another substituted.14 As to the age of writing, in a recent Nebraska case,15 the opinion is expressed that the question of the age of a written paper is not one of science or skill so as to make admissible the opinion of an expert upon its mere in-

⁸ The People v. Gonzalez, 35 N. Y. 49, 61. 9 State v. Knight, supra. And the chemical expert may state what direction the blood stain took. See Commonwealth v. Sturtivant, 117 Mass. 122. But in a case decided in Mississippi some years ago where it was proposed to ask the experts to give their opinions as to the relative positions of the combatants at the time of the affray when blood was deposited on the shirt of the victim with a view of showing by the blood stains that the prisoner was probably prostrate on the ground and deceased on top of him when the stains were received, the court held against the submission of this testimony on the ground that it did not involve any matter for scientific research or special skill. Dillard v. State, 58 Miss. 368, 387.

^{10 45} Mich. 638.

¹¹ Commonwealth v. Dorsey, 103 Mass. 412.

¹² Also Dr. Lester Curtis and Prof. Harold Moyer.

¹⁸ In re Goods of Hindmarch, 1 P. & M. 307.

¹⁴ Dubois v. Baker, 80 N. Y. 355. In a like case an expert has been allowed to state that one figure has been substituted for another; Nelson v. Johnson, 18 Ind. 329, and the cancelling of certain words; Beach v. O'Riley, 14 West Va. 55.

¹⁵ Cheney v. Dunlap, 20 Neb. 265.

spection. The court in giving the opinion seems to indicate, and we do not doubt such to be the law of evidence, that after a scientific analysis of the ink used, and such attendant experiments as would naturally be followed in forming anything like a correct scientific conclusion, such testimony would then have been received. In the examination of blood spots the microscope is a great aid in determining whether it is human blood or not. Although if the blood has long been dried on the clothing, Taylor in his work on Med. Jurisprudence, says their is no certainty of either chemical analysis of microscopical examination aiding a correct conclusion. 16

Evidence as Affected by the Opinions of Photographers and Photographic Copies.— Photography has been made an important aid to courts and public officials in these latter days. The delicate, but wonderfully powerful design of the camera, imitating as it does the most wonderful piece of the human organization, designed by the creator to enable the mind to properly comprehend and enjoy the the beauty of the universe, has given us the benefit of a beautiful art to aid science in its work. A distinguished expert in speaking of the photographical art in connection with showing the difference in inks used in a certain case says "the photograph is able to distinguish shades of color which are inappreciable to the naked eye; thus where there is the least particle of yellow present in a color, it will take notice of the fact by making the picture blacker just in proportion as the yellow predominates, so that a very light yellow will take a deep black. So any shade of green, or blue, or red where there is an imperceptible amount of yellow will print by the photographic process more or less black, while either a red, or blue, verging to purple, will show more or loss faint as the case may be. Here is a method of investigation which may be very useful in such cases and which will give no uncertain answer." In the case of Town v. Parkersburg Branch R. R. Co., 17 the court held the testimony of photographers as not always reliable. In this case an offer to establish the forgery of certificates in controversy by a comparison with photographic copies of originals was made. The court said: "As a general rule, as the

medin of evidence is multiplied the chance of error increases. Photographs do not always produce fac-similes of the objects delineated, and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at least a mimetic art which furnishes only secondary impressions of the original that vary according to the lights and shadows which prevail whilst being taken." The photographic art is not perfect, but it at least approaches nearer to perfection than any other known power of reproduction by copying process. If the court looked for perfect results in the applied test before it, the reasoning above is not to be wondered at. However, the reasoning in the case of Marcy v. Barnes, 18 is the very reverse of this. Photographers have been allowed to state an opinion as to whether photographs in evidence were well executed.19 Photographic copies of the locus in quo are competent to go to the jury whenever it is important to show such fact.20 Questions of identity of person have been established by photographs.21. In these cases it is but fair to state that such photographic copies were received upon the theory that no better means of identification were at hand. Such evidence must of necessity be only secondary in its nature. The court said in the case of Udderzook v. Commonwealth, above cited: "The Daguerrean process was discovered in 1839 it was soon followed by photography. It has been customary, and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the image on the plate made by the rays of light through the camera are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in gen-

¹⁶ See page 307, Taylor's Med. Juris.

^{17 39} Md. 693, 17 Am. Rep. 540.

^{18 16} Gray, 161.

¹⁹ Barnes v. Ingalls, 39 Ala. 193.

²⁰ Kandall v. Chase, 133 Mass. 210; Church v. City of Milwaukee, 31 Wis. 513; People v. Buddensick, 103 N. Y. 487; Bliss v. Johnson, 76 Cal. 597; Blair v. Pelham, 118 Mass. 421; Cozzens v. Higgins, 33 Howard Prac. Rep. 439. In Ruloff v. People, 45 N. Y. 218, same was held; Barker v. Perry, 67 Iowa, 146; Locker v. Sioux City, etc., R. R. Co., 46 Iowa, 109; Dyson v. N. Y., etc., R. R. Co., 57 Conn. 9.

²¹ Udderzook v. Commonwealth, 76 Penn. St. 349; Marion v. State, 20 Neb. 233; Ruloff v. People, 45 N. Y. 213; Brooke v. Brooke, 60 Md. 529.

eral use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses." This seems better reasoning than that of the Maryland court. In the case of Leathers v. The Salver Wrecking Company, 22 it was held that photographic copies of public documents on file in the public departments at Washington, which public policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way. Photographic copies were not received with the depositions of witnesses living in another State who had stated their opinion of the genuineness of disputed handwriting, the opinion being based upon a photographic copy of the instrument in dispute attached to interrogatories. The conclusion reached by the court in this case28 was that photographic copies of instruments sued on could only be used as secondary evidence, and rejected the testimony on the ground that no foundation had been laid for it. the matter of Foster's will decided in 1876.24 the court says: "If the court had permitted photographic copies of the will to be given to the jury with such precautions as to secure their identity and correctness, it might not perhaps have been error;" although the court in its conclusion passed against the admission of such copies. The same conclusion was followed in Maclean v. Scripps.25 A photographed copy of a forged note that has since become illegible, is admissible to prove the words of the note upon proof that it is an exact copy of the words.26

Owosso, Mich.

PERCY EDWARDS.

- 2 2 Wood, 682 (U. S. C. C.).
- 28 Ebone v. Zimpelman, 47 Texas, 503.
- 24 34 Mich. 28.
- 25 52 Mich. 214, 219.
- 26 Duffin v. People, 107 Ill. 113.

MUNICIPAL CORPORATIONS—SEWERS—NEG-LIGENCE.

FUCHS V. ST. LOUIS.

In the Supreme Court of Missouri, March 3, 1896.

A city is liable for any omission of reasonable and ordinary care in the management of its sewers. What is ordinary care depends very greatly on the facts and circumstances of each particular case.

BARCLAY, J.: This action was brought under the damage act (R. S. 1889, ch. 49, secs. 4426,

4427), to recover for the death of Mr. Carl E. Fuchs. Plaintiff is his widow and charges that his death was occasioned by the wrongful act or neglect of the defendants, which charge the defendants deny. The defendants are the City of St. Louis and the Waters-Pierce Oil Company. The case came to trial in the circuit court, in St. Louis. At the close of the testimony instructions were given to the effect that plaintiff could not recover against either defendant. Plaintiff took a nonsuit with leave, etc., and having, without result, duly moved to set it aside, brought the case here by appeal, after the customary exceptions preserving her case for review. The plaintiff's husband was killed by the explosion of a public sewer which was in the possession and control of the city. The question presented by this appeal is whether the facts tend to show a liability for that misfortune, as to either one of the defendants. Mr. Fuchs had for many years owned a building on the east side of Fourth street between Chouteau avenue and Convent street. In July, 1892, he occupied the lower floor and cellar of this building as a place of business, where he conducted a saloon. The house stood over a public sewer, built there by the city, before he acquired the property in 1884. The house was built in that year. The sewer was called the "Mill Creek Sewer." It was a large one, constructed and maintained by the city. It was used to drain an extensive territory, as well as to carry off the surface water and sewage from the public buildings in the central part of the city, including the City Hall, the "Four Courts," and the jail. The sewer extended from the west beneath and across Broadway (or Fifth street) and Fourth street, underneath and across Mr. Fuchs' lot, and thence eastwardly, a distance of about four blocks, to the Mississippi river, its outlet. The sewer was provided with several closely covered openings or manholes which were available for ventilating it. Several of those manholes were located along the line of the sewer near the saloon property, one of them a short distance west of it. The sewer was about 14 feet in diameter, had an arched top, and was built chiefly of masonry. July 22, 1892, about noon, a fire broke out on the premises of the Waters Pierce Oil Company, located some ten blocks west, and two or three blocks north, of the saloon. While the fire was in progress, and the city fire engines were throwing streams of water on the burning buildings, large quantities of oil and water ran from the premises of the oil company, and spread out among the railroad tracks adjoining. Then a gang of laborers, under direction of the chief of the St. Louis Fire Department, dug a trench among the railroad tracks, and by that means conducted the oil and water into a drain leading to the Mill Creek sewer. This oil was not burning at the time. The men who did this were not on the premises of the oil company, and no officer of that company present was seen or heard to give them any directions concerning the prosecution of the work, nor was it shown that the workmen were in the employ of the oil company. Nor was the sewer inlet, into which this oil was conducted on the premises of the oil company. How much oil ran into the sewer does not clearly appear, but the amount was, at least, three or four hundred gallons. Four days after the fire the explosion occurred, shortly after 4 P. M. The immediate cause was the act of an employee of a shop on the opposite side of the street from the saloon, who went into the cellar in the course of his business, taking a lighted candle. As he approached the drain or sewer inlet, there was a puff of flame and an explosion which knocked him off his feet, stunned him, and set fire to his He remembered nothing more for some time thereafter, but another man near him took up the story at that point and testified that the big explosion (which demolished part of the saloon) occurred before you could count ten, after the mishap to the man with the candle. The final explosion made a noise like a cannon, as one witness described it. It tore open the top of the sewer for a long distance, and among other damage blew out part of the saloon building and killed the plaintiff's husband. The drain opening into the cellar where the explosion originated connected with the Mill Creek sewer. The presence of a large body of oil in the sewer at the time and place of the catastrophe was established by the testimony of a witness who was sitting at a table in the saloon with Mr. Fuchs when the explosion took place. This witness was thrown into the sewer and swept down it a distance of several hundred feet, but was fortunate enough to escape alive. His evidence showed the presence also of much coal oil gas in the sewer while he was in it. There was evidence that the conflagration at the oil works was large and attracted general public attention. A gas engineer, of many years' experience in manufacturing gases from petroleum and its products, testified for plaintiff that crude petroleum, exposed to a temperature of 60 degrees Fahrenheit, in a confined space, given off inflammable vapors or gases which will explode when brought into contact with flame; that naptha is one of the first products of the distillation of the crude petroleum, and is lighter, and the like vapors will form from it speedier than from the crude oil in the same temperature; that these vapors or gases are lighter than the air and rise, and, although not combustible spontaneously, will explode so soon as a flame comes in contact at any point with the gas. The evidence also indicated that the outlet of the sewer at the river was stopped up by reason of the high stage of water. There was evidence to show that some of the large manholes or inlets, to this sewer, in the vicinity of the saloon, were not opened after the oil ran into the sewer, and that the cover of a manhole in the street west of the saloon was thrown into the air by the explosion and broken in pieces. The death of plaintiff's husband occurred July 26, 1892, the day of the

disaster, and this suit was instituted on September 16th following: 1. The first question is whether the case should have gone to the jury on the issue of negligence on the part of the city. Irrespective of any inquiry as to the capacity of construction of the sewer, it is settled law in Missouri that a city is liable for any omission of reasonable or ordinary care in the management of such a property. What is ordinary care depends very greatly on the facts and circumstances of each particular case. In determining what care of property is reasonable, its situation and the objects of its use should be considered.

Here was a large sewer which ran under business buildings in a populous part of the city, and the sewer exploded in the circumstances described. There is not, by the way, the slightest claim or suggestion of any negligence on the part of the deceased. That a large body of inflammable oil had entered the sewer, because of the fire at the oil works, was a fact which the jury might naturally have inferred the city had notice of, after a lapse of four days, as also of the high water in the Mississippi river prevailing at that time, preventing a free discharge of the contents of the sewer in that direction. The fact that gases form from such oils, upon subjection of the latter to heat, is a matter of ordinary scientific knowledge, of which courts will take judicial notice. It was, moreover, testified to as a fact in the case before us. In view of the conditions existing at the time of the disaster, what was the duty of the city; or, rather, what fair inferences may be drawn (from the fact of the explosion and its circumstances) as to the performance or nonperformance by the city of the duty of ordinary care towards its citizens living along the line of the sewer? It is in evidence that the large vent or manhole in the street, just west of the saloon, was tightly covered during the four days from the fire to the explosion, and that when the latter occurred the iron cover of that opening, about three feet in diameter, was thrown a great distance by the force of the shock. The time was summer-the latter part of July. Yet nothing whatever appears to have been done by the city authorities, so far as this evidence indicates, toward averting the effects likely to follow the escape of such a large body of volative oils into a sewer whose natural outlet was obstructed by the high water in the river, as stated. All the facts which made the sewer dangerous might fairly have been found to be within the knowledge of the city officials, after the lapse of time following the fire. Vanderslice v. Philadelphia (1883), 103 Pa. St. 102. Carefully managed sewers do not, according to the common experience of men, usually blow up and scatter destruction and death. Such a performance is of itself entitled to consideration on the issue of care in respect of such property; or, as some jurists have said: "The thing itself speaks." Had the cover of the large opening west of the saloon been removed, so as to allow the direct escape of the gas at that point, it

may be that the disaster would have been avoided. It was not removed; nor do any other steps appear to have been taken in regard to the care of the sewer by the city authorities after the flow of the oil into it on the 22d of July. It is not always consistent with common prudence to await a catastrophe before taking precautions against it, nor is it conclusive of careful management that a particular disaster had never before occurred. It is often an essential partlof reasonable care to guard against those performances which men of ordinary prudence would naturally and reasonably anticipate in dealing with such dangerous agencies as science has contributed to our highly complex civilization. To what extent such foresight is demanded by the duty to use ordinary care it would be very difficult to say. We shall not attempt to generalize on that topic now. And as the cause at bar should be brought to another trial, we do not propose to go into any further comment on the facts that seems needful to indicate our general view as to their probative force and tendency. It appears to us, on the testimony submitted, that it cannot be declared as a conclusion of law that the city fully performed the full measure of its duty in respect of the sewer property; and hence that the learned trial judge erred in giving the instruction which denied plaintiff the right to go to the jury for a finding of fact as to the alleged negligence of the city. 2. Touching the charge against the oil company, there is no evidence as to the origin of the fire at the works, nor any evidence of any want of care on the part of the company in regard to the flow of oil into the sewer. That flow was caused by the direction of the chief of the city fire department for the purpose of averting the danger of spreading the conflagration. The oil company was not responsible for that action on the facts shown, nor was it responsible for the care of the public sewer which exploded four days later. We conclude that the ruling and finding as to the oil company should be affirmed; but as to the city the judgment is reversed and the cause remanded for a new trial. Brace, C. J., and Robinson, J., concur. Macfarlane, J., concurs in the result.

NOTE.—The questions involved in the principal case have been before the courts frequently, and their decisions are in harmony on most of the propositions considered. It is admitted that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation or its officers for the public good. Such powers are considered to be governmental functions, and of no peculiar advantage to the corporation. Ulrich v. St. Louis, 112 Mo. 138. The authority given to construct sewers is held to be legislative and quasi judicial. Woods v. Kansas City, 58 Mo. App. 272; Schreiber v. Mayor of New York, 82 N. Y. Sup. 744; Hession v. Wilmington (Del., June, 1893), 27 Atl. Rep. 830; Fort Wayne v. Coombs, 107 Ind. 75; Wessman v. Brooklyn, 16 N. Y. Sup. 97. It is discretionary with the municipality as to what, if any, action shall be taken in the premises. Therefore the municipality is not responsible because of damages sustained by reason of its failure to construct any sewer (Woods v. Kansas City, supra; Seifert v. Brooklyn, 101 N. Y. 136; Fort Wayne v. Coombs, 107 Ind. 75), or because the sewer it provided was not sufficient for the public necessities, or was built upon a defective plan. Schreiber v. Mayor of New York, supra; Wessman v. Brooklyn, 16 N. Y. Sup. 97. It would follow that there would be no liability, the municipality having acted in good faith, though the sewer was inadequate for the ordinary demands on it (Hession v. Wilmington, supra; Schreiber v. Mayor of New York, supra), but this is not always conceded. Fairlawn C. Co. v. Scranton, 148 Pa. 231; Los Angeles C. Assn. v. Los Angeles, 103 Cal. 461. It has been held that after experience has demonstrated that a sewer is, under ordinary conditions, insufficient for its purposes, a city is liable for damages accruing from its existence. Netzer v. City of Crookston (Minn., Nov., 1894), 61 N. W. Rep. 21. So if the sewer results in a direct and physical injury to any one, but such result may be avoided by a change of plan, the city is liable for all injuries which may accrue therefrom, after it has been notified of the injuries resulting therefrom. Seifert v. Brooklyn, 101 N. Y. 136. When a city undertakes the construction of a sewer, its duties in constructing the same properly according to the plan, in keeping it in repair and in proper condition, are considered to be ministerial (Selfert v. Brooklyn, supra; Hession v. Wilmington, supra), and ministerial duties are mandatory. Woods v. Kansas City, 58 Mo. App. 272. Therefore a city is held liable for damages accruing from any defect in carrying the plans for the construction of a sewer into execution (Hession v. Wilmington, supra; Valparaiso v. Cartwright, 8 Ind. App. 429; Woods v. Kansas City, supra; Netzer v. City of Crookston, supra; Fort Wayne v. Coombs, 107 Ind. 75), for negligence in keeping it in repair (Wessman v. Brooklyn, 16 N. Y. Sup. 97; Fort Wayne v. Coombs, supra), for allowing poisonous gases to escape from it (Atlanta v. Warnock, 91 Ga. 210; Dallas v. Schultz (Tex. Civ. App., May, 1894), 27 S. W. Rep. 292), for allowing it to become obstructed, and for any other negligence in managing it, whereby anyone has been injured. Woods v. Kansas City, 58 Mo. App. 272; Valparaiso v. Cartwright, supra. In such cases only ordinary care is demanded from a municipality. Netzer v. City of Crookston, supra; Wessman v. Brooklyn, 16 N. Y. Sup. 97. Where a sewer gets out of repair or contains obstructions, it has been held that the municipality is not liable for damages arising therefrom, until it has been notified of its condition, or such condition has continued so long that notice thereof is to be imputed. Seifert v. Brooklyn, 101 N. Y. 136; Woods v. Kansas City, supra; Fort Wayne v. Coombs, 107 Ind. 75. When the damages complained of have been due to some extraordinary flow of water occasioned by an unexpected flood, or to an act of God, or to an inevitable accident which could not have been reasonably foreseen, all the authorities agree that there is no liability therefor (Los Angeles C. Assn. v. Los Angeles, 103 Cal. 461; Hession v. Wilmington, supra; Dist. of Col. v. Gray, 1 Dist. Col. App. 500; Fairlawn C. Co. v. Scranton, 148 Pa. 231), unless some negligence of the municipality, amounting to want of ordinary care, concurred in, and contributed to, said damage. Woods v. Kansas City, supra. When the injury occurs from an accident, which there is no reason to apprehend, or from the omission of some pre-caution, which, if taken, would have prevented the injury, which could not reasonably have been anticipated, and would have occurred only under excep



tional circumstances, there is no liability. Cases cited by Sherwood, J., dissenting in the principal case; Sullivan v. Jefferson Ave. R. R. (Mo.), 34 S. W. Rep. 566. [Sherwood, J., in a separate opinion, does not consider the latter opinion to be in harmony with the principal case.] If, in making sewers or other street improvements, the flow of surface water is altered, a municipality is not liable for damages caused thereby, though the work is done negligently or on a defective plan (Champion v. Crandon, 84 Wis. 405), unless thereby the water is first accumulated by artificial means, so as to increase the volume and detrimental effect with which it flowed on the land of the complainant. Wakefield v. Newell, 12 R I. 75; Field v. West Orange, 46 N. J. Eq. 183; New Albany v. Ray, 3 Ind. App. 321. The liability of municipalities for defects in their sewers is considered to arise from the theory that the creation of sewers is for the benefit of their special or local interests, and is not a governmental function.

S. S. MERRILL.

BOOK REVIEWS.

SHINN ON ATTACHMENT AND GARNISHMENT.

The subject of this treatise was not known to and has no precedent in the English common law. It is entirely the creation of statute and every State in the Union has enacted laws, more or less similar upon the subject. Questions relative to the construction of and procedure under attachment and garnishment statutes constantly arise and with increasing frequency in response to the demands and growth of mercantile life. It may also be said that there is no subject of the law which presents to the practitioner more perplexing problems or in reference to which more diversities of opinion exist. For this reason a new and exhaustive treatise on the subject is a valuable addition to the library of every practitioner. This may be said without detracting in the least from the merits of older productions; for as to a subject exclusively statutory, and having nothing of common law interest it will readily be understood that a text book to be of value must be not only exhaustive, but also a compendium and discussion of the later questions and cases. The work of Charles D. Drake on the subject was, at the time of its publication, considered masterly, but it has long ceased to be of modern value in view of the rapid development and change of the law governing the subject of attachment and garnishment. The only work within recent years which has present value is that of Mr. Waples but while having great merit it is not as complete or exhaustive as the volumes before us. It would be impossible within the necessary limits of this review to enter into a detailed analysis of the contents of the two very large volumes wherein the author has considered the American law of Attachment and Garnishment. It will have to suffice us to say that he discusses in successive chapters the origin, nature and purpose of attachment, what demand will support the action, what property or interest may or may not be attached, the parties to and ground for attachment, the affidavit, the bond, the writ, execution and return thereof, possession of attached property, release of possession, the lien created by attachment, dissolution of the attachment, liability of the plaintiff beyond the covenants of the bond, priorities, intervention, incidental matters of pleading and practice, judgment execution and sale. All the above appears in the first volume. The subject of garnishment appears in volume two. Here there are chapters on definition, na-

ture, scope and effect of garnishment, who may be held as a garnishee, efficiency of garnishment, the process and its operation, the answer, its contents and effect, proceeding when answer is wanting or unsatisfactory, interplea in garnishment, judgment in garnishment, and garnishee's protection from other suits. The above statement of its contents will serve to show the scope of the work and its very complete and exhaustive character. An examination of the volumes themselves will but emphasize this conclusion. They exhibit throughout exceeding care and great diligence in the accumulation of the material. We cannot discover that any cases on the subjects or any questions which might properly be found therein have been omitted. The text is written in a clear admirable style and the author discusses in a vigorous and luminous manner many controverted and perplexing questions. It has an admirable index and table of cases. We do not hesitate to commend the work to the profession as having decided merit and of great modern usefulness. Of its mechanical execution we cannot but speak in great praise. The volumes are beautifully printed and the binding and exterior appearance exceptionally good. Published by Bowen-Merrill Co., Indianapolis.

HUMORS OF THE LAW.

At the last banquet of the Kansas City Bar Association, Judge Barclay, of the Missouri Supreme Court, made a witty response to a toast, in the course of which he read the following clever satire upon the opinions of courts, the author of which he said was unknown: Blackstone v. Mumm, appellant, March term, 1895. Opinion of the court by Jackson L. Gillison, J.

This is a suit on the equity side of the court—the tender side, as it were—and the facts will be sufficiently involved during the course of our remarks.

It appears from the bills of fare, doctor's bills, prescriptions, and other papers in the case, that the defendant, Mumm, brought an action of ejectment against the plaintiff, Blackstone, and obtained judgment of ouster and possession with ten dollars damages for rents, carriages and shutters, in February, 1895.

The present dress suit is now pressed with a view to set aside that judgment on the ground of fraud and conspiracy.

It is claimed by Blackstone that, during the trial of the ejectment action, Mumm became personally acquainted with the witnesses for Blackstone, and loaded them so heavily with spirits and res gestæ that the burden of proof was more than they could bear; so they sat down (on the witness stand) and swore in favor of Mumm when, in point of fact, in their normal and innocent high school condition, their statements and actions were all in support of Blackstone (as he walked home).

Because of this fraud, in changing their evidence, Blackstone asks relief.

The case has the odor of a case of champagne and the testimony is highly spirited. The witnesses alleged to have been so inverted and damoralized do not appear to know exactly which side they undertook to lie on at the ejectment trial. They refer in their testimony to a great banquet, and speak of having been "extra dry," of trying to "dry-'em-on-a-pole," of "boiled owls" and "Black larks." They also meation "blind tigers," "meandering straights," and other matters of which courts cannot take judicial notice in term time.

The counsel for Mumm objected to all those statements of fact without proof of the witnesses' meaning, professing deep and deadly ignorance of such nomenclature.

This court (whatever they may know in vacation or on fishing excursions) is bound to assume that those objections were interposed in legal good faith, and will treat them (as well as counsel) to the best we have in court.

But it seems that our learned trial brother, Judge-Scarrit, a jurist of large experience, ruled that those matters were all proper and usual subjects of judicial cognizance in Kansas City at all times. He found that the witnesses for Blackstone in the original suit had been deluded and tinctured by Mumm, and hence granted to Blackstone the prayer of his petition.

But it should be noted that Blackstone was numerously present at the event to which the witnesses refer and took part in the res gestæ, described by them. The learned judge overlooked Blackstone's contributory negligence in the premises. Blackstone should have stopped, looked and listened more closely to the proceedings of the banquet in order to protect his witnesses (his team as it were) from coming into proximity to such dangerous agencies as Mumm was at that time operating.

After a careful review of the record, this court is of opinion that the very able and eloquent trial judge must have imbibed (among other things, rather too liberal an idea of the weight of Blackstone's evidence; and that his judicial notice was somewhat too extended for open court.

It appears, moreover, that the court took a recess, during the trial, to observe some curious experiments with various fluids mentioned by some of the witnesses. Those experiments were conducted at a neighboring drug store by the judge, assisted by some experts who testified in the cause to throw light or darkness on the points involved. This was clearly error. The jury, called to aid the court in trying the issue of fraud, should, also have been invited to participate.

In a case purporting to be equitable in its nature, it was serious error to treat the jury thus, or rather not to treat them better by permitting them to share in the aforesaid fluid experiments.

The depression and gloom of the jury, in such circumstances, would readily lead them to find fraud and conspiracy on very slight testimony. This has been settled by a long line of solid authorities, Lathrop's Angell, Carriers, Sec. 43; Jones on Liens, Sec. 5.6; Phillips' U. S. Practice, Sec. 406; Ball's Leading Cases, 68; 1 Dean on Blockades, 119; 2 Hagerman on Jackpots, p. 60, ante; Black on Intoxicating Liquors, Sec. 425 and cases cited.

WREKLY DIGEST

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- 1. ACCORD AND SATISFACTION Conclusiveness.—A contract stating that it is in full settlement of all actions and causes of action on account of all matters of any kind between the parties is conclusive as to any controversy existing, where there was no evidence of fraud or mutual mistake.—LAUZON v. BELLEHEUMER, Mich., 66 N. W. Rep. 345.
- 2. ACCOUNT STATED—Evidence by Note.—A note, attached to a declaration, and shown to have been executed in extension of an account, for which the separate estate of the debtor's wife was also liable, and in acknowledgment of the amount due thereon, will be treated as an account stated, and is admissible in an action against the wife to prove the amount due.—MCCORMICK V. ATTMEAVE, Miss., 19 South. Rep. 198.
- 3. APPEAL Absconding Debtor.—Under Mill. & V. Code, § 4192, subsec. 4, providing for an attachment where a debtor intentionally conceals himself to avoid legal process, the question of such intent is one of fact, and the finding thereon of the court of chancery appeals will not be reviewed.—FARMERS' & TRADERS' BANK V. EVANS, Tenn., 34 S. W. Rep. 2.
- 4. APPRAL—Error Election.—Where a case is presented for review to this court within the time allowed in which to perfect an appeal, but a petition in error is filed therewith, the party bringing the case here will be presumed to have elected the remedy by error, and the case will be so considered.—CHILDERSON V. CHILDERSON, Neb., 66 N. W. Rep. 281.
- 5. APPEAL Supplementary Proceedings.—An order made on supplementary proceedings, declaring that a third person, who was made a party, was indebted to the execution defendant and requiring him to pay plaintiff's judgment from the first money due on such debt, was a final judgment, from which an appeal will lie.—HARPER V. BEHAGG, Ind., 42 N. E. Rep. 1115.
- 6. Assignment-for Benefit of Creditors—Invalidity.—An assignee for benefit of creditors under a void assignment has no title to the property assigned, and cannot maintain replevin against the sheriff seizing it under attachment.—Mosconi v. Burchinell, Colo., 48 Pac. Rep. 912.
- 7. Assignment for Benefit of Creditors—Validity.

 —An assignment is not void for preferring certain creditors where the deed of assignment expressly states that the assignee shall pay claims to creditors "according to the true amounts legally due them."—GOODBAR SHOE CO. V. MONTGOMERY, Miss., 19 South. Rep. 196.

- 8. Assignment for Creditors—Filing Notice—Lien.
 —An attachment lien is an incumbrance, within Sess.
 Laws 1885, p. 48, making the filing of a deed of general assignment in a county where real estate conveyed by the deed is situated constructive notice to a purchaser or incumbrancer of the transfer.—SPANGLER v. WEST, Colo., 43 Pac. Rep. 905.
- 9. ATTACHMENT Affidavit.—An affidavit for an attachment, setting forth the grounds therefor in the language of the statute, is sufficient.—BURNHAM V. RAMGE, Neb., 66 N. W. Rep. 277.
- 10. ATTACHMENT Claim by Third Person.—On a claim in attachment by a third person, there was evidence of a debt from defendant to another corporation, and from the latter to claimant. The books of such corporation showed that defendant was credited with payment of its debt by delivery to claimant of the pig iron attached. It was shown that the iron was delivered to claimants under such agreement for payment, and that claimant was in possession thereof for over a month prior to the levy thereon: Held, that the property was not subject to the attachment.—MARY LEE COAL & BAILWAY CO. V. KNOX, Ala., 19 South. Red. 67.
- 11. ATTACHMENT—When Authorized.—Under Sand. & H. Dig. § 325, subd. 6, authorizing the issuance of an attachment when a debtor has removed property from the State, not leaving enough to satisfy the claims of his creditors, the value of the property left is to be determined by its fair market value, and not by what it would bring at forced sale.—NESBIT V. SCHWAB CLOTHING CO., Ark., 34 S. W. Rep. 79.
- 12. ATTACHMENT Wrongful Attachment-Joint and Several Liability .- Creditors, acting separately and without concert, though simultaneously, sued out attachments, which were simultaneously levied on property which they were justified in believing had been transferred by their common debtor in fraud of their rights; and, having each indemnified the sheriff, sold the property, and applied the proceeds in payment of their respective demands. The purchaser from the debtor, in an action on the indemnifying bond of one of the attaching creditors, recovered damages for the wrongful taking and sale of the attached property: Held, that the levy of the several attachments was a single tort, and therefore constituted a single cause of action, for which the attaching creditors were jointly and severally liable.-VANDIVER v. POLLAK, Ala., 19 South. Rep. 180.
- 13. ATTORNEY AND CLIENT Evidence.—In an action by attorneys for professional services, defendant, if not an attorney, is not a competent witness to testify as to the value of plaintiff's services, though he has employed and settled with other attorneys, and knew what their charges were in other cases.—HOWELL V. SMITH, Mich., 66 N. W. Rep. 218.
- 14. ATTORNET'S LIEN—Setting off Judgments.—An attorney's lien is so far subject to the equities arising out of and existing between the parties to an action that a judgment on appeal for costs against the plaint-iff may be set off pro tanto against a similar judgment in the same action in plaintiff's favor, without regard to such lien of the attorney.—LINDSAY v. PETTIGREW, S. Dak., 66 N. W. Rep. 321.
- 15. BAILMENT—Action by Bailee.—A bailee may sue a third person for injury to the property.—BAGGETT v. McCormick, Miss., 19 South. Rep. 89.
- 16. BENEVOLENT ASSOCIATIONS—Submission of Grievances.—Members of fraternal benevolent associations may lawfully agree, as part of their scheme of organization, to submit their domestic grievances in the first instance to the internal tribunals of their order, and, having so agreed, cannot, against the protest of the association, maintain a civil action against it, until the condition precedent has been, in legal contemplation, complied with.—STATE V. SMITH, N. J., 33 Atl. Rep. 849.
- 17. BILL OF EXCEPTIONS—Authentication.—A bill of exceptions in a cause tried in the district court must

- be authenticated by the certificate of the clerk of such court, to entitle it to be considered in the supreme court.—ROMBERG v. FORKEN, Neb., 66 N. W. Rep. 282.
- 18. BILL OF EXCEPTIONS—Authentication.—In the absence of a certificate of the cierk of the district court authenticating the bill of exceptions, it will be presumed that every essential averment in the petition not negatived by the verdict, was proven, and that the instructions refused were properly denied.—ROMBERG V. HEDIGER, Neb., 66 N. W. Rep. 283.
- 19. BILL OF EXCEPTIONS—Time for Preparing.—Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions embodying the evidence on that trial is fixed at the latest, by the term at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied.—STATE V. AMBROSE, Neb., 66 N. W. Rep. 306.
- 20. BUILDING AND LOAN AS OCIATIONS Usury.—An applicant for a loan from a building and loan association was informed by the association that he must become a member to secure the loan, and subscribed for stock in order to secure the loan, and not as an investment. In consideration of a loan of \$450, he gave his note for \$500, due in five years, and contracted to pay \$4.17 interest per month and \$6 ss dues: Held, that the contract was usurious, the legal rate being 12 per cent.—PROPLE'S BUILDING, LOAN & SAVINGS ASS'N V. RISING, Tex., 34 S. W. Rep. 147.
- 21. Caeriers—Contract for Shipment of Freight.—A shipper of freight who signs a contract of shipment in the absence of fraud or deceit, is conclusively presumed to know its contents and to have assented thereto.—Kellerman v. Kansas City, St. J. & C. B. R. Co., Mo., 84 S. W. Rep. 41.
- 22. CARRIERS Injuries to Baggage.—A carrier of passengers is not liable to a firm for injuries done to an article belonging to the firm, but carried by the carrier as the personal baggage of a passenger, although the passenger was a member of the firm.—STATE v. KNIGHT, N. J., 33 Atl. Rep. 845.
- 28. CARRIERS—Injuries Pleading—Amendment.—In a suit for personal injuries the petition elleged that defendant's train was derailed because of a defective track and road-bed. In an amendment it was alleged that the train was derailed because of a defective axle of the tender: Held, that the negligent derailment of the train was the act complained of, and the amendment did not set up a new cause of action.—TEXAS & P. RY. CO. V. BUCKALEW, Tex., 34 S. W. Rep. 164.
- 24. Carriers Live-stock Shipment Evidence.—In an action for delay in a stock shipment, error in allowing the owners of the stock, who had no personal knowledge of the weight of the animals, or of the sales made, to testify as to such matters by referring to accounts submitted by their commission merchants, which had not been introduced in evidence, was not cured by a subsequent offer to put such accounts in evidence, where it appeared that the court rejected the offer on the ground that the accounts were not properly verified.—GULF, C. & S. F. RY. Co. v. FROST, Tex., 34 S. W. Rep. 166.
- 25. Carrier cannot, by contract, limit its liability.—A carrier cannot, by contract, limit its liability for injury to live stock to such injuries as are caused by gross negligence.—Baltimore & O. S. W. RY. Co. v. Ragsdale, Ind., 42 N. E. Rep. 1106.
- 26. CARRIERS Penal Statute—Negligence.—Rev. St. U. S. § 4386, requiring railroad companies, under a penalty imposed, payable to the United States, to unload animals shipped, at stated periods, for rest, food, and water, gives to a shipper whose animals are injured by fallure of the company to do so a cause of action enforceable in a State court.—CHESAPRAKE & O. RY. CO. V. AMERICAN EXCH. BANK, Va., 23 S. E. Rep. 925.

- 77. CARRIERS OF PASSENGERS—Railroad Companies.—
 One who, through collusion with the conductor of a railway train, is riding for less than the required fare, cannot recover damages from the railway company for injuries received by being ejected while the train is in motion.—WILLIAMS v. MOBILE & D. R. Co., Miss., 19 South. Rep. 20.
- 28. CARRIERS OF GOODS—Express Company.—Where plaintiff, on a certain day, expected a packagejby express at a place where it was customary for consignees to call for packages upon notice of their arrival, and plaintiff, in the evening of the same day, and in time to receive the same, was notified of the arrival of said package, but directed the express company to retain the package until the next day, and it was stolen that night without fault on the part of the company, the company is not liable for its loss.—Southern Exp. Co. v. Holland, Als., 19 South. Rep. 66.
- 29. CERTIORARI—Removal and Appointment of Officer.—Certiorari does not lie to review the action of the board of trustees of a city declaring vacant the office of city marshal, and appointing a person to fill the same.—LORBEER v. HUTCHINSON, Cal., 48 Pac. Rep. 896.
- 80. CHATTEL MORTGAGE Acceptance—Evidence.—
 That a mortgage was, after the execution and filing
 of a chattel mortgage, informed thereof, and authorized her attorney to take possession of the property,
 is a sufficient acceptance of the mortgage, as against
 other creditors of the mortgagor subsequently attaching the property.—LOUDEN v. VINTON, Mich., 66 N. W.
 Rep. 222.
- si. Chattel Mortgages—Description of Property.—A chattel mortgage sufficiently describes the property as the entire stock of merchandise in a certain store, giving the lines of goods, it appearing that nothing was added to the stock after the giving of the mortgage.—Dillon v. Dillon, Wash., 48 Pac. Rep. 894.
- 32. CHATTEL MORTGAGE Recording. Where the plaintiff in an action in replevin claims the right of possession under and by virtue of a certain chattel mortgage, and it is admitted that the property covered by said mortgage remained in the possession of the mortgagor, it is necessary for the plaintiff to establish the fact that such chattel mortgage was on file in the office of the register of deeds of the proper county at the time an attaching creditor levied upon such goods, in order to impart validity to such chattel mortgage as against an attaching creditor without actual notice. —GRIFFIS v. WHITSON, Kan., 48 Pac. Rep. 818.
- 33. CHATTEL MORTGAGE—Sufficiency of Description.

 —A deed of trust describing the property mortgaged as the crops to be raised by the grantor, during a certain season, "on lands" in a certain county "leased from" a certain person by the grantor, sufficiently describes the property subject to the mortgage.—WETLIN V. MOUNT, Miss., 19 South. Rep. 201.
- 34. CONDEMNATION PROCEEDINGS—Estoppel to Question Validity.—A landowner, who has accepted and retained a sum awarded in condemnation proceedings, is estopped from questioning the validity of the proceedings.—HOLLAND V. SPELL, Ind., 42 N. E. Rep. 1014.
- 35. CONSTITUTIONAL LAW Interstate Commerce-Rates of Freight.—Sayles' Civ. St. art. 4258a, § 8, provides that no railway company in the State shall charge for the transportation of any freight a greater sum than is specified in the bill of lading, and any railway company refusing to deliver freight to the consignee on payment or tender of the charges stated in the bill of lading shall be liable to a penalty equal to the amount of such charges for each day's delay: Held, that such statute is inconsistent with the provisions of the interstate commerce act requiring railway companies engaged in interstate commerce, under the penalties prescribed, to charge and collect the rates of freight specified in the published tariff schedule, and is therefore void as to interstate shipments of freight.-St. Louis S. W. Ry. Co. of Texas v. Carden, Tex., 34 8. W. Rep. 145.

- 86. CONSTITUTIONAL LAW-Itinerant Peddlers—License Tax.—A city ordinance requiring all transients, other than citizens of the city, selling goods of any kind within the city, to pay a license tax, and in default thereof be imprisoned or fined, is, when applied to citizens of other States, a violation of Const. U. S. art. 4, § 2, providing that the citizens of each State shall be entitled to all the privileges of citizens of the several States.—McGraw v. Town of Marion, Ky., 84 S. W. Ren. 18.
- 37. CONTRACT Assignment.—By contract between P and M the former purchased all the hemlock bark growing on M's land, and, in consideration therefor, agreed to convey to M certain other land, reserving to himself, however, the hemlock bark growing thereon. After executing and delivering to M a deed containing the same reservation as to the bark as was contained in the original contract, P assigned such contract to a third person, describing it as a contract between M and P "for the sale and removal from the lands therein described of the hemlock bark thereon:" Held, that the assignee thereby acquired title only to the bark growing on M's land, and not to that on the land conveyed by P to M.—SCHOONMAKER V. HOYT, N. Y., 42 N. E. Rep. 1069.
- 38. CONTRACT Conditional Sale.—A enters into a contract with B, by the terms of which A agrees to furnish some new machinery, and put it with the old machinery already in the mill of B, and is to remodel said mill, and guaranties to change it so that it will do certain things. B agrees, when the mill fulfilis the guaranty of A, to accept and settle for it: Held, that B is not bound to accept and settle for it, and is not in default in the payments contracted for, until it fulfills the guaranty.—RICHARDSON V. GREAT WESTERN MANUF'G CO., Kan., 48 Pac. Rep. 809.
- 89. CONTRACT Consideration. A promise to the parents to pay their child a certain sum in consideration of the privilege of naming the child is a good consideration for a note given to the child by the promisor, so as to enable the child, the parents having surrendered to the child all rights therein, to recover thereon.—EATON V. LIBBET, Mass., 42 N. E. Rep. 1127.
- 40. CONTRACT—Consignments.—A contract between manufacturer and dealer, whereby the dealer agrees to sell vehicles shipped to him, and remit to the manufacturer all notes and cash received therefor, and to guaranty the payment of the notes so taken, and which reserves to the manufacturer the ownership of the vehicles until settlement is made, with the right to cancel the contract or withdraw any of the "jobs" at his pleasure, and which provides that the manufacturer shall ascertain and set apart the dealer's commissions, and may, at the end of the year, have the unsold vehicles stored by the dealer, subject to the manufacturer's order, is a contract of consignment, and not one of sale.—MILBURN MANUF'G CO. v. PEAK, Tex., 34 S. W. Rep. 102.
- 41. CONTRACT Construction Mutuality.—Plaintiff had been manufacturing tin cans for defendant for some time at an agreed price, when defendant wrote to plaintiff that he would take his entire output of cans if he would agree not to sell to a certain other person, and directing plaintiff to enter his order for a certain number of cans "as heretofore." Plaintiff accepted the proposition, and shipped cans which were paid for at the price theretofore agreed upon: Held, that the contract was not invalid for failure to definitely fix the price to be paid for the cans.—WALSH v. MyERS, Wis., 66 N. W. Rep. 250.
- 42. CONTRACT—Damages.—The measure of damages for breach of contract on the part of the buyer to purchase an article to be manufactured by the seller, for which there was no market value, the seller having desisted from manufacturing the article after notice from the buyer of his repudiation of the contract, is the difference between the contract price and the cost of production, and not the difference between the contract price and the price at which the seller at the time

- of the breach was enabled to effectuate sales thereof.
 —Todd v. Gamble, N. Y., 42 N. E. Rep. 982.
- 43. CONTRACT—Rescission Fraud.—A rescission of the contract for the purchase of land, and the cancellation of the conveyances, on the ground that the representations of the vendor were false and fraudulent, is an extraordinary power of equity, and should not be exercised unless it is clearly established that the representations were false or fraudulent, and that they were relied on by the purchaser, and the right to disaffirm the contract must be exercised promptly after the discovery of the fraud.—WOOD v. STAUDENMAYER, Kan., 43 Pac. Rep. 760.
- 44. Conversion—What Constitutes.—That an officer forecloses a chattel mortgage, invalid as against an attaching creditor of the mortgagor, for failure to record the same, the possession of the property being in no way interfered with by the officer or purchaser at the foreclosure sale, does not constitute a conversion, as against the attaching creditor.—Thorr v. Robbins, Vt., 33 Atl. Rep. 896.
- 45. CORPORATIONS Annual Report. In action against the trustees of a corporation, under Comp. St. div. 5, § 460, making the trustees liable for corporate debts unless they file, "in the office of the clerk of the county where the business of the company is carried on," a report, stating the amount of capital, etc., the complaint is bad, if it fails to state in what county the business of the corporation was carried on. WETHEN V. KEMPER, Mont., 48 Pac. Rep. 716.
- 46. CORPORATIONS—Certificates of Stock Negotiability.—The character of complete negotiability does not attach to stock certificates so as to make a transfer to a bona fide purchaser equivalent to actual title, though there was no agency in the transferror, and the certificate had been lost without fault of the true owner, or had been obtained by theft or robbery; and the owner of a stock certificate, lost without his negligence, or stolen, has the right to reclaim it from the hands of one into whose possession it subsequently comes, though a bona fide holder.—KNOX v. EDEN MUSEE AMERICAIN CO., N. Y., 42 N. E. Rep. 988.
- 47. CORPORATION—Contracts Validity.—A contract between two corporations will not be declared invalid because the corporations have common directors, where its fairness is manifest.—EVANSVILLE PUBLIC HALL CO: V. BANK OF COMMERCE, Ind., 42 N. E. Rep. 1098.
- 48. CORPORATIONS Contracts with Promoters.—A corporation will be bound by contracts made on its behalf by its promoters before organization, if, after it is organized, with full knowledge of all the facts, it assumes the contract, and agrees to pay the consideration, or accepts and retains the benefits.—SCHREYER V. TURNER FLOURING MILLS Co., Oreg., 43 Pac. Rep. 719.
- 49. CORPORATIONS—Corporate Obligations—Use by Officers.—One who takes corporate bonds from officers of the corporation to secure their private indebtedness is bound to ascertain their right to dispose of the bonds.—Germania Safety Vault & Trust Co. v. BOYNTON, U. S. C. C. of App., 71 Fed. Rep. 797.
- 50. CORPORATIONS Indictment of Turnpike Company.—Under Mill. & V. Code, \$ 5347, providing that when the performance of any act is prohibited by statute, and no penalty for the violation of the statute is imposed, the doing of the prohibited act is a misdemeanor, a turnpike company, though operating under a special charter, may be indicted for collecting tolls contrary to a provision in its charter.—NASHVILLE & D. R. R. TURNPIKE CO. V. STATE, Tenn., 34 S. W. Rep. 4.
- 51. CORPORATIONS Insolvency Corporate Existence.—Where a corporation, when founded, assumes the debts of the partners theretofore carrying on the business, that the partners afterwards gave their notes for such indebtedness does not relieve the corporation from liability therefor, so as to prevent a preference thereof by the corporation.—Johnston v. Gumbel, Miss., 19 South. Rep. 100.

- 52. CORPORATIONS Insolvent Corporations Receiver.—The receiver of an insolvent corporation, appointed in proceedings under Gen. St. 1894, § 5897, may maintain an independent action to enforce the collection of the amount of a call on unpaid subscriptions made by the board of directors in accordance with the by-laws, and due and payable prior to the commencement of the proceedings which resulted in the appointment of the receiver.—Basting v. Ankeny, Minn., 66 N. W. Rep. 266.
- 58. CORPORATIONS—Liability for Fraud of Officers.—A bank, to which real property has been conveyed by an officer of the bank, in his individual capacity, for its full value, incumbered by a mortgage executed by such bank officer in his individual capacity, and to which such bank is in no manner a party, is not liable to the mortgagee for a loss sustained by him, because of worthless securities received by him in exchange for a discharge of such mortgage, where such securities were the individual property of such bank officers, and such discharge was obtained by such bank officers in their individual capacities, and not as officers of the bank.—STAPLES v. HUEON NAT. BANK, S. Dak., 66 N. W. Rep. 314.
- 54. Corporations—Misnomer—Amendment.—Where suit is brought against a corporation, correctly describing it, and correctly naming its agents, and its attorneys defend without a plea in abatement, and the evidence clearly identifies the defendant, an amendment to the petition, correcting a misnomer of defendant, is properly allowed.—Southern Pac. Co. v. Graham, Tex., 34 S. W. Rep. 135.
- 55. CORPORATIONS Officers—Authority to Execute Note.—The authority of the president and secretary of a business corporation to execute notes of such corporation will not be presumed from the mere fact that they have exercised it.—CITY ELECTRIC ST. BY. Co. v. FIRST NAT. EXCH. BANK, Ark., 34 S. W. Rep. 89.
- 56. CORPORATIONS—Receiver.—Where officers of a corporation, knowing its insolvency, in bad faith resist application made, on the ground of insolvency, for its dissolution and appointment of a receiver, allowance cannot be made to its attorneys for services in resisting the application, though they acted in good faith.—PEOPLE V. COMMERCIAL ALLIANCE LIFE INS. Co., N. Y., 42 N. E. Rep. 1044.
- 57. COURTS—Attorney as Judge—Agreement of Parties.—An attorney cannot be empowered by the district court or by the parties to preside as judge at a trial, or exercise judicial authority in the case.—MC-GARVET V. HALL, Colo., 48 Pac. Rep. 909.
- 59. CRIMINAL EVIDENCE Cross examination as to Character.—On the cross-examination of witnesses, to prove the good character of the accused for peace and quietness, they may be asked if they had not heard particular acts of violence imputed to the accused. Reputation is derived from what people generally say of the party whose character is the subject of investigation, and the witness, testifying to the good he has heard of the party, may be asked, on the cross-examination, if he has not also heard evil conduct attributed to the party.—State v. Pain, La., 19 South. Rep. 188.
- 59. CRIMINAL EVIDENCE—Proof of Handwriting.—Unless writings are in evidence in the case, and are admitted to be the genuine handwriting of the party, they cannot be admitted for the purpose of proving the handwriting of such party.—STATE v. THOMPSON, Mo., 34 S. W. Rep. 31.
- 60. CRIMINAL EVIDENCE—Homicide—Insanity—Expert Witnesses.—A physician cannot teatify as to the sanity of accused, his opinion being based on statements made to him by accused after the homicide which are not in evidence.—PEOPLE v. STRAIT, N. Y., 42 N. E. Rep. 1045.
- 61. CRIMINAL EVIDENCE—Res Gestæ.—In a proceedtion for murder, exclamations by deceased and witnesses of the homicide as defendant approached the house in which the difficulty accrued, and which he



had just left, that "there he comes with a gun," are admissible as res gestes.—STATE v. BIGGERSTAFF, Mont., 43 Pac. Rep. 709.

- 62. CRIMINAL EVIDENCE—Res Gestm.—Acts and declarations of participants in a transaction constitute parts of the res gesta, and proof of same is admissible.—STATE v. FONTENOT, La., 19 South. Rep. 111.
- 63. CRIMINAL LAW-Bigamous Cohabitation-Indictment.—An indictment under Pube St. ch. 244, § 1, providing that every person who shall be convicted of being married to another, or of cohabitating with another as husband and wife, having at the time a former husband or wife living, shall be imprisoned, etc., failing to allege the existence of a second marriage, is fatally defective.—In RE WATSON, R. I., 33 Atl. Rep. 873.
- 64. CRIMINAL LAW—Competency of Jury.—That a jury was ordered and summoned to attend at a civil term of the district court in one of the parishes of the State, whereat the grand jury who found the indictment against the defendant and the petit jury who tried and convicted him were selected and organized, is not ground for new trial or arrest of judgment.—STATE V. DICKERSON, La., 19 South. Rep. 140.
- 65. CRIMINAL LAW-Gaming-Pool Table.—Under Pen. Code, arts. 358, 364, prohibiting the exhibition of gaming tables, and betting at any such table, it was an offense to play at a pool table where the loser in each instance paid the table fees, though there was no express understanding between the players that he would do so.—HALL V. STATE, Tex., 34 S. W. Rep. 122.
- 66. CRIMINAL LAW—Grand Jury—Number of Jurors.— Under Const. art. 5, \$ 13, providing that grand juries shall be composed of twelve men, a body composed of more than twelve men is not a grand jury.—Ex PARTE REYNOLDS, Tex., 34 S. W. Rep. 120.
- 67. CRIMINAL LAW—Indictment—Charging Offenses Conjunctively.—Under Pen. Code, § 218 (St. 1891, p. 283), making it felony for any person to throw out a switch, etc., with intent to derail any train, or board any train with intent to rob it, etc., an indictment charging defendant with throwing a switch with intent to derail a passenger train, "and" boarding a passenger train with intent to rob the same, and not specifically showing that the two acts were directed against the same train, was not bad for duplicity, it being inferable from the indictment that they were directed against the same train, and the case having been tried on that assumption.—PEOPLE V. THOMPSON, Cal., 48 Pac. Rep. 748
- 68. CRIMINAL LAW Indictment—Impeachment by Grand Juror.—A member of the grand jury cannot be permitted to impeach its finding by testifying that he, as a witness before that body to support the indictment, was not sworn.—STATE v. COMEAU, La., 19 South. Rep. 130.
- 69. CRIMINAL LAW Instructions Weight of Evidence.—A charge that "a confession freely and voluntarily made is among the best evidence known to the law, and if the jury believe from the evidence that defendant did make such a confession, they are authorized to consider this in connection with the other evidence," was erroneous as a charge on the weight of the evidence.—Thompson v. State, Miss., 19 South. Rep. 204.
- 70. CRIMINAL LAW-Killing Diseased Animals.—Rev. St. 1894, § 2164 (Rev. St. 1881, § 2070), provides that whoever kills, for the purpose of sale, a sick, diseased, or injured animal, or who sells, or has in his possession with intent to sell the meat of any such animal, shall be fined, etc.: Held, that an information for killing diseased animals for the purpose of selling for food need not state that the meat was to be sold within the State.—MOESCHKE V. STATE, Ind., 42 N. E. Rep. 1029.

71. CRIMINAL LAW — Larceny — Indictment.—Pen. Code, § 52, provides that if any person steal certain mimals named, "of any value," he shall be imprisoned in the penitentiary not more than 10 nor less than 1

- year, or, in the discretion of the court, be imprisoned in the county jail not exceeding 1 year, or fined not exceeding \$100, or both: Heid, that an indictment under such statute need not state the value of the cattle alleged to have been stolen.—STATE v. Young, Wash., 48 Pac. Rep. 881.
- 72. CRIMINAL LAW-Prize Fighting.—Not all physical contests for a prize or reward are punishable, under the statute, as prize-fights. The contest must be a fight, and there must be an intent on the part of the contestants to do violence to, and inflict some degree of bodily harm on, each other.—STATE V. PURTELL, Kan., 43 Pac. Rep. 762.
- 78. CRIMINAL LAW Seduction Indictment.—A female under 10 years of age is not the subject of seduction, since she is incapable of consent, under Code, § 1281; and an indictment for seduction is not insufficient which falls to aver that the female alleged to have been seduced was over 10 years of age.—Carlisle v. State, Miss., 19 South. Rep. 207.
- 74. CRIMINAL LAW Uttering Forged Deed.—An indictment, under Cr. Code 1896, § 3952, for uttering a forged deed with intent to defraud, is sufficient, if in the prescribed form, and pursuing the language of the statute, without an averment that defendant uttered said deed, knowing the same to be false or forged.—ESPALLA V. STATE, Ala., 19 South. Rep. 82.
- 75. CRIMINAL PRACTICE—Indictment—Description of Offense.—Under St. § 1960, creating the separate offense of aiding and assisting in setting up a machine ordinarily used for betting, it is essential that an indictment clearly aver facts showing that the machine was set up, and the principal offense committed.—Commonwealth v. Lansdale, Ky., 34 S. W. Rep. 17.
- 76. CRIMINAL PROCEDURE Sentence.—Where a verdict of conviction, assessing the punishment at fine and imprisonment, was erroneous as to the latter, in assessing a term less than that prescribed by statute, as a result of misdirection by the court, the verdict was not avoided in whole, as being outside the statute.—STATE v. ARNOLD, Ind., 42 N. E. Rep. 1095.
- 77. CRIMINAL TRIAL—Impeachment Witness.—One cannot, on the ground of surprise, discredit his own witness by proof of contradictory statements previously made by him, where he has not shown that his witness ever told him she would testify she made the statements he desired to prove she had made, or that she ever, in fact, made the statements.—STAIE V. BURKS, Mo., 34 South. Rep. 48.
- 78. DEATH BY WRONGFUL ACT-Survival of Cause of Action.—Under Code 1892, § 1916, providing that a cause of action for injuries causing death shall survive to the personal representative, if deceased could have sued in case the injuries had not been fatal, no action survives to the personal representative if death was instantaneous.—MOVEY v. ILLINOIS CENT. R. Co., Miss., 19 South. Rep. 209.
- 79. DEED Bona Fide Purchaser.—A recorded deed, in which the courses, distances, and monuments, together with the corners and witnesses thereto, and the locations, are given as in an official survey, so as to furnish the means of identifying the tract intended to be conveyed is notice to a subsequent purchaser, though, by mistake, the land is described as lying in the "northwest," instead of the "northeast," quarter of the section.—FRICK v. GODARE, Ind., 42 N. E. Rep.

80. DEED-Building Restrictions.—Violation of a provision in a deed that no store or saloon should be erected on the lot, but that it should be kept for dwelling-house purposes only, will be enjoined, though prior to the deed the grantor had leased a store opposite for a saloon, and thereafter conveyed adjoining lots without any restrictions, it appearing that such other deeds were pursuant to contracts made long before, and that the property conveyed with the restrictions had been purchased by such grantor to prevent the erection of a saloon there, and to protect his store

- on the next corner and his residence property in the next block from being depreciated by proximity of a saloon.—REILLY v. OTTO, Mich., 66 N. W. Rep. 228.
- 81. DEED Construction Exceptions.—The exception of "the taxes assessed for the year 1898" from the covenant in a deed against incumbrances did not include an assessment for the construction of a sewer.—SMITH V. ABINGTON SAV. BANK, Mass., 42 N. E. Rep. 1183.
- 82. DEED—Constructive Delivery.—Where a mother executes a deed to her son, and voluntarily places the same upon record for the purpose and with the intent of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance.—Issitt v. Dewey, Neb., 66 N. W. Rep. 288.
- 83. DEED—Grant of Water Right.—A grant of right to use a certain quantity of water, from a designated pond or small lake, "for the purpose of carrying on" certain works situated on a natural stream constituting the outlet of such pond, such right to cease when the grantor's furnace should be in operation, does not limit the use of the water to the particular works operated by the grantee at the time; but a person succeeding to the grantee's rights may use such quantity of water to operate different works.—Hall v. Sterling Iron & Railway Co., N. Y., 42 N. E. Rep. 1057.
- 84. DEED Nature of Estate.—A conveyance of land by the words, "give grant, bargain, sell, convey, and confirm" to a railroad corporation, and to its successors and assigns, forever, for the purpose of extending its railroad, and as part of the route thereof, creates in the grantee a fee, limited to the purpose and use indicated.—BRECKINRIDGE v. DELAWARE, L. & W. R. CO., N. J., 33 Atl. Rep. 800.
- 85. DIVORCE—Decree.—A woman was twice married, and, having heard that her first husband was living, began proceedings to obtain a divorce from him. The proceedings were ex parte, defendant, having been served with summons by publication, and a decree was entered as prayed: Held, that the proceedings were strictly in rem, and determined only that plaintiff was no longer the wife of defendant, and did not determine that defendant was then living, and that she was his wife at the time of entering the decree.—HUNTER V. HUNTER, Cal., 48 Pac. Rep. 756.
- 86. Drainage Damages Benefits.—The damages referred to in Rev. St. 1894, § 5660 (Rev. St. 1881, § 4290), in relation to drainage, which shall be assessed "to the parties owning the lands benefited, in proportion as each tract of land is assessed for benefits," means the actual damages, if any, after deducting the benefits.—WILSON v. TALLEY, Ind., 42 N. E. Rep. 1009.
- 87. EASEMENT—Light and Air.—When a parcel of land held in common is severed into two tracts by quitclaim deeds simultaneously interchanged by the tenants in common, and there is a store on one of the two lots, with a window through which light and air is received across the other.lot, such window cannot be closed by the owner of the latter lot if the influx of light and air is reasonably necessary to the beneficial enjoyment of the store.—GREER V. VANMETER, N. J., 33 Atl. Rep. 794.
- 88. ESTOPPEL IN PAIS.—To constitute an estoppel in pais, the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to give.—BURKE v. UTAH NAT. BANK, Neb., 66 N. W. Rep. 295.
- 89. EVIDENCE—Action against City—Mortality Tables.
 —In an action for injuries not resulting in death, mortality tables are admissible, provided they are accompanied by proper instructions in regard to their use.—CAMPBELL V. CITY OF YORK, Penn., 38 Atl. Rep. 879.
- 90. EVIDENCE—Negligence of Master.—In an action by an employee against his employer for personal injuries caused by defendant's negligence in failing to station a watchman at an uncovered trench in which

- plaintiff was working, evidence of what was usually done at other places, and under different cfroumstances, as to guarding such trenches, was properly excluded.—CRAVEN v. MAYERS, Mass., 42 N. E. Bep. 1181.
- 91. EVIDENCE—Parol Evidence Surety.—Parol evidence is admissible to show that a joint maker of a note signed as surety, though that fact does not appear upon the notes—KENDALL v. MILLIGAN, Ark., & S. W. Rep. 78.
- 92. EXECUTION—Exemptions—Watch.—Under section 5127, Comp. Laws, which makes absolutely exempt "all wearing apparel and clothing of the debtor and his family," a watch owned by the debtor, and which he has carried constantly for three years, is absolutely exempt, as wearing apparel.—BROWN v. EDMONDS, S. Dak., 66 N. W. Rep. 310.
- 93. EXECUTION Supplementary Proceedings Insolvent Corporation.—The act of March 15, 1898 (Laws 1898, p. 436), providing for the citing and examination of judgment debtors in aid of execution, does not authorize such proceeding in an action against an insolvent corporation for which a receiver has been appointed, there being no authority for the issuance and enforcement of an execution against the property of such corporation in behalf of a single creditor.—ALLEN v. STALLCUP, Wash., 43 Pac. Rep. 884.
- 94. EXECUTION SALE—Conflict of Jurisdictions.—Appointment of a receiver by a federal court, in a suit commenced therein after commencement in a State court of an action to enforce a mechanic's lien, will not affect the lienholder's right to sell the property on special execution under the lien judgment rendered in his action.—Rogers & Baldwin Hardware Co. v. CLEVELAND BLD'G CO., Mo., 24 S. W. Rep. 57.
- 95. EXTRADITION—Fugitive from Justice.—A fugitive from justice, surrendered by one State upon the demand of another, may, notwithstanding his objection, be prosecuted by the latter for any extraditable offense committed within its borders, without first having had an opportunity to return to the State by which he was surrendered.—IN RE PETRY, Neb., 66 N. W. Rep. 308.
- 96. FEDERAL COURTS—Jurisdiction—Diverse Citizenship.—In order to confer jurisdiction of a suit on a chose in action on the federal court, on the ground of diverse citizenship, the bill must show the plaintiff's assignor resided in another State.—BENJAMIN V. CITY OF NEW ORLEANS, U. S. C. C. (La.), 71 Fed. Rep. 758.
- 97. FEDERAL COURTS—Mandamus—Power of Circuit Courts of Appeal.—The circuit courts of appeal have no power to Issue a mandamus directing a circuit court of dismiss a case in limine, on the ground that no jurisdiction has been acquired over the defendant by the method of service pursued, for the circuit court of appeal can only issue a mandamus in aid of their own jurisdiction (Act March 3, 1891, § 12 Rev. St. § 716); and they have no jurisdiction in a case in which the only question involved is the jurisdiction of the court below, as such cases are reviewable on appeal only in the supreme court (Act March 3, 1891, §§ 5, 6).—United States v. Severens, U. S. C. C. ofApp., 71 Fed. Rep. 768.
- 98. FRAUDS, STATUTE OF—Agreement for Sale of Personalty.—An oral contract to manufacture and furnish the iron work for a building is not an agreement relating to a sale of personalty, within the statute of frauds, where such iron work is not in existence at the date of the contract.—Heintz v. Burkhard, Oreg., 43 Pac. Rep. 866.
- 99. FRAUDS, STATUTE OF—Memorandum.—Where an agent was duly authorized in writing to sell certain property, at specified terms, to a particular person, whose name did not appear, and the agent in acknowledgment of a deposit on the purchase price, executed a receipt to said person, setting out her name, both writings constitute a sufficient memorandum of sale to satisfy the statute of frauds.—White v. Breen, Ala., 19 South. Rep. 59.



- 100. FRAUDULENT CONVEYANCES. The fact that a mortgage is executed for a sum materially greater than the actual amount of indebtedness is only a badge of fraud, and does not render the instrument void per st.—ADAMS V. LAUGEL, Ind., 42 N. E. Rep. 1017.
- 101. FRAUDULENT CONVEYANCES—Change of Possession.—Where the goods remained with the seller, the sale was fraudulent, as against his existing creditors, though, prior to a levy by them, the buyer removed a portion of the goods.—AUTREY v. BOWEN, Colo., 48 Pac. Rep. 908.
- 102. FRAUDULENT CONVEYANCE—Evidence.—Where a sale of a stock of goods is alleged to have been fraudulent as to creditors, the purchaser may be asked, and allowed to answer, as a witness in his own behalf, whether he had any knowledge or notice that his vendor was selling the goods with intent to hinder, delay and defraud his creditors.—RICHOLSON v. FREEMAN, Kan., 43 Pac. Rep. 772.
- 103. FRAUDULENT CONVEYANCES Knowledge of Grantee.—A creditor purchasing property from a failing debtor will be affected by the intent of the latter to defraud his other creditors, where he shares that intent, and aids in giving effect to it; and the transaction will not stand as to the other creditors, whatever may be its effect between the immediate parties.—MARTIN V. KETES, Mo., 34 S. W. Rep. 53.
- 104. Fraudulent Conveyance—Stock Trade— Possession.—A deed of trust of land and a stock in trade is void as to creditors where the grantors are allowed by oral agreement to retain possession of the stock, and use the same in continuing the business.—Bank OF HAZELHURST V. GOODBAR, Miss., 19 South. Rep. 204.
- 105. GIPT—Express Trust.—An entry on the books of a savings bank in the name of a donor, "in trust for the donee," is not conclusive evidence, by itself, of an absolute, indisputable gift; but extrinsic evidence is competent to control its effect.—BATA SAV. INST. V. HAWTHORN, Me., 33 Atl. Rep. 836.
- 106. GIFT—Savings Banks Deposit.—The important difference between a gift and a voluntary trust is that in the one case the whole title, legal as well as equitable—the thing itself, passes to the donee, while in the other the actual, beneficial, or equitable title passes to the cestia que trust, while the legal title is transferred to athird person, or is retained by the one creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust as is the gift of the thing itself in a gift inter vivos.—Norway Sav. Bank v. Merriam, Me., 33 Atl. Rep. 840.
- 107. HOMESTEAD—Abandonment.—The right of minor children in a homestead left by the father, being contingent on the right of the surviving widow during her life, is lost, if she changes her domicile to another State.—Carrigan v. Rowell, Tenn., 34 S. W. Rep. 4.
- 106. HOMESTEAD—Conveyance.—Where a widow, who had only a life estate in a homestead, conveyed the same to grantees, who agreed to extinguish sheriff's certificates issued on foreclosure sale thereof, but said grantees took an assignment of said certificates, and afterwards obtained a sheriff's deed to the premises, they cannot assert the title so acquired against the remainder-men.—Melms v. Pabst Brewing Co., Wis., 66 N. W. Rep. 244.
- 109. HOMESTEAD—Effect of Divorce.—Const. art. 16, 50, exempting the "homestead of a family" from forced sale, does not, on divorce of the husband and wife, exempt the homestead, which in the decree of divorce is set apart to the wife for life, and which she continues to occupy as a home, she having no family, from forced sale under a judgment against her, recovered subsequently to the divorce.—Bahn v. Starcke, Tex., 34 8. W. Rep. 103.
- 110. HOMESTEAD Mechanic's Lien. A contract whereby a loan company agreed to furnish all the labor and material necessary in the erection of a

- dwelling-house, and in consideration thereof to retain a lien on the premises for the moneys paid therefor, which was executed by weekly payments made by the loan company to the contractor for the labor and material, there being no evidence that the contract was a subterfuge to cover up a loan on the homestead, gave a lien on the premises, and did not constitute a mortgage on the homestead.—Pioneer Savings & LOAN CO. v. EDWARDS, Tex., 34 S. W. Rep. 192.
- 111. HOMESTEAD—Rights of Wife—Law of Kansas.—One S induced his wife, who was of unsound mind, to execute a mortgage on their homestead, situated in Kansas, the mortgagee being ignorant of the wife's incapacity. Upon the institution of a suit for foreclosure, to which S, his wife, and their children were made parties, S set up such incapacity as a defense. Pending the suit, S's wife died, and the bill was dismissed as against the children, at plaintiff's request: Held, that as, under the laws of Kansas, the right of the wife in the homestead was only a right to be protected in its enjoyment during her life, the title remaining in the husband, S, could not, after his wife's death, resist the enforcement of the mortgage.—MINERS' SAV. BANK V. SANDY, U. S. C. O. (Kan.), 71 Fed. Rep. 840.
- 112. HUSBAND AND WIFE Actions Between Contracts.—A husband cannot recover for work and labor done on his wife's farm, and for taxes paid thereon, in the absence of an express contract.—STANLEY v. STANLEY, Ind., 42 N. E. Rep. 1031.
- 118. HUSBAND AND WIFE—Antenuptial Agreement—Deed by Husband in Fraud of Wife.—In an action by a wife to set aside a deed by the husband to land claimed by her under a prior deed given in consideration of marriage, but not recorded, where the complaint alleged the execution of such prior deed, and the evidence showed that a second deed was thereafter executed to plaintiff because of defects in the first, an amendment setting up the execution of the second deed was within Rev. St. 1889, § 2098, providing that pleadings may be amended to conform to the proof when the amendment does not substantially change the cause of action.—Harlan v. Moore, Mo., 34 S. W. Rep. 70.
- 114. HUSBAND AND WIFE—Community Personal Property.—Hill's Ann. St. § 1899, having given the husband control and management of the community personal property of the husband and wife, "with a like power of disposition as he has of his separate personal property," such property is subject to seizure on execution for his individual debts.—Powell v. Puch, Wash., 48 Pac. Rep. 879.
- 115. HUSBAND AND WIFE—Deed to Wife.—Where, in attachment against a husband, his wife claims the property by deed from her husband, declarations of the husband as to his ownership of the property made before he conveyed the land to his wife are not admissible, but such as were made afterwards, while the husband was in possession of the land are admissible.—GEORGE TATLOR COMMISSION CO. V. BELL, Ark., 34 S. W. Rep. 80.
- 116. HUSBAND AND WIFE-Right of Husband's Creditors.—An insolvent debtor may, as against his creditors, employ his time in aiding his wife to carry on a business owned by her, so that the accumulation will belong to her.—SHELDEN V. SHATTUCK, Mich., 66 N. W. Rep. 220.
- 117. HUSBAND AND WIFE—Separate Property of Wife.—A husband, at his wife's request, bought two lots for her, and also, at her request, borrowed the money to pay for the same and build a house thereon, and gave his notes therefor, which were paid at maturity by the wife from her separate property. The husband took the title to the lots in his own name, and they were levied on by a creditor of his, but whose debt was not made on the faith of his ownership of the property, but before its purchase. Before sale under the levy, the husband conveyed the property, through a third person to his wife: Held, that the husband was a trustee of the wife, and his creditors obtained no in-

terest in the property.-CLOWSER v. NOLAND, Mo., 34 S. W. Rep. 64.

118. INJUNCTION BOND-Damages.—Where one sues to enjoin the withdrawal of water from a natural stream, claiming that he is entitled to the entire flow, and, without hearing, a proforma decree is entered, on bill and answer, dismissing the bill, and continuing the temporary injunction, as modified by agreement of the parties, till final disposition of the cause, and the supreme court, on a trial on the merits, affirms the decree, attorney's fees incurred by defendant is the supreme court cannot be included in assessing damages on the bond.—BARRE WATER CO. V. CARNE, Vt., 33 Atl. Rep. 898.

119. INSOLVENCY—Validity of Preferences.—A statute which declares that all assignments in trust, made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the benefit of all creditors equally (Rev. St. Ohio, § 6343), does not extend to the case of an insolvent debtor giving mortgages to certain creditors with intent to prefer them separately, and without creating any trust in favor of any other party, and such preferences are valid. And it is not sufficient to bring the case within the statute to aver that the creditor receiving such mortgage holds in trust for himself and for the assignor, for this is a mere averment of a legal conclusion.—England v. Russell, U. S. C. C. (Ohio), 71 Fed. Rep. 818.

120. INSURANCE—Breach of Condition—Waiver.—An insurance company which, after a loss of the property covered by its policy, with a knowledge of acts amounting to a breach of warranty by the insured, fails to declare such policy forfeited, but on the contrary continues to recognize its liability thereon by demanding repeated proofs of loss, and by insisting upon arbitration under a stipulation which applies to the measure of damages only, will be held to have waived all defenses based upon such breach of warranty and resulting forfeiture of the policy.—Home Fire Ins. Co. v. Kennedy, Neb., 66 N. W. Rep. 278.

121. INSURANCE — Conditions—Judgment Liens.—An insurance policy which provides that it shall be void "if there be a mortgage, bill of sale, or other ilen" on the property insured without the fact being indorsed on the policy, is not invalidated by the fact that, at the time of the insurance, there were judgment liens against the property.—Georgia Home Ins. Co. v. SCHIELD, Miss., 19 South. Rep. 94.

122. INSURANCE — Condition in Policy — Parol Evidence.—A clause in a policy on a stock of goods, requiring the assured to keep a set of books showing the changes taking place from time to time in the stock, cannot be varied by parol evidence that before the policy was issued the company's agent told the assured that it was unnecessary to keep such books.—Germania Ins. Co. v. Bromwell, Ark., 34 S. W. Rep. 63.

123. Insurance—Failure to Disclose Incumbrance.—
The withholding of information as to an incumbrance
on property in an application for insurance avoids
the policy, where contrary to a condition of the contract.—LESTER v. MISSISSIPPI HOME INS. Co., Miss., 19
South. Rep. 99.

124. INSURANCE—False Statements in Application.—Where a policy provided that no statements made or given to its agents, or any other person, should affect its rights unless incorporated in the application, parol evidence of statements made to the agents of defendant is admissible to show a waiver of the breach of warranty of such statements, where it was proposed to follow it up by showing that the information given to the agents had been communicated to the company.—WARD V. METROPOLITAN LIFE INS. Co., Conn., 33 Atl. Rep. 902.

125. Insurance-Limitation of Suit.—Act March 4, 1891, forbidding stipulations for a period of time less than two years in which to sue, and including, in terms, "any stipulation, contract or agreement," invalidates a stipulation limiting to six months the time

in which suit may be brought on a policy.—GERMAN INS. Co. v. Luckett, Tex., 34 S. W. Rep. 172.

126. INSURANCE—Policy.—A paper, headed "Conditions," containing a stipulation that the assured shall at all times keep his commercial books and papers in an iron safe to preserve them from fire, the paper being plainly marked as part of the policy, delivered to and accepted by the assured, will be deemed part of the policy, especially when the assured sues upon the policy with the paper attached as constituting his contract.—GOLDMAN V. NORTH BRITISH MERCANTILE INS. CO., La., 19 South. Rep. 187.

127. Interest—Usury.—Interest reserved on coupon interest notes after their maturity, which were given at the inception of the principal debt to secure the annual interest accruing thereon, is not usurious.—STICKNEY V. MOORE, Ala., 19 South. Rep. 76.

128. Intoxicating Liquor — Petition for Liquor License.—A petition filed in an application for license to sell intoxicating liquors should contain such a description of the premises where it is proposed to conduct the business as indicates the exact location; and if it does this it is sufficient.—WAUGH v. GRAHAM, Neb., 66 N. W. Rep. 301.

129. Intoxicating Liquors — Sales by Druggist.— The imposition of a \$50 license fee on druggists for right to sell liquor is not unconstitutional, as an abuse of the police power, though in a certain locality its effect is to preclude druggists selling the same.—Commonwealth v. Fowler, Ky., 34 S. W. Rep. 21.

180. JUDGMENT—Collateral Attack.—Erroneous action of the circuit court in an attachment suit in allowing cost to the plaintiff, the amount recovered being iess than \$100, cannot be collaterally attacked in an action on the bond of an intervener, conditioned on the payment of the judgment recovered, which should be adjudged a lien on the property.—GILL v. BACKUS, Mich., 66 N. W. Rep. 347.

131. JUDGMENT-Equitable Relief.—A court of equity will not enjoin a judgment at law, upon the ground of fraud, where it does not appear that such judgment is inequitable, or where it is disclosed that plaintiff has not exercised due diligence in the assertion of his rights.—NORWEGIAN PLOW CO. v. BOLLMAN, Neb., & N. W. Rep. 292.

132. JUDGMENT—Insane Surety.—A judgment rendered against an insane surety on an attachment bond, who was sane at the time the bond was executed, is valid.—POLLOCK V. HORN, Wash., 43 Pac. Rep. 885.

183. JUDICIAL SALE—Validity.—Where interested parties attack the title of property offered at a judicial sale, in such a way as to deter bidders and depress values, and where the price paid for the property is greatly inadequate, the sale should be set aside.—Wood v. Drury, Kan., 43 Pac. Rep. 763.

134. JURY — Peremptory Challenge.—In a criminal trial, after the first witness had commenced to testify, a juror told the court that he might have talked about the case, though on his examination he had stated the contrary, and the court granted defendant's motion for his examination over objection. The witness proving competent, defendant, who had not exhausted all his peremptory challenges, without the interposition of any further motion, challenged the juror peremptorily: Held, that the challenge was properly denied; Rev. St. 1894, § 1863 (Rev. St. 1881, § 1794), providing that peremptory challenges shall be made before the jury is sworn, and the proper course being to move to set aside the submission.—Kuhtz v. State, Ind., 42 N. E. Rep. 1102.

185. JANDLORD AND TENANT — Lease—Damages.—A tenant, evicted when his crops were growing, may not recover of the landlord, as damages, the value of the natured and gathered crops, without an allowance for rent.—JEFCOAT v. GUNTER, Miss., 19 South. Rep. 94.

186. LANDLORD AND TEMANT—Lien.—Under Code, § 8069, providing that the landlord shall have a lien on the furniture of his tenant, which shall be superior to

all other liens except those for taxes, the lien of a vendor on furniture sold a tenant, which was on the premises at the time of the sale, and on which a mortgage was taken to secure the purchase price, is superior to that of the landlord afterwards accruing.—GLASS v. TISDALE, Ala., 19 South. Rep. 70.

137. LANDLORD AND TENANT—Tenant from Year to Year—Right to Crops.—Where a tenant occupies a farm under a written lease for two years, and after the termination of the time specified in the written lease, remains in the actual occupancy of the farm with the assent of the owner, cultivating the same, and paying the same rent that he did under the written lease, he becomes a tenant from year to year, and it requires a notice in writing for three months prior to the end of the year to terminate such lease.—WHRAT v. BROWN, Kan., 43 Pac. Rep. 807.

139. LIBEL—Privileged (ommunications.—To prefer written charges against a policeman before the board of police commissioners, to the effect that he had committed perjury, faisely and with the deliberate purpose of injuring said policeman and causing his dismissai from the police department, is actionable.—DENNEHY V. O'CONNELL, Conn., 33 Atl. Rep. 920.

139. LIFE INSURANCE—Mutual Benefit Society—Change of Certificate.—A mutual benefit society which issues to a member a certificate of insurance, conditioned, among other things, on "paralysis so extensive as to produce absolute disability," caunot modify the certificate, by excluding this cause of disability, without the express consent of the member.—STARLING V. SUPREME COUNCIL ROYAL TEMPLARS OF TEMPERANCE, Mich., 66 N. W. Rep. 340.

140. LIFE INSURANCE—Suicide—Insanity.—Suicide of the insured is not a breach of a warranty in his application that he will not "die by his own hand," if, at the time of taking his life, his reasoning faculties are so far impaired that he is not able to understand the moral character, general nature, consequences and effect of his act, or when he is impelled thereto by an insane impulse which he has not the power to resist.—MUTUAL LIFE INS. CO. OF NEW YORK V. LEUBRIE, U. S. C. C. of App., 71 Fed. Rep. 843.

141. LIFE INSURANCE—Surrender—Consent of Beneficiaries.—Under a life policy payable to insured in twenty years, if he was then alive; but in case of his death before that time payable to his mother, if living; if not, to his brothers and sisters; and providing that, on surrender thereof at the end of three years, "receipted by the insured and beneficiaries," the cash value specified therein would be paid, it is necessary, on making such surrender, that the receipt be signed, not only by insured and his mother, but by the other beneficiaries.—LOCKWOOD v. MICHIGAN MUT. LIFE INS. Co., Mich., 66 N. W. Rep. 280.

142. LIMITATION OF ACTION—County Warrants.—The provisions of Rev. St. 1889, § 8195, that a county warrant, having been delivered, that shall not be presented for payment within five years from its date, or having been presented and not paid for want of funds, shall not be again presented within five years after the funds shall have been set apart for its payment, "shall be barred and shall not be paid, nor shall it be received in payment of any taxes or other dues," is a limitation of actions on warrants, as well as a direction to the county officers, and governs such actions, to the exclusion of the general statute of limitations, under the provisions of the latter (§ 6791) that it shall not extend to any action otherwise limited by any statute.—WILSON V. KNOX COUNTY, Mo., 34 S. W. Rep. 45.

143. LIMITATION OF ACTIONS—Personal Privilege.—Where the statute of limitations is pleaded as a defense, but the defendant, when testifying, states explicitly that he does not plead the statute, the plea, which is a personal privilege, must be regarded as withdrawn, and the issue should not be further considered.—Lewis v. Buckley, Miss., 19 South. Rep. 197.

144. M.NDAMUS—Validity—Collateral Attack.—A writ of mendamus to compel county officers to pay judg-

ments against the county is not void because the judgments were void.—BOASEN v. STATE, Neb., 66 N. W. Rep. 303.

145. MARRIED WOMAN—Damages.—In an action by a wife for personal injuries, she may recover damages for any impairment of her capacity to earn money.—HAMILTON V. GREAT FALLS St. RY. Co., Mont., 43 Pac. Rep. 718.

146. MASTER AND SERVANT—Action for Injuries.—A railroad company is not an insurer of the safety of its employees, but is liable for injuries resulting to an employee from its failure to exercise reasonable and ordinary care toward him, unless he has been guilty of contributory negligence upon his part.—Atchison, T. & S. F. R. Co. v. Winston, Kan., 43 Pac. Rep. 777.

147. MASTER AND SERVANT—Assumption of Risks.— Laws 1890, ch. 898, § 12, imposing a penalty on the owner of factories in which women are employed for failure to cover cogwheels, does not prevent a woman from assuming the obvious risks from uncovered cogwheels. —KNISLEY V. PRATT, N. Y., 42 N. E. Rep. 986.

148. MASTER AND SERVANT—Contributory Negligence'—A boy of 14 years, being employed in a tinware factory to operate a small foot machine used for the purpose of punching eyes in small tin cans that were being manufactured by machinery, who voluntarily leaves his place of business and goes away to another part of the establishment for the purpose of adjusting a belt connecting one of the machines of the factory with the line of the main shaft, and while thus employed receives serious and fatal injuries, of which he dies, his parents cannot recover damages of the corporation.—DALY v. H. HALLER MFG. Co., La., 19 South. Rep. 116.

149. MASTER AND SERVANT—Injuries to Employee.—A complaint alleging that deceased, while employed in the yard of defendant stone company, was crushed by a large stone, which fell on him; that defendant had negligently placed and for three months allowed said stone to remain with its edge resting upon two small stones, laid on loose earth, which was liable to press down on one side, and silow the stone to fall over; and that deceased was ignorant of the dangerous condition of said stone, and was unable to see the earth under said stone, does not show that the said loose earth was the cause of said stone's failing over, but shows that the danger complained of was incident to the service, failure to negative the assumption of which renders the complaint bad.—SALEM BEDFORD STONE CO. V. HOBBS, Ind., 42 N. E. Rep. 1022.

150. MASTER AND SERVANT—Negligence—Machinery.—In an action to recover for injuries received by plaintiff while employed as engineer in defendant's mill,
and in working with a certain machine, the question
whether or not such machine was being used "in the
manner contemplated by its manufacturer" is immaterial, and an instruction that makes the liability of
defendants, or the tisk assumed by plaintiff in his employment, dependent on whether the machine was so
used, is misleading and erroneous.—GLOVER V. MEINRATH, Mo., 34 S. W. Rep. 72.

151. MASTER AND SERVANT—Railroad Companies—Negligence.—That a station agent, whose duty it is to signal trains from the depot platform, goes upon the track to follow and stop a train, the engineer of which failed to show that he had seen the signal to stop, and thereby prevent a collision, does not render him a trespasser, so as to relieve the company of liability for injuries to him, unless the employees upon the train actually knew of his presence in time to avoid injury to him.—ILLINOIS CENT. R. CO. V. MAHAN, Ky., 34 S. W. Rep. 16.

152. MASTER AND SERVANT—Railroads—Injuries to Employee—Negligence.—In an action for the death of a brakeman, where there is evidence that he was killed by a steel rail failing from the flat car on which it was loaded, and being thrown against him by the motion of the train while he was sitting on a rear car, it is

error to direct a verdict for defendant.—McCRAT V. GALVESTON, H. & S. A. RY. Co., Tex., 84 S. W. Rep. 95.

158. MASTER AND SERVANT-Rule of Safe Place .-Libelant, the mate of a vessel, was engaged in the between decks, with a gang of men, in loading lumber. A chute led from the wharf to a port in the vessel's side, below the level of the wharf, and the pieces of lumber were placed in the chute by another set of men, under the charge of a foreman, on the wharf, and were allowed to slide down into the between decks. It was the duty of one of the men on the wharf to give a warning cry when a piece of lumber was placed in the chute, in order to enable those below to get out of the way. If this warning cry was given, there was no danger to the men below, and the place in which they were working was in itself proper and safe, and the man to whom the duty of giving warning was intrusted was a competent and proper person. He omitted to give the warning at the time of sending a large piece of lumber down the chute, and libelant was struck by it and injured: Held, that the master's duty to furnish a safe place for his employees to work did not extend beyond employing a competent and proper person to give the necessary warning, nor include the actual giving of such warning in each particular case.—HER-MANN V. PORT BLAKELY MILL CO., U. S. D. C. (Cal.), 71 Fed. Rep. 858.

154. MECHANICS' LIENS — Enforcement—Sureties.—A surety on a contractor's bond cannot be held liable thereon when the failure of performance of the contract is caused by the default of the obligee.—MAIN STREET HOTEL CO. OF HORTON V. HORTON HARDWARE CO., Kan., 48 Pac. Rep. 769.

155. MECHANICS' LIENS — Liability of Owner.—The contractors having failed to complete certain buildings, the owners thereof are not liable to a subcontractor for the amounts paid by them to others in order to protect and complete the buildings, though they had notice of said subcontractor's claim.—BRENEMAN V. BEAUMONT LUMBER CO., Tex., 34 S. W. Rep. 196.

156. MECHANICS' LIENS — Notice — Waiver.—The requirements of Pub. Acts 1891, No. 179, § 4, providing that a contractor shall furnish the owner a statement of laborers and material-men under his contract, with the amounts due each, before he shall have a right of action to enforce a mechanic's lien therefor, cannot be considered waived in favor of a contractor unless under circumstances amounting to an estoppel.—STERNER V. HAAS, Mich., 66 N. W. Rep. 348.

157. MECHANIC'S LIEN—Service of Summons.—In an action to enforce a mechanic's lien, service of summons upon the owner within the period of limitation prescribed by statute for the commencement of such an action does not preserve the lien as against other incumbrancers who are not made parties to such an action within the period of limitation.—WOOD v. DILL, Kan., 43 Pac. Rep. 822.

158. MINES AND MINING—Right to Follow Dip.—When the outcrop of a vein passes through one end line and one side line of a location, the locator may draw in the other end line to the point of intersection of the vein with the side line, and abandon what lies beyond; and he will then have the same extralateral rights as if the claim had been so located in the first instance.—TYLER MIN. CO. V. LAST CHANCE MIN. CO., U. S. C. C. (Idaho), 71 Fed. Rep. 348.

159. MORTGAGES—Foreclosure—Parties.—Under Code Proc. § 148, providing that all persons interested in the cause of action must be made parties, an assignor, in an action to foreclose a mortgage as to interest coupons which he has taken up as guarantor, must make the holder of the principal bond a party.—BACON v. O'KEEFE, Wash., 43 Pac. Rep. 886.

160. MORTGAGES — Subrogation. — That borrowed money was used in paying a debt secured by lien on the debtor's property does not entitle the lender, who was under no obligation to pay the debt in the absence of an agreement, to be subrogated to the rights of the lienor.—GOOD V. GOLDEN, Miss., 19 South. Rep. 100.

161. MORTGAGE FORECLOSURE—Waiver of Irregularities.—Where a mortgagor is in position to waive an
irregularity in foreclosure proceedings under a power
of sale, and to confirm and validate a sale of the mortgaged premises to the mortgagee for the full amount
of the debt, with interest and all costs—there being no
other person except the mortgagor who could at any
time question the regularity of the sale—and the mortgagor has, within a reasonable time, caused a deed to
be tendered conveying perfect title to the mortgagee,
the latter cannot insist upon the invalidity in the foreclosure proceedings, repudiate the sale and maintain
an action to recover upon the mortgage note.—SAXE v.
RICE, Minn., 66 N. W. Rep. 268.

162. MUNICIPAL CORPORATIONS—Change of Grade of Streets—Damages.—Under the constitution of this State, providing that private property shall not be taken or damaged for public use without compensation, a city is liable for damage resulting from a material change of the grade of its streets from the natural surface.—CITY OF HARVARD V. CROUCH, Neb., 66 N. W. Rep. 276.

168. MUNICIPAL CORPORATIONS — Construction of Walks—Injuries.—A municipality is not responsible for personal injuries resulting solely from a property holder's failure to construct a walk in front of his premises as ordered.—SHIETART V. CITY OF DETROIT, Mich., 66 N. W. Rep. 221.

184. MUNICIPAL CORPORATIONS—Contractor's Bond-Release of Sureties.—Sureties on the bond of a contractor for a public improvement requiring payment for all labor and material furnished for the work are not released, by payment of an antecedent debt by the contractor to a material-man from the contract price, to the extent of such payment, from liability to such material-man for materials furnished.—Hirth v. Powers, Mich., 66 N. W. Rep. 215.

165. MUNICIPAL CORPORATIONS—Grant of Street Franchise.—The city of St. Louis has no power to grant the privilege of constructing electrical subways under the surface of its streets for the private gain of the grantee, though intended to be leased to others for public uses, as it would be, in effect, to delegate its powers over the public streets to others, to be exercised for their own profit; nor has it the right to permit such constructions without reserving the power of control over their construction, maintenance, and use.—STATE V. MURPHY, Mo., 34 S. W. Rep. 51.

166. MUNICIPAL CORPORATIONS—Power to Take by Devise.—At common law, municipal corporations authorized to hold land in *mortmain* had power to take by devise.—McIntosh v. City of Charleston, S. Car., 28 S. E. Rep. 948.

167. MUNICIPAL CORPORATIONS—Special Assessments.—Though a city fails to obtain jurisdiction to make a special assessment for a street improvement, because of a defective notice, yet, if a property owner signs the petition for such improvement, and, at the time it is being made, personally inspects the work, and makes no objections thereto, or to the levyling, of the assessment, he and his successors in interest will be estopped from questioning the validity of the proceedings.—WINGATE V. CITY OF TACOMA, Wash., 43 Pac. Rep. 874.

168. MUNICIPAL CORPORATIONS — Street Improvements.—Under Rev. St. 1894, § 4292, providing that the common council of a city or town, "with the concurence of two-thirds of the members thereof," may order street improvements made, an allegation in a complaint that such improvement was ordered by a city, "by a two-thirds vote of her common council," is sufficient.—City of Connersville v. Merrill, Ind., 42 N. E. Rep. 1112.

169. NATIONAL BANK—Action for Money Loaned.—A national bank, having joined with other persons in a partnership to operate a mill, cannot be prevented from recovering moneys loaned to the firm, on the ground that it had no power to become a partner in a mill.—CAMERON v. FIRST NAT. BANK OF DECAUTES.
Tex., 34 S. W. Rep. 178.

170. NEGLIGENCE - Dangerous Premises - Falling Building.—Every one is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the neighbors or passengers, under penalty of all losses and damages which may result from the neglect of the owner in that respect. The owner of the building cannot free himself from this primary obligation by leaving to an insurance company, which, carrying a policy on the building, had elected, after a fire, to make repairs upon it, to determine the necessity of and the extent of repairs. He cannot, as between himself and the public, shift responsibility from himself to the insurrance company. The insurance contract may fix and determine the rights and obligations of the parties thereto, but it is not a measure for the rights of the public, nor a criterion by which to test the liability of the owner to it .- STEPPE V. ALTER, La., 19 South. Rep.

171. NEGLIGENCE—Pleading.—In an action by a servant of the lessee against the lessor for personal injuries caused by the defective condition of the elevator in the building of the lessor, which the lessee had the privilege of using, and received while the servant was using the elevator, by reason of its falling, the complaint need not set out in what way the elevator was defective.—ELLIS V. WALDRON, R. I., 38 Atl. Rep. 869.

172. NEGOTIABLE INSTRUMENT — Extension of Note.—
The fact that, at the maturity of a note, and at the end
of each year for two years thereafter, the principal
maker paid to the holder interest for the year past,
either at a legal or usurious rate, will not operate as a
novation, and release sureties from liability thereon,
without satisfactory proof of an agreement for a definite extension in consideration of such payments.—
ALLEY V. HOPKINS, Ky., 34 S. W. Rep. 18.

173. NEGOTIABLE INSTRUMENT—Indorsement.—Where there is no evidence as to the date of an indorsement of negotiable paper the presumption of law is that it was made before maturity, and that the holder is a bona fide holder for value; and the party who denies this must prove it, and without such proof he cannot avail himself of the equities of defenses.—Challis v. Woodburn, Kan., 43 Pac. Rep. 792.

174. NEGOTIABLE INSTRUMENT — Note — Limitation.— When a party has pleaded the statute of limitations as a defense to a promissory note, and such note is introduced in evidence by the opposing party, and it appears upon its face to be barred by the statute,—the court taking judicial notice of when the action was commenced,—the burden of proving such facts as will show the note is not in fact barred devolves upon the party claiming under the note.—DIELMANN V. CITIZENS' NAT. BANK OF MADISON, S. Dak., 66 N. W. Rep. 811.

175. NEGOTIABLE INSTRUMENT — Place, Manner, and Time of Payment.—A note does not lose negotiability, as allowing payment by another note instead of money, by a provision that, if desired, the indebtedness could be extended by the makers and indorsers giving a new note.—Anniston Loan & Trust Co. v. STICKNEY, Ala., 19 South. Rep. 63.

176. Nuisance — Obstruction of Navigable Stream.—
The fact that an obstruction in a navigable stream is a
matter of public concern does not prevent the maintenance of an action by a person whose private interests
are affected thereby, to protect such interests.—GARL
v. WEST ABERDEEN LAND & IMPROVEMENT Co., Wash.,
43 Pac. Rep. 890.

177. OFFICE AND OFFICERS — Appointment and Removal.—The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court. Such power vested in a board cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause

for removal exists.—STATE v. ARCHIBALD, N. Dak., 66 N. W. Rep. 285.

178. OFFICE AND OFFICER—Vacancies—Appointments.
—The general rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee.—State v. Childs, Minn., 66 N. W. Rep. 264.

179. PARTNERSHIP—Accounting — Appeal.—A decree in a partnership accounting will not be disturbed on appeal where it appears that the settlement was just, and was made on a consideration of all the partnership affairs.—Eames v. Miller, Mich., 66 N. W. Rep. 388.

180. PAYMENT — Lien on Machinery.—Where purchaser of goods give an acceptance for the price, and neither party regards it other than evidence of the amount to be paid, it will not be considered as payment.—MARINETTE IRON WORKS CO. v. CODY, Mich., 66 N. W. Rep. 834.

181. PAYMENT—Presumption—Lapse of Time.—Where, 27 years after the maturity of a series of promissory notes and the last indorsement of interest paid thereon, an action was brought upon the notes, and to forelose a mortgage given to secure them, held that, although the statute of limitations was not a bar, because of the non-residence and absence of the defendants, yet the lapse of time raised a presumption of payment, which was not overcome by the facts found and the evidence received or offered.—COURTNEY v. STAUDENMAYER, Kan., 48 Pac. Rep. 758.

182. PLEADING—Action on Note.—Want of consideration in an action on a promissory note is new matter, which must be specially pleaded, and is not available as a defense under a general denial.—SHARPLESS v. GIFFEN, Neb., 66 N. W. Rep. 285.

188. PLEADING—Aider by Verdict.—A complaint for goods sold, failing to allege the date of such sale, or the reasonable value or agreed price of such goods, or the terms of payment, is cured by verdict, where an itemized statement was furnished to defendant, and defendant admitted the delivery of the goods.—NICOLAI BEO. CO. V. KRIMBLE, Oreg., 43 Pac. Rep. 865.

184. PLEDGE — Collateral Security—Express Agreement as to Sale.—In the absence of express agreement authorizing it, a pledgee cannot become the purchaser of the pledged property at his own sale; and if the property be bid off by him, the contract of pledge is not thereby terminated, nor the relations of the parties changed, unless the pledgor elects to treat the transaction as a valid sale, in which event the pledgee will be accountable for the net proceeds of the sale.—GLIDDEN V. MECHANIC'S NAT. BANK, Ohio, 42 N. E. Rep. 996.

185. PRINCIPAL AND AGENT.—Where one intrusted with the sale of real estate purchases it himself through other parties, the vendor may rescind the sale, though the price paid is all that was demanded by her.—RICH V. BLACK, Penn., 33 Atl. Rep. 881.

186. PRINCIPAL AND AGENT.—Where one conducting business for another, under an agreement to be responsible for all goods sold by him, takes a note for goods sold, which is, after the close of the business, renewed by the principal, such renewal does not release the agent from liability for the goods.—BUELTERMAN V. METER, Mo., 34 S. W. Rep. 67.

187. PRINCIPAL AND AGENT — Agency to Sell Land—Revocation.—The interest of a real estate broker in commissions to be earned will not prevent a revocation of his agency at any time prior to a sale.—NEAL v. LEHMAN, Tex., 34 S. W. Rep. 158.

188. PRINCIPAL AND AGENT—Broker—Action for Commission.—Where a contract for procuring a sale specifies a fixed price, and in an action on the contract for commissions there is evidence that plaintiff procured a purchaser with whom defendant personally negotiated a sale for a less sum, but none to show that the purchaser was willing to pay the specified price, or

why he did not pay it, a nonsuit should be directed.— CHILDS V. PTOMEY, Mont., 43 Pac. Rep. 715.

189. PRINCIPAL AND AGENT—Contracts.—A contract, to be obligatory upon a principal, when made by an agent, must be made in the name of the principal. If the agent contract in his own name, the contract is the contract of the attorney and not of the principal.—COCKERHAM V. PEROT, La., 19 South. Rep. 122.

1905 PRINCIPAL AND AGENT—Ratification of Agent's Acts.—One, who with knowledge of the facts, received the proceeds of lumber cut by plaintiff under an unauthorized contract made by his agent with plaintiff, ratified the contract.—SMITH V. BARNARD N. Y., 42 N. E. Rep. 1054.

191. PRINCIPAL AND SURETY—Indemnity.—A share of certain money distributed by order of court was allotted to a married woman, and paid to her attorney. Before paying it over to his client, he exacted from her a bond of indemnity to hold him harmless if he was compelled to refund it, which was given and signed by her husband as surety. The order of distribution was afterwards set aside, and the attorney assigned the bond to the person by the final order entitled to the money: Held, that there having been no recovery against the attorney, and there being no liability for the money on his part, the assignee could not recover on the bond.—WARRUM v. DERRY, Ind., 42 N. E. Rep. 1128.

192. PRINCIPAL AND SURETY—Indemnity—Employee's Fidelity Bond —A surety on a fidelity bond, indemnifying a corporation against loss of money intrusted to its treasurer, through the "embezziement or larceny" thereof by him, is not liable for money intrusted to him, and for which he failed to account, on which, while in his hands, the corporation charged him interest.—MILWAUKEE THEATER CO. V. FIDELITY & CASUALTY CO., Wis., 66 N. W. Rep. 360.

193. PRINCIPAL AND SURETY — Partnership.—Parties who signed the bond of one of the members of a copartnership, conditioned for the due and faithful performance of his duties in and concerning the business in which the firm engaged, held not released from their obligation thus assumed by an increase in the amount of the capital invested in the business.—MCAULEY V. COOLEY, Neb., 66 N. W. Rep. 304.

134. PRINCIPAL AND SURETY—Release of Surety.—The cancellation of the principal debtor's deed of trust on his own property releases the surety from liability on a deed of trust on her property given as additional security.—CHISM V. THOMPSON, Miss., 19 South. Rep. 210

195. PROCESS — Summons-Publication.—Code Civ. Proc. 1837, § 73, provides that in certain cases, when an affidavit setting up any such case is filed with the cierk, and stating that a cause of action exists against defendant, and that he is a necessary or proper party to the action, the cierk shall cause the service of summons by publication: Held, that the affidavit is sufficient if it sets forth, substantially in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons.—ERVIN V. MILNE, Mont., 43 Pac. Rep. 706.

196. PROHIBITION—When Granted.—Where an inferior court acts within the bounds of its jurisdiction, and there are no marked defects or irregularities in its proceedings, the supreme court, under its supervisory jurisdiction, will not annul the judgment rendered in the case, though it may be contrary to the law and the evidence.—State v. King, La., 19 South. Rep. 142.

197. PROHIBITION—When Lies.—Prohibition against proceedings in a lower court will not lie, unless it is affirmatively shown that the supreme court has jurisdiction, and that the lower court is acting or threatening to act without authority.—CLIFFORD v. PARKER, Wash., 41 Pac. Rep. 717.

198. RAILROAD COMPANIES — Condemnation Proceedings.—The measure of damages to land by the location of a railroad through it, aside from the value of the land appropriated for the right of way, is the depre-

ciation in the market value of the land by reason of such location of the road; and, as tending to show such depreciation, all the inconveniences directly caused by the road may be taken into consideration.—OMAHA, H. & G. RY. CO. V. DOMEY, Kan., 48 Pac. Rep. 831.

199. RAILBOAD COMPANY—Elevated Railroad—Injunction.—The operation of an elevated railway in front of plaintiff's premises will not be restrained, on the ground of interference with his easements of light, air, and access, where it was shown that the use of the street by such railway was authorized by law, that the value of the property had been greatly enhanced by its construction and maintenance, and no actual damage was shown.—O'REILLY V. NEW YORK EL. R. Co., N. Y., 42 N. E. Rep. 1063.

200. RAILROAD COMPANIES—Municipal Corporations—Power to Close Street.—A city council has no power to close the intersection of streets to the public, and give a railroad company exclusive use thereof, in the absence of any general law or provision in the city charter giving it such power.—SAN ANTONIO & A. P. RY. Co. v. BERGSLAND, Tex., 34 S. W.Rep. 154.

201. RAILHOAD COMPANIES—Negligence.—One who is about to cross the track, and would under ordinary circumstances have ample time to do so, but is arrested in crossing by an alarm and commotion in a city street which is crowded with people, and is run down by a train coming around a curve, is not chargeable with contributory negligence.—ALABAMA & V. RT. Co. v. Lowe, Miss., 19 South. Rep. 96.

202. RAILROAD COMPANIES—Negligence—Trespassers.—The evidence showed that deceased, a trespasser on defendant's track was first observed by the engineer when 400 feet away, though he might have been seen for one eighth of a mile, the track being unobstructed for that distance; that, on seeing him, the engineer gave a sharp warning whistle, which could be heard for several miles there being scarcely any breeze stirring, and no noise except that made by the train and the bell, which was kept continually ringing; that deceased must have walked at least 15 feet after the signal was given; and that the train could not have been stopped in less than 600 feet: Held, that defendant was not negligent.—SINCLAIR v. CHICAGO, B. & K. C. RY. CO., Mo., 34 S. W. Rep. 76.

203. RAILHOAD COMPANIES—Presumptions of Negligence on the part of the operatives of a railroad train cannot be presumed from the mere fact that a personal injury was caused by such train to one to whom the railroad-company owed no contract duty.—ATCHISON, T. & S. F. R. CO. v. MCFARLAND, Kan., 43 Pac. Rep. 788.

204. RAILROAD COMPANY—Separate Coach Act—Damages.—A railroad company is not liable to a private person, for failing to furnish him "a coach equal, in all points of comfort and convenience to the one provided for white passengers on the same train," as required by the separate coach act, in the absence of evidence that plaintiff was damaged thereby.—NOS-WOOD V. GALVESTON, H. & S. A. RY. Co., Tex., 34 8. W. Kep. 180.

205. RAILHOAD COMPANIES — Speed of Train—Negligence.—When the ordinances of a city through which a railroad runs prohibit the running of trains at a greater speed than six miles an hour within the city limits, the running of a train at greater speed than that allowable is negligence per se, but it is not such negligence as authorizes the recovery of damages for an injury inflicted by such train, unless it appears from the evidence that such unlawful speed was the proximate cause of the injury.—CHICAGO, R. I. & P. RY. CO. V. KENNEDY, Kan., 43 Pac. Rep. 802.

206. RAILHOAD COMPANIES — Use of Track as Footway.—No duty rests upon a railway company in favor of the public who uses its track as a footway to keep its switches blocked in its private switchyards, to lessen the chances of injury to pedestrians.—INTERIATIONAL & G. N. RY. Co. v. LEB, Tex., 34 S. W. Rep. 189.



207. BAILROADS — Construction — Surface Water.— When the contour of land is such that a railroad embankment must dam the natural outlet of the surface water from farm lands, and a short trestle, no higher or costlier than the embankment, would obviate the difficulty, the company building such embankment with knowledge of the circumstances is liable for injury caused by the surface water to farm lands.—CANTON, A. & N. R. CO. V. PAINE, Miss., 19 South. Rep. 199.

208. RAILROADS—Contributory Negligence.—A child 13 years old is guilty of contributory negligence in attempting to pass, at a railroad crossing, between two sections of a long freight train eight feet apart, where, when she arrived at the crossing, the two sections were at a standstill, but, before she started to pass between them, the engine section had commenced to close up.—WALLACE v. NEW YORK, & H. R. Co., Mass., 42 N. E. Rep. 1125.

209. RELBASE—Ratification.—Where plaintiff, within twelve hours after an injury, while still under the influence of oplates, and without any person present to protect his rights, was induced by the railroad company liable for the injury to release his claim for a small cash payment, it is proper to instruct that the release was not binding, unless plaintiff, subsequently, when competent to act, with full knowledge of the facts and his rights under them, and of his right to disaffirm, ratified the same.—ALABAMA & V. RY. Co. v. JOERS, Miss., 19 South. Rep. 105.

210. REMOVAL OF CAUSES—Federal Question.— Mandamus proceedings to compel a railroad engaged in interstate commerce to run its trains to a certain station in obedience to a State statute involve a federal question, since a judgment therein may impose a burden on interstate commerce.—PEOPLE v. ROCK ISLAND & P. RT. Co., U. S. C. C. (III.), 71 Fed. Rep. 753.

211. REPLEVIN—Pleading and Proof.—A plaintiff in replevin may, under a petition alleging general ownership and right of possession in himself and a wrongful detention by defendant, prove fraud inducing a previous sale by plaintiff to defendant, and a rescission because thereof. It is not necessary to specially plead the fraud.—PHENIX IRON WORKS CO. v. MCEVONY, Neb., 66 N. W. Rep. 290.

212. SALE—Construction of Warranty.—A warranty given by the Sultan Cart Company reads as follows: "We warrant all of our work to be of good material, and made in workmanlike manner. In case breakage shall occur within one year, by reason of defective material, we will replace all broken parts free of charge, but the agent must be cautious and use his judgment in the matter. We will not make good any breakage, only such that is defective:" Held, that this warranty should be construed as a warranty of each cart, and every part thereof, as to workmanship and material, for the period of one year, with the privilege of having any defective part or cart replaced free of cost during said period.—Watson v. Beckett, Kan., 43 Pac. Rep. 787.

213. SALE.—Rescission for Fraud of Buyer.—Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor.—First Nat. Bank v. McKinney, Neb., 66 N. W. Rep. 230.

214. SALE—Warranty—Breach.—The vendor, at a public auction sale of a number of horses, publicly stated "that all horses which would then and there be offered for sale had been driven single," and that all horses which were not safe to drive single would be specified when sold: Held, that where horses were afterwards sold without any statement as to whether they were safe to drive single, there was a warranty that they were safe.—INGRAHAM v. UNION R. CO., R. I., 33 Atl. Rep. 375.

215. SLANDER-Evidence-Malice.-In an action for stander the jury may consider the wealth and standing

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of defendant, to determine the influence of his statements.—Botsford v. Chase, Mich., 66 N. W. Rep. 325.

216. Specific Performance.—Where the vendor, in a contract for the sale of land, falls to make the payments required by his contract, and takes no steps to enforce it after notice from the vendor that he had forfeited it, and permits a subsequent grantee to take possession of the land and make valuable improvements thereon, specific performance will not be enforced at the instance of the vendee.—Catheo v. Gray, Mich., 66 N. W. Rep. 346.

217. SUNDAY—Negotiable Note—Delivery.—The fact that a note was handed to plaintiff in satisfaction of a guaranty on Sunday, it not appearing that the contract was made on Sunday, would not invalidate the delivery.—STEERE V. TREBILOOCK, Mich., 66 N. W. Rep. 342.

218. SUNDAY TRAVEL—Injury to Passenger.—Gen. St. § 1569, providing that every person who shall do any secular business, or engage in any sport or recreation on Sunday, shall be fined, when construed with Pub. Acts 1882, p. 12, and Pub. Acts 1883, p. 258, repealing the sections of former statutes prohibiting travel and the letting of vehicles for hire on Sunday, does not prohibit riding for pleasure, on a street car on Sunday, so as to exempt the carrier from liability for injury to the passenger.—HORTON v. NORWALK TRAMWAY CO., Conn., 33 Atl. Rep. 914.

219. TAXATION—Special Assessments — Sprinkling Streets.—Sprinkling the streets of a city is not an improvement of the abutting property of such a character as to justify the imposition upon such abutting property of a special assessment for the expense thereof, and an act authorizing the imposition of assessments for such purpose is in violation of fundamental law, and not within the taxing power.—New York LIFE INS. CO. V. PRIEST, U. S. C. C. (Mo.), 71 Fed. Rep. 815.

220. TENANTS IN COMMON—Lease by One.—A lease by one tenant in common of the right to take oysters without the consent of his cotenant does not give the lessee an exclusive right as against subsequent lessees of the cotenant; and it is immaterial that the first lessee expended money in making the bed productive.—MOTT v. UNDERWOOD, N. Y., 42 N. E. Rep. 1048.

221. TENDER—Running of Interest.—Where money is borrowed from a bank for the purpose of making a tender, and, on its refusal, is again returned to the bank, this is insufficent to stop the running of interest. To have that effect, the money must be kept continually ready, so that no profit is made upon it.—MIDDLE STATES LOAN, BLDG. & CONST. CO. OF HAGERSTOWN V. HAGERSTOWN MATTRESS & UPHOLSTERY CO. OF WASHINGTON COUNTY, Md., 33 Atl. Rep. 886.

222. TRADE-MARKS — Descriptive Words.—Where the words "Fire-Proof Oil" are used to designate a peculiar brand of illuminating oil, and are thus used in a label, in connection with the name of the manufacturer and its place of business, the words are used in the sense of affirming a high degree of purity which renders the oil non-explosive from fire contact, and, being thus descriptive, cannot be appropriated to an exclusive use.
—Scott v. Standard Oil Co., Ala., 19 South. Rep. 71.

223. TRESPASS—Equity.—To a bill filed by the owners in fee of land, alleging that the defendants, with design to defraud and injure complainants, had entered upon the land under color of a void tax deed, and had committed irreparable injury, by digging and taking from the soil phosphate of great value and quantity, the exact value of which could not be ascertained without an accounting, and praying for an injunction and account of the phosphate dug, a plea was interposed, alleging, simply, that defendants were not committing the trespass and injury alleged at the time the bill was filed: Held, that the plea was no sufficient answer to the bill, and was rightfully overruled.—BROWN v. SOLARY, Fla., 19 South. Rep. 161.

224. TRESPASS—Judgment in Unlawful Entry.—Judgment in unlawful entry and detainer is not a bar to an

action for trespass, the former being merely a possessory action.—RICHARDSON v. CALLIHAN, Miss., 19 South. Rep. 95.

225. TRESPASS—Rights of Wrongdoer to Maintain.—A girl of 18 was accustomed to help her father in the business of his farm. The father said that he left her in charge of his farm on the day in question, as he left for a few hours: Held, that the daughter was not thereby empowered to resent by force an entry upon a part of the farm that had legally been condemned for public use.—EAST JERSEY WATER CO. V. SLINGERLAND, N. J., 83 Atl. Rep. 848.

226. TRIAL—Directing Verdict.—Where plaintiff's testimony, if believed, was sufficient to support a verdict in his favor, it was error to direct a verdict for defendant, though plaintiff's evidence was uncorroborated in any, and contradicted in many, material points, and he was shown to have made statements, purposely false, out of court, contradicting his testimony.—O'BRIEN V. CHICAGO & N. W. RY. CO., Wis., 66 N. W. Rep. 363.

277. TRUST—Agreement to Pay Interest.—A circular was issued under the heading "Depositors' Co-operative Association," signed by one as "Manager," inviting deposits, on which interest would be paid semi-annually. Plaintiff made a deposit with the manager, taking a certificate reciting that the money should remain one year, and bear interest at 6 per cent., but might be sooner drawn on notice, and, in case drawn before six months, no interest would be paid: Held, that the relations created by the deposit were those of debtor and creditor, and that no trust was created, but the money became at once the property of the association or manager.—LEAPHART V. COMMERCIAL BANK OF COLUMBIA, S. Car., 23 S. E. Rep. 939.

228. TRUSTEE — Services Inconsistent with Trust.—Where a partner, as a club member, becomes one of a club committee to purchase real estate for it, expressly agreeing to charge no commission, and that the club shall have the benefit of any bargain made, the club are entitled, as against the partnership, to a commission allowed by the vendor.—REDHEAD v. PARKWAY DRIVING CLUB, N. Y., 42 N. E. Rep. 1047.

229. USURY—Intent.—The price of property sold in good faith may be included in the same security with money loaned, and the fact that the price was large, and more than the property could have been sold for, does not necessarily condemn the transaction as usurious. The inquiry in such a case is whether, upon the evidence, there was any corrupt agreement or device, or shift, to receive or take usury; and in this aspect of the case the quo animo as well as the acts of the parties is most important.—SAXE v. WOMACK, Minn., 66 N. W. Rep. 269.

230. USURY — Joint Note. — Where three persons jointly liable on a note, after making payments thereon, including usury, separate their liability for the balance by each giving an acceptance for his share thereof, a deduction for usury may be had in an action on one of such acceptances; but the deduction shall be only a proportional part of the usury, though the other acceptances have been paid without any claim for such deduction.—Deposit Bank v. Robertson, Ky., 34 S. W. Rep. 23.

281. VENDOR AND PURCHASER—Breach—Tender of Performance.—Plaintiff paid \$500 on the execution of a contract to convey land. The contract represented that there was on the land only a mortgage of \$1,000. A mortgage for \$1,500 additional, of which the vendor had no knowledge, was being foreclosed when the \$500 was paid; and after the date fixed for performance of such contract there was a decree of foreclosure, under which the land was afterwards sold: Held, that a tender of performance by plaintiff was necessary to entitle him to maintain an action for breach of such contract.—ZIEHEN v. SMITH, N. Y., 42 N. E. Rep. 1080.

232. VENDOR AND PURCHASER—Specific Performance—Equity.—Where a vendor of land sues to enforce a

specific performance of an executory contract by the purchaser, aithough the substantial part of the relief asked is the recovery of money, and though he also asks the enforcement of a vendor's lien, the action is clearly triable in equity.—Gates v. Parmly, Wis., 66 N. W. Rep. 258.

283. WILLS—Ademption of Bequest.—A general bequest to a child, of a share of testator's personalty, may be satisfied pro tinto by a conveyance of real estate during the life of the testator, where such is the clear intention; such conveyance not operating as a revocation of the bequest, but as a satisfaction.—Carmichel v. Lathrop, Mich., 66 N. W. Rep. 350.

234. WILLS — After acquired Land.—Testatrix, after giving a legacy to one of her children for her separate use, devised "all" of her land to other children and a grandchild, specifying of what such land consisted, and also gave, to one of the children to whom the land was given, a legacy reciting that it was given to make him "even" with the other children on account of advances previously made them. She then directed her debts to be paid out of the "balance" of her "property," and, "should there be anything left," provided that it should be divided among her own children, to whom the land in part was given: Held, that after-acquired land passed under the will.—WEBB V. AECHIBALD, Mo., 34 S. W. Rep. 54.

235. WILL—Life Tenants and Remainder-men.—Testator left his estate to his executors, in, trust, to receive and collect the rents of the real estate, and the income and profits of the personal estate, and after deducting taxes and certain annuities, to pay the residue of the net income to his daughter during her life, the corpus of the estate to go to her children after her death. The executors invested a part of the estate in mortgages, which were foreclosed, they buying in the property, in order to protect the estate, for the amounts of the mortgages: Held, that the testator's daughter was entitled to the profits arising from the subsequent sale of such property at an advance.—IN RE PARE'S ESTATE, Penn., 33 Atl. Rep. 884.

236. WILLS—Mental Capacity—Evidence.—That testator for 10 years suffered greatly from a cancer in his face, which, before the execution of the will, had destroyed one eye, and partly destroyed the sight of the other, together with the opinion of non-experts, none of whom testified to any facts which could reasonably be made the foundation of an opinion, that testator was of unsound mind, is insufficient to sustain a verdict that testator was of unsound mind, as against direct evidence in support thereof.—RARICK v. ULMER, Ind., 42 N. E. Rep. 1099.

237. WILL—Mental Capacity—Non-expert Witness.—A non-expert testifying to the mental capacity of a testator cannot, on re-direct examination, be asked his opinion of the mental capacity of a testator in a hypothetical case.—SAGAR v. HOGMIRE, Mich., 66 N. W. Rep. 326.

288. WITNESS—Juror—Competency.—A juror is a competent witness for a party in a suit on a trial before himself and fellows, where he testifies only as to the character of the party calling him.—WHITE V. STATE, Miss., 19 South. Rep. 97.

239. WITNESS—When Interested Adversely to Estate.—Under Rev. St. 1894, § 506 (Rev. St. 1881, § 489), providing that in suits in which an estate is interested, and to which its administrator or executor is a party, "any person who is a necessary party to the issue or record, and whose interest is adverse to such estate," shall be incompetent to testify against the estate as to matters occurring during the life-time of the decedent. In an action to charge an estate with a claim on the ground that the decedent was a member of ifirm, another member of the alleged firm, though not a party, is incompetent to prove the partnership as against the estate, but he is competent to show the correctness of plaintiff's account.—Leach v. Dickerson, Ind., 43 N. E. Rep. 1031.



Central Law Journal.

ST. LOUIS, MO., APRIL 24, 1896.

The uncertainty of litigation is well illustrated by the final result of the case of State v. Withrow in the Supreme Court of Missouri, to which we called attention in a recent issue (42 Cent. L. J. 191) at the time the opinion of division No. 1 of that court was rendered. Thereafter the case went to the court in banc which has just reversed the decision of division No. 1 and awarded the writ of prohibition. The interesting part of the history of this case is that there is but one dissenter-Judge Barclay,—in the court sitting in banc, though at the hearing in division No. 1 two of the judges reached a conclusion directly opposed to that to which they now assent. However there is nothing to prevent a judge from changing his mind especially in reference to a question so susceptible of two opinions as was this case. It involved the power of the circuit judges of the city of St. Louis to make rules governing the selection of "special juries" which, as was claimed by those who opposed the rules, in effect abolished such juries except in name, and were in derogation of the statute providing for special juries and of the State constitution. Division No. 1 however did not so think. It was there held that the circuit judges had full power to frame rules governing the selection of special juries, and that an order of court requiring the jury commissioner to draw and furnish a special venire of "good and lawful men" without designation of qualifications other The court in banc however reached a different result. They argue that "special juries," as distinct from a common jury, were a feature of the common law and that our legislature, by adopting it, must be presumed to have done so with a full understanding of the meaning, force and effect "which that expression had acquired during its long sojourn at common law," that the constitutional guarantees as to trial by jury means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and that, therefore, it is neither in the power of law makers nor courts to take

away the right to a special jury or by the operation of rules force a litigant who lawfully asks for such a panel to accept anything else. Though the opinion of the court by Judge Sherwood is learned, exhaustive of the precedents and very plausible, it is not While it is conentirely convincing. cededly beyond the power of courts to make rules in derogation of statutory or organic law, and though a certain kind of special jury was undoubtedly known to the common law, it is not clear that the rules adopted by the circuit judges in this case, regarding the manner of providing a "special jury" were bevond their jurisdiction.

Not long ago the Supreme Court of California reversed a case upon the ground of undue interference by the trial judge with the verdict of the jury. Mahoney v. San Francisco & San Mateo Ry. Co., 42 Pac. Rep. 969. The error consisted in language used by the court in the course of supplementary instructions to the jury which in effect compelled them to agree to a verdict. The recent case of State v. Kellev, 24 S. E. Rep. 45, was reversed by the Supreme Court of South Carolina upon the ground that the verdict was obtained through duress on the part of the court. It appeared that a jury in a prosecution for assault with intent to kill retired about 4 o'clock P. M., with the usual instructions about bringing in a sealed verdict. They were furnished with supper, and with breakfast the next morning. The sheriff was then instructed to give them nothing more to eat, and they remained in the room until about 7 o'clock P. M. of the second day. They then came in at the direction of the judge, who, learning that their disagreement was one of fact, sent them back to the jury room, and some time during the night they rendered a sealed verdict. Before retiring the second time, the foreman said: have been in the room twenty-four hours and can't agree." It also appeared that on three separate occasions the jury had attempted, through the officer in charge, to communicate to the judge that they could not agree. and wished to be discharged. The recalcitrant member or members of the jury, under such duress of starvation, not unnaturally finally consented to a verdict, and the appellate court very properly holds, not only

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that the jurors themselves had good grounds for complaint, but that a verdict rendered under such circumstances must be set aside and a new trial ordered.

NOTES OF RECENT DECISIONS.

WILL—ATTESTATION—ERRONEOUS NAME.—
It was held by the Supreme Court of California in Re Walker's Estate, 42 Pac. Rep. 815 that where a witness, in attesting a will, inadvertently wrote the surname of the testator instead of his own, there was no sufficient compliance with Civ. Code, § 1276, providing that each of the attesting witnesses must sign his name at the end of the will. The court was somewhat divided on the question, three of the members dissenting. The opinion of the court by Henshaw, J., contains an exhaustive review of the English authorities.

OFFICERS-DE FACTO OFFICERS-ELECTION UNDER UNCONSTITUTIONAL LAW-COLLATERAL ATTACK.—The Supreme Court of Ohio decide, in State v. Gardner, 42 N. E. Rep. 999, that the official acts of public officers, in an office created by an unconstitutional statute of this State, performed before the statute has been declared unconstitutional by an authoritative decision of the courts of the State, cannot be collaterally attacked. Different courts have decided this question differently. Lynch v. People, 122 Ill. 420, 12 N. E. Rep. 726; Burt v. Railroad Co. (Minn.), 18 N. W. Rep. 285; Coyle v. Com., 104 Pa. St. 117; Mechem, Pub. Off., §§ 318, 327; Van Fleet, Collat. Attack, p. 33, § 21; Norton Shelby Co., 118 U. S. 425, 6 Sup. Ct. Rep. 1121; Hildrith's Heirs v. McIntire's Devisees, 1 J. J. Marsh, 206. question was before the Ohio court for the first time. Bradbury, J., in announcing the decision of the court says that "while not insensible to the consideration justly due to the high standing of those courts and authors, we are bound to reach that conclusion which, in our judgment, is best sustained by sound reason, and that best comports with an enlightened public policy and the maintenance of public order." Spear, J., concurred in an opinion exhaustively reviewing the following authorities in addition to those cited

above: People v. Weber, 86 Ill. 283; Brown v. O'Connell, 36 Conn. 432; Smith v. Linch, 29 Ohio St. 261; Clark v. Com., 29 Pa. St. 129; Campbell v. Com., 96 Pa. St. 344; State v. Brooks, 39 La. Ann. 817; Ex parte Strange, 21 Ohio St. 610. Shauck, J., dissented.

CONSTITUTIONAL LAW—POLICE POWER.—In People v. Smith, 66 N. W. Rep. 382, decided by the Supreme Court of Michigan, it was held that a statute requiring emery wheels used as machinery to be provided with blowers to carry away the dust arising from their operation, is not unconstitutional as class legislation, but valid as a police regulation for the benefit of the public welfare. The court said in part:

The case of People v. Warden of City Prison, 144 N. Y. 529, 89 N. E. Rep. 686, is an interesting one upon this question, and although the decision there laid down is criticised (perhaps justly) by Mr. Justice Peckham in a dissenting opinion, concurred in by two of his associates, the power to regulate private affairs where the public necessity exists is asserted in an exhaustive opinion by the same learned judge in the case of Health Department of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. Bep. 883, in the course of which the power to regulate the appliances for manufacturing is asserted. 145 N. Y. 48, 44, 39 N. E. Rep. 833. The opinion says: "Hand rails to stairs. hoisting shafts to be inclosed, automatic doors to elevators, automatic shifts for throwing off belts or pulleys, fire escapes on the outside of certain factories, all these re required by the legislature from such owner, and without any direct compensation to him for such expenditure. Has the legislature no right to enact laws such as this statute regarding factories, unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health, as against all owners of such property, unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character, and to mistake the foundstion upon which they are placed." The trouble with these cases arises over the inability of the courts to fix a rigid rule by which the validity of such laws may be tested. Each law of the kind involves the questions: (1) Is there a threatened danger? (2) Does the regulation invade a constitutional right? (3) Is the regulation reasonable? In the present case no controversy is raised over the first of these. Hence we are not called upon to discuss it. As is implied by what has been said, the constitutional right to use property without regulation is plain, unless the public welfare require its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity that the third question depends. All, then, seems to be embraced in the question of necessity. Unless the emery wheel is dangerous to health, there is no necessity, and consequently no power, to regu-

late it. Unless the blower is a reasonable and proper regulation, it is not a necessary one. Who shall decide the question, and by what rule? Shall it be the legislature or the courts? And, if the latter, is it to be determined by the evidence in the case that happens to be first brought, or by some other rule? Does it become a question of fact to be submitted to the jury or decided by the court? Of all the devices known to human tribunals, the jury stands pre-eminent in its ability to determine cases in direct violation of and contrary to law, without impairing the binding force of the law as a rule of future action. We have known of instances where question of the constitutionality of the acts, as applied to the particular case on trial, has been made to depend upon the finding of the jury upon the facts in the case. But there is a manifest absurdity in allowing any tribupal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. Whether this law invades the rights of all the persons using emery wheels in the State is a serious question. If it is a necessary regulation, the law should be sustained, but, if an unjust law, it should be annulled. The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. Manifestly, then, the decision could not settle the question for other parties, or the fate of the law would depend upon the character of the case first presented to the court of last resort, which would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. It would seem, then, that the questions of danger and reasonableness must be determined in another way. The legislature, in determining upon the passage of the law, may make investigations which the courts can-not. As a rule, the members (collectively) may be expected to acquire more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to the dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be in favor of the validity of legislative action. If the courts find the plain provisions of the constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts of which judicial notice may be taken, then the act must fall otherwise it should stand. Applying this test, we think the law constitutional, and the judgment is therefore affirmed. The other justices concurred.

Duress—Settlement of Dispute.—The Court of Civil Appeals of Texas decides, in Alexander v. Trufant Com. Co., 34 S. W. Rep. 182, that the fact that a creditor would be unable to continue his business unless payment for grain shipped the debtor should be promptly made, as provided in the contract of sale, of which fact the debtor was aware at the time of the sale, does not render a settlement of a dispute between them as to the grade of the grain, entered into by the creditor to secure prompt payment, invalid for duress. The court says:

If the defendant in error violated its contract under which the grain was shipped, the plaintiff in error had a remedy at law by which he could have enforced his rights and redressed his wrongs. He was a free man, with the courts of his country opened to him, without restraint, either actual or constructive, nor threatened either in life, limb, liberty or property, dealing with one who had not even the semblance of power to harm him, when he entered into the contract by which he says he was so greviously wronged. Courts in this country are not wont to lend a willing ear to the complaints of a man who shows that he has, for the purpose of obtaining a part of what is due him, voluntarily yielded his rights to one who has no power to harm him. If such complaints were favorably entertained, the man who has the courage to stand up for and maintain his rights would be placed at a serious disadvantage by any truckler who might choose to make them against him in our courts. We cannot better express our views on this point than by quoting the language used by Mr. Justice Cooley in a similar case. He says: "In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money, and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment, except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract, which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal, doctrine; and if accepted no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who profe-sed to be in great need." Hackley v. Headley, 45 Mich. 569, 8 N. W. Rep. 514. And of Mr. Justice Harlan in U. S. v. Silliman, 101 U. S. 465-471, when he says: "Instead, however, of seeking the aid of the law, claimants, with a full knowledge of their legal rights, executed new charter parties, and from time to time received payments according to the rates prescribed therein; protesting, when the new agreements were signed, that they were executed against their wishes and under the pressure of financial necessity. They now seek the aid of the law to enforce their rights under the original charter parties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretense that a refusal on their part to accede to the illegal demand of the quartermaster's department would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their liberty, to avoid which it became necessary to execute new charter parties; nor were those charter parties executed for the purpose or as a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for



the conduct of their business, or to meet their pecuniary obligations to others. Their duty, if they expected to rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiations of a valid contract. We are aware of no authority, in the textbooks or in the adjudged cases, to justify us in holding that the last charter parties were executed under duress. There is present no element of duress, in the legal acceptation of that word. The hardships of particular cases should not induce the courts to disregard the long-settled rules of law." In that case the claimants had a strong adversary, the United States, who, through the quartermaster's department, demanded that they should execute a new charter party, containing stipulations essentially different, as to compensation, from those embodied in the contracts under which the government obtained possession of the barges; and it announced its purpose to retain possession, and withhold all compensation, unless and until the claimants executed the proposed new charter parties.

Taxation—Exemption — Municipal Corporation — Public Improvement — Assessment.—That property exempt from taxation is still liable for assessments for public improvements has been decided by a long line of cases, the latest of which is Yates v. City of Milwaukee (Wis.), 66 N. W. Rep. 248, wherein the following is from the opinion of the court:

In the case of Hale v. City of Kenosha, 29 Wis. 605, in considering the distinction between taxes and assessments, it was said that "assessments, as distinguished from other kinds of taxation, are those special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, improving harbors or navigable rivers within the limits of the municipality, and the like, which are necessary to pay for the improvements, and are laid with reference to the special benefit which the property is supposed to have derived from the expenditure;" and the language of Bronson, J., in Sharp v. Speir, 4 Hill, 76, that "our laws make a plain distinction between taxes which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city or village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement," after citing the previous cases in this State on the subject, was declared to be "peculiarly applicable to our system of taxation and assessment." As such assessments are laid with reference to the special benefit which the owner of the property is supposed to have derived from the improvement, it is manifestly just that, to the extent which his property has been benefited, it should be charged with the cost of the improvement, and it would be inequitable to exempt it from such an assessment. No presumption, therefore, of an intention to exempt such property from assessment, can arise from the use of language which does not clearly show that the legislature intended such exemption, and to charge the special benefit thus derived by a private owner upon the funds raised by general taxation. While assessments are said, in strictness, to be made under the taxing

power, they are "so far separated and distinguished from general taxation as to have obtained a distinct name and that name 'assessments.' As such, they have been known and described for a number of years in the older States, in their contracts, laws, and constitutions. A clear distinction between it and other taxation was established." Weeks v. City of Milwaukee, 10 Wis. 248, 244. A familiar illustration of the popular understanding is found in the language used in leases, and in those before us, where general taxes, when so intended, are named simply as "taxes;" and when assessments are intended, the words "special taxes" or "assessment" are employed to express such intent. Legislative exemptions of property from taxation are to be strictly construed. This rule is universal. Cooley, Tax'n, 54; Weston v. Supervisors, 44 Wis. 256. In pursuance of this principle, it has been generally held that a law exempting property from "taxation" does not exempt it from assessment for street improvements; that the terms "taxes" and "assessments" are not synonymous, and that the latter is not included in the former. Lima v. Cemetery Ass'n, 5 Am. & Eng. Corp. Cas. 547, and note, where the cases on the subject are collected; Winona & St. P. Ry. Co. v. City of Watertown (S. D.), 44 N. W. Rep. 1072; City of Sioux City v. Independent Dist. of Sioux City (Iowa), 7 N. W. Rep. 488; 25 Am. & Eng. Enc. Law, 160, and numerous cases cited in note 2; Worcester Agricultural Soc. v. Mayor, etc., of Worcester, 116 Mass. 189, 191; Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; McClean Co. v. City of Bloomington, 106 Ill. 209; Adams Co. v. City of Quincy, 130 Ill. 566, 22 N. E. Rep. 624; Zable v. Orphans' Home, 92 Ky. 89, 17 S. W. Rep. 212; State v. Mills, 34 N. J. Law, 177; Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506; Roosevelt Hospital v. Mayor, etc., 84 N. Y. 108; Railway Co. v. Decatur, 147 U. S. 190, 13 Sup. Ct. Rep. 293.

FRAUDULENT CONVEYANCE — PARTIAL IL-LEGALITY OF CONSIDERATION.—The Supreme Judicial Court of Massachusetts decides, in Traders' Nat. Bank v. Steere, 43 N. E. Rep. 187, that the fact that a transfer by a debtor in payment of a just debt was also in consideration that the transferee should not prosecute the former for a crime, does not render the transfer subject to attack at the instance of creditors as fraudulent. The following is from the opinion of the court:

The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors does not neces. sarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. . If it is, they may set it aside; if it is not, they cannot. We may assume, in accordance with the decisions in Weeks v. Hill, 38 N. H. 199, and in Clark v. Gibson, 12 N. H. 386, that if an insolvent person appropriates a considerable portion of his property for his own benefit in a way forbidden by law, such an appropriation is ipso facto a fraud upon his creditors. Money taken by an insolvent person from his estate, and paid to compound a felony is disposed of fraudulently as against creditors, and may be treated by them as still applicable to the payment of their debts. But the payment of one or more

creditors in full by way of preference is not fraudulent at common law. It is not a misappropriation of the debtor's property. Sawyer v. Levy, 162 Mass. 190, 38 N. E. Rep. 365. Such a payment does not become fraudulent as against creditors merely because the creditor, when he receives payment and gives up the evidence of his debt, illegally promises, as a part of the transaction, to compound a felony of which the debtor is guilty. The added illegal element in the contract is condemned by the law, because it is against public policy, but it does other creditors no harm. The money paid is no more than is due for the debt, and nothing is taken from the other creditors for an illegal use. See Bank v. Haskins, 3 Metc. (Mass.), 332-340; Harvey v. Varney, 98 Mass. 118-120. They are affected as well as all other members of the community are affected, and not otherwise. If it were possible to do so, they would have no right to use the debtor's liability to punishment for his crime as a means of obtaining an advantage to themselves. Taylor v. Jackues, 106 Mass. 291; Morse v. Woodworth, .55 Mass. 283, 27 N. E. Rep. 1010, 29 N. E. Rep.

VESTING OF LEGACY — PRESUMED ASSENT OF EXECUTOR.

It is well established, that the legal title to a legacy will not vest in the legatee, without the express or implied assent of the executor. This follows from the principle, vesting the entire personal estate of the deceased testator in his executor, and the purpose of the rule is to protect creditors of the estate, and to prevent the testator from defrauding them, by bequeathing all his property, to various people who, if their rights were complete at the probate of the will, might take possession of the property to the loss So, that if the legatee of the creditors. takes possession of his legacy, without the assent of the executor, the latter can maintain trespass or trover against him, and that, although the will expressly directs that such consent shall not be necessary to the legatee's right.' The rule applies as well to the executor's own legacy as to that of another; though, of course, in such a case the assent, which may be either express or implied, is more often implied from the conduct or indirect expressions of the executor.2

Such is the rule at law. The tendency in equity is to somewhat modify it. Thus, while,

Woerner's Am. L. Admr., § 453; Croswell's Exrs.
 \$490, et seq.; Schouler's Exrs. & Admr., § 493; Wms.
 Exrs. pp. (1380, 1381).

as to a general legacy, such assent is, at law. a condition precedent to the legatee's right of action for the legacy, yet in equity he may proceed without such assent since in the equitable action, all the conflicting interests would be considered, and the legacy ordered paid only, if sufficient assets appeared, so rendering the assent of the executor superfluous.8 The purpose of the rule is the protection of the estate. It is not intended that the wishes of the executor should control those of his testator. The legatee is only required to await the executor's reasonable convenience. Therefore, it is well established that, where the circumstances justify it, a court of equity will either compel the executor to assent to the legacy, in order that the legal title may vest in the legatee, or, upon the principle of regarding that as done, which, in equity and good conscience, ought to be done, will assume that the executor has already assented. Says Judge Woerner, in his American Law of Administration.4 "If the executor unreasonably refuse his assent, relief may be obtained in equity; or it will sometimes be presumed, upon the theory that the executor has done what he ought to have done." Mr. Justice Story, in his great work on Equity Jurisprudence, discusses this subject somewhat more fully: "If the testator does not dispose of the residue of his estate, and yet, from the circumstances of the will, the executor is plainly not entitled to the residue, then he will be held liable to distribute it as a trustee for the next of kin. But the spiritual courts have no jurisdiction whatsoever to enforce a distribution for trusts are not cognizable in those courts and cannot be enforced by them. Even in the common case of a legacy of personal estate, the legacy does not vest in the legatee until the executor assents to it; and until he assents it would seem not to be suable in the spiritual courts. But courts of equity consider the executor to be a trustee of the legatee and will compel him to assent to and pay the legacy as a matter of trust."5 The cases relied on, fully sustain the doctrine stated. In Wind v. Jekyll,6 decided in 1719, it was said: "A de-

² Croswell's Exrs. § 492. See, also, Chester v. Greer, 5 Humph. 26, 31; Murphree v. Singleton. 3 Ala. 412, 415; Vanzant v. Bingham, 76 Ga. 759; Walker v. Walker, 26 Ala. 262.

⁸ Croswell's Exrs., § 498.

^{4 § 453.} See, also to the same effect Schouler Exrs. v. Admrs., § 488; Wms. Exrs., p. (1375); 1 Roper's Legacies, 573.

⁵ Story's Eq. Jur. § 540.

^{6 1} P. Wms. 572.

vise of a chattel interest, differs from a grant thereof, such devise vesting nothing in the devisee until the executor assents: from whence it follows, that the executor is a trustee for the legatee with respect to his legacy, and this is the only reason why a legatee may bring his bill in equity against the executor for his legacy supposing it to be a trust." Again, in Cray v. Willis, decided about ten years later, where the question was as to the right of survivorship arising out of the joint-tenancy of two legatees, who were also executors, and it was important to determine whether the legacy had vested, it was said: "Besides in case of a legacy a term for years given to two, if the executors assent to the legacy, and one of the legatees dies, the legacy then will be admitted to survive, because, by consent of the executors, the legacy is to become a legal property, and consequently determinable according to the rules of the common law. Now it is not very reasonable that when the debts are all paid, (as they are in this case), the executors, delaying to give their consent to do what in equity they ought, nay, what they are compellable to do, viz.: to consent to a legacy. should defer the vesting of a legal right in a third person. But if this were so here is an implied assent: If I devise a term for years to my executor, who enters generally, he may prima facie take as legatee, this being more for his advantage; though it is otherwise where I devise a term to my executor for life only, with remainder to J S. Because if the term were vested in the remainder-man it could not be divested out of him again, and so might make a devastavit."

In Lark v. Linstead, said the Maryland Chancellor, in discussing the equitable jurisdiction of legacies: "It will be found upon examining the cases cited by Judge Story in the sections just referred to, and in the case of Wind v. Jekyll, that no action will lie at law to recover a legacy, until in the case of a specific legacy, the executor has assented thereto; or, in the case of a pecuniary legacy he has promised to pay it, that a court of equity regarding the executor as a trustee, will compel him to assent and pay the legacy as a matter of

trust.10 It is not, therefore necessary to inquire, in this case, whether the facts and. circumstances are sufficiently strong to infer the assent of the executor to the legacy in question, as we are now in a court of equity. where, in a proper case, relief may be granted irrespective of any such assent." In Chapman v. Fenwick," which was a petition by a negro for freedom under the will of his former owner, the court (Cranch, C. J.) said, p. 435: "If the emancipation be a specific legacy, and if the assent of the executor has not been given; inasmuch as the real and personal estate are both equally charged by this will; and as that fund is admitted to be sufficient without the value of the petitioners, he may be compelled to assent."12 The general doctrine is clearly laid down in Andrews v. Hummerman.18 "It seems to be well settled in the law, that in a specific devise of chattels, though the right vests at the death of the testator, yet the assent of the executor is necessary to enable the legatee to obtain possession. At the common law, and this founded upon the liability of the executor for debts, he has a right to refuse the legacy until he has ascertained whether there are assets. It is therefore held to be necessary to go into chancery to obtain payment of a legacy, where there will be an account and discovery of assets, and a decree of payment if those be found sufficient. Now, at the common law an action lies for a legacy on a promise to pay, there being a sufficiency of assets.14 And trover will lie for a specific legacy after an assent of the executor.15 An assent will be presumptive evidence of assets." In Georgia, where the plan of codification has been adopted, the principle has been embodied in the Code, 1882.16 It is expressly provided that the executor cannot "by capriciously withholding his assent, destroy the legacy. In equity the legatee may compel him to assent." This rule has been applied by the Supreme Court of Missouri in the well-considered case of

^{7 2} P. Wms. 529, 581.

⁸ 2 Md. Ch. 162. See, also, Crist v. Crist, 1 Ind. 570.

^{9 1} P. Wms. 575 (supra).

^{10 1} Sto. Eq. Jur. § 540 (quoted above).

^{11 4} Cranch, C. C. 481.

¹⁸ See, also, Nancy v. Snell, 6 Dana (Ky.), 143, which was another petition for freedom under a bequest of emancipation.

^{18 6} Pick. 129.

¹⁴ Cowp. 288.

^{15 3} Atk. 223.

¹⁶ §§ 2451, 2452, 2458.

¹⁷ See, also, Neison v. Cornwell, 11 Gratt. 724.

Collier's Will. 18 to a trust for the benefit of the testator's heirs. There the testator vested the residuum of his estate in trustees. to be divided among his children upon the happening of a certain event, who were then to take the absolute legal estate of their respective portions. Meanwhile the estate in the hands of the trustees was charged with the support and education of the beneficiaries and also charged, to such extent as to the trustees should seem proper, with their advancements and settlement in life. trustees were clothed with large discretionary powers, not only as to the maintenance and education of the beneficiaries and their advancement and settlement in life, but even to make a difference or distinction among them in the division and partition of the trust estate, "if from Providential visitation, or unforeseen casualty, or their own bad conduct, * * * said trustees shall think it right and proper and safest and best, under all the circumstances." The court held that the interest of the beneficiaries vested upon the testator's death, that upon the death of two of the children before the happening of the contingency upon which division was to be made, their respective interests passed to their personal representatives; that the beneficiaries of the trust took under the will itself, and not under the power of appointment vested in the trustees. Said Wagner, J.: "The law is said to favor the vesting of estates, the effect of which principle seems to be, that property which is the subject of any disposition whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or as soon afterwards as such object comes into existence or the terms thereof will permit. As therefore a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person in esse simply (without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest.19 The cases above stated are all strictly in accord with generally recognized principles that the vesting of distributive in the estate of decedents.20

WILLIAM L. MURFREE, JR.

CRIMINAL LAW-EVIDENCE OF OTHER OFFENSES.

JANSEN V. PEOPLE.

Supreme Court of Illinois, January 20, 1896.

On the trial of defendant for rape alleged to have been committed on the person of his daughter, a girl 12 years old, it was error to admit, for any purpose, evidence of a like offense subsequently committed on the person of another daughter.

CRAIG, C. J.: This was an indictment in the circuit court of Stephenson county against Ebbert Jansen, plaintiff in error, for rape alleged to have been committed on or about the 1st day of May, 1894, upon the person of Mary Jansen, a daughter of the defendant, who at the time the offense was committed, was under the age of 14 years. On a trial before a jury, the defendant was found guilty as charged in the indictment, and his term of imprisonment was fixed at six years in the penitentiary. The court overruled a motion for a new trial, and entered judgment on the verdict, to reverse which the defendant sued out this writ of error.

It is first claimed by counsel for defendant that the court erred in the admission of improper evidence; and under this head it is said the prosecution was permitted to introduce evidence that another offense was committed by the defendant on the person of another daughter subsequent to the one charged in the indictment. Upon looking into the record it appears that Yetta Janzen, a sister of the prosecuting witness, was called and testified on behalf of the people, and from her evidence it appeared that she had been absent from home about three years living with a family named Clipping, who resided some five miles from the defendant. Upon cross-examination of the witness the following occurred: Counsel for defense stated that he desired to show that the witness had become displeased with her father because as she did not have as good a home with him as she had at Clipping's. By the court: "You may show that briefly, but not go into details." "Q. You did not want to stay at home did you, Yetta? A. No, sir. Q. Did your father want you to stay at home? A. Yes, sir." After this evidence was called out by the defendant, the court, over the objection of the defendant, permitted the witness on behalf of the people to testify as follows: "He tried to use me in a bad way in bed. First he was in another bed, and afterwards he came into my bed. The boys and Mary were outdoors. This was about 5 o'clock in the morning. After he got into bed, he took hold of my arms, and got on top of me. He unbuttoned my drawers, and put his private parts between my legs. I hollered, 'Ouch.' I hollered more than one.—not very loud. When I got up and went outdoors, I found half a dozen men there." The evidence was admitted, as stated by the court, for the purpose of showing why the witness Yetta left home, and the jury

¹⁸ 40 Mo. 287.

¹⁹ 1 Jar. on Wills, 726, note by Perk.; 2 Fearne on Rem., 78.

Schoulers' Exrs. & Admrs., § 479. See, also, § 467; Croswell Exrs.' & Admrs., § 527.

were told by the court that the evidence was not admissible for the purpose of showing that defendant had committed a crime on the girl Yetta, and they should not consider it for that purpose. The defendant testified as a witness in his own behalf, and in cross-examination admitted that he was in bed with the girl Yetta on the morning of May 15th, the day he was arrested, but he testified that he did nothing to the girl; and in rebuttal the court, over the objection of the defendant, permitted three witnesses to testify that on the morning of May 15th they were in the defendant's home, and saw the defendant in bed with Yetta Janzen in the act of criminal sexual intercourse with her. This evidence was admitted by the court, as stated at the time, on the following ground: The Court: "I wish to state that this evidence is admitted because the defendant, in his examination, testified that he had gone into this room and got into the bed with this girl, but had done nothing else. If it was material and competent for him to testify as to that matter, I think it is proper that the prosecution should be permitted to contradict it, and for that purpose I admit it in evidence, and the jury will understand that they are not hearing it for the purpose of trying this defendant for any crime committed on Yetta, but simply for the purpose of contradicting his own testimony." If the evidence of the girl Yetta and of the three other witnesses in regard to what occurred on the morning of May 15th proves anything, the evidence proves the defendant guilty of a rape on the person of Yetta Janzen, an offense for which the defendant was not indicted, and for which he was never put upon trial; and the question presented is whether the admission of evidence which proves the defendant guilty of a crime not charged in the indictment is error for which the judgment should be reversed. In 2 Russ. Crimes, p. 772, the author says no evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. It will be remembered that the crime charged against the defendant in the indictment was a rape on the person of Mary Janzen. Any evidence which tended to prove the defendant guilty of the crime alleged in the indictment was proper for the consideration of the jury, but evidence which tended to prove the defendant guilty of another crime, another rape, on some person not named in the indictment, was not competent. When a defendant is put upon trial on an indictment, he is presumed to be ready to meet the charge contained in the indictment, but he is not presumed to be ready to defend against a charge not made against him in the indictment, nor does the law

require him to meet such a charge. In Whart. Cr. Law, § 635, the author, among other things, says: "It is under no circumstances admissible for the prosecutor to put in evidence the defendant's general bad character, or his tendency to commit the particular offense charged, nor is it admissible to prove independent crimes, even though of the same general character, except when following strictly within the exceptions above stated." The exceptions alluded to by the author would not embrace the evidence under consideration. In Parkinson v. People, 135 Ill. 401, 25 N. E. Rep. 764, a similar question arose, and it was held that evidence tending to prove a similar but distinct offense from that for which one is being tried is not admissible for the purpose of raising an inference or presumption that the person committed the particular act for which he is on trial. See, also, Baker v. People, 105 Ill. 452. In criminal cases where it becomes necessary to prove a guilty knowledge on the part of a defendant, evidence of other offenses committed by him, though not charged in the indictment, may be admissible for that purpose. Thus, upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner in order to show his knowledge of the forgery. 2 Russ. Crimes, p. 777. The case under consideration, however, is not a case of that character, and the rule there announced has no application to this case. It is true that the court undertook to confine the application of the evidence of Yetta Janzen to the question why she had left home, and to confine the application of the evidence of the three witnesses to a mere contradiction of the defendant's evidence that he had done nothing when in bed with the girl Yetta. There are cases where evidence not admissible generally may be admitted for a single purpose, and may be confined to that purpose by the instruction of the court, but this is not a case of that character. Here the defendant was indicted for a rape on his own daughter, a girl 12 years old. On the trial of the defendant for this charge, would it be possible to prove that the defendant had been guilty of a like offense on another daughter who was only a year or two older, and confine the effect of such evidence on the mind of the jury to some trivial or insignificant matter that arose on the trial? The answer to this question is obvious. It is true that the commission of one offense is not evidence of the commission of another and an independent offense; yet the proof of the one cannot be said to be without influence on the mind of the juror, convincing him that the defendant may be guilty of the other. In Shaffner v. Com., 72 Pa. St. 60, in speaking on this subject, the court said: "Logically, the commission of an independent offense is not proof, of itself, of the commission of another crime. Yet it cannot be said to be without influence on the mind; for certainly, if one be shown to be guilty of another crime equally hein-

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ous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty. * * It is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but is detrimental to justice to burden a trial with multiplied issues that serve to confuse and mislead a jury." Whether the defendant was guilty of the charge contained in the indictment was a question for the jury, and it was the right of the defendant to have that question fairly submitted to the jury. That has not been done. The evidence of an independent offense was calculated to prejudice the jury, and we think it was error to admit that evidence. The judgment will be reversed, and the cause remanded. Reversed and remanded.

NOTE.—Admissibility of Evidence of Other Crimes. -The logic of the law applicable to the admissibility of evidence relevant to the issue, established at an early period of the common law the proposition that evidence of other crimes is not admissible upon the trial of a defendant for a specific offense. The object of an indictment is to give the accused distinct information of a specific charge, and, therefore, giving evidence of facts unconnected with that charge would be to take the accused by surprise. Nobody, it is said, can be prepared to answer and explain away every transaction of his life, and hence the courts have almost an invariable rule that evidence of other crimes and misdeeds must be shut out and the whole attention of court and jury confined to the single issue before them.

Peckham, J., in his opinion in the celebrated case of People v. Sharpe, says that the general rule is that when a man is put upon trial for an offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that under ordinary circumstances proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose, where that is important, of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted, although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor.

Thus, the general rule is not an absolutely inflexible one, and has some well defined exceptions. Rex v. Dossett, 2 C. & K. 306; Rex v. Geering, 18 L. J. M. C. 215; Rex v. Addy, 3 Den. C. C. 264; Rex v. Winslow, 8 Cox, 307; Rex v. Gray, 4 F. & F. 1102; Makin v. Atty. Gen., App. Cas. 57. The last mentioned case, decided in 1894, is a leading one on the subject. If we look at the cases in which, in criminal charges, evidence of other acts may be admitted against the prisoner, we find them falling into three classes: First. Where guilty knowledge is a necessary part of the offense, as in a charge of uttering counterfeit coin. Evidence of the passage of like money, within a reasonable time before or after the commission of the offense for which the prisoner is on trial, is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character. So also for the purpose of proving that a shooting was not accidental, where such a fact is claimed, evidence may be given of efforts, or even

threats, made by the defendant to shoot the same individual on prior occasions.

Secondly. Where malicious intent is the essential part of the crime, as in charges of false pretenses and embezzlement, where evidence may be given of previous errors of a similar kind in the accounts kept by the prisoner in order to negative a defense that the prisoner had made an innocent mistake. Rex v. Richardson, 2 F. & F. 843; Commonwealth v. Price, 10 Gray, 472; Copperman v. People, 56 N. Y. 591; Commonwealth v. Coe, 115 Mass. 481; Mayer v. People, 80 N. Y. 364; Commonwealth v. McCarthy, 119 Mass. 354.

Thirdly. In cases where other criminal acts of the prisoner, although in a sense distinct, are really in substance part of the same transaction, as, for instance, in cases of treason and conspiracy to commit a felony. State v. Lapage, 57 N. H. 245.

In the following cases evidence of this character has been held admissible as within one of the exceptions above noted: State v. Cowell, 12 Nev. 337, 6 Cent. L. J. 221; State v. Palmer, 65 N. H. 216; State v. Kline, 54 Iowa, 183; McDonald v. State (Ala.), 3 South. Rep. 305; Commonwealth v. Ferry (Mass.), 15 N. E. Rep. 484; State v. Matthews (Mo.), 10 S. W. Rep. 144; U. S. v. Boyd, 45 Fed. Rep. 851; Commonwealth v. Russell (Mass.), 30 N. E. Rep. 763; State v. Baker (Oreg.), 32 Pac. Rep. 161; Harris v. State (Tex.), 22 S. W. Rep. 1037; Burnett v. State (Tex.), 22 S. W. Rep. 47; People v. Patterson (Cal.), 86 Pac. Rep. 436; People v. Skutt, 96 Mich. 449; Proper v. State, 85 Wis. 615; Cross v. State (Ind.), 37 N. E. Rep. 790; Mason v. State (Tex.), 20 S. W. Rep. 564; Langford v. State (Fla.), 14 South. Rep. 815; Anson v. People (Ill.), 85 N. E. Rep. 145; Strong v. State (Tex.), 22 S. W. Rep. 680; State v. Walton (N. Car.), 18 S. E. Rep. 945; State v. Minton (Mo.), 22 S. W. Rep. 808; Sullivan v. State (Tex.), 20 S. W. Rep. 927; People v. Harris (N. Y.), 83 N. E. Rep. 65; People v. Walters (Cal.), 32 Pac. Rep. 864; Cross v. State (Tex.), 20 S. W. Rep. 579; Horn v. State (Ala.), 15 South. Rep. 278; Moore v. U. S., 150 U. S. 57; Davis v. State, 22 S. W. Rep. 794; State v. Fitzsimmons (R. I.), 27 Atl. Rep. 446; Frazer v. State (Ind.), 34 N. E. Rep. 817; State v. Burke, 56 N. W. Rep. 180.

In the following cases evidence of this character was excluded: Commonwealth v. Jackson, 182 Mass. 16; Kinchelon v. State, 5 Humph. (Tenn.) 9; People v. Corbin, 56 N. Y. 363; Bousal v. State, 35 Ind. 460; People v. Barney, 48 Cal. 551; Barton v. State, 18 Ohio. 221.

In the case of Proper v. State, 55 N. W. Rep. 1085, 85 Wis. 615, testimony of the character excluded in the principal case was held admissible, and is in direct opposition to the decision of the Illinois court.

JETSAM AND FLOTSAM.

THE "TRUST FUND" THEORY.

In the late case of Adams & Westlake v. Deyette, 65 N. W. Rep. 471, the Supreme Court of South Dakota rests its decision on the ground "that the assets of a corporation are a trust fund for its creditors." On this theory a judgment confessed by a corporation for money due on an executed ultra vires contract, admitted to give a right of action for the sum recovered, was set aside as a preference of creditors. The "trust fund" doctrine seems to owe its origin to a decision by Judge Story in 1824, in the case of Wood v. Dummer, 3 Mass. 308. Since that decision it has been alter-

nately applied and rejected by courts and eulogized and condemned by text writers. Within the last two years Judge Thompson has characterized it as "the only doctrine worthy of respect," and the Supreme Courts of Indiana, North Carolina and Alabama have distinctly repudiated it, the latter overruling a number of cases where its existence had been recognized. See 5 Thompson on Corporations, 5115; Bank of Crawfordsville v. Dovetail, etc. Co., 40 N. E. Rep. 810 (Ind.); Thomson-Houston Co. v. Henderson Co., 21 S. E. Rep. 961 (N. C.); Jewelry Co. v. Volfer, 17 South. Rep. 525 (Ala.).

Just what the doctrine is, even those who uphold it do not seem to know. It seems to be an accommodating judicial ignis fatuus, which is present or absent as courts seem to require. No court has been able to describe it exactly, or to define its limits. It is admitted that there is no trust in the strict sense of the term. But these admissions tend to still greater confusion. The logical conclusion of holding that there was a strict trust would be that the creditor of an insolvent corporation could not enforce his claim at law. When this argument was pressed on the court in Gottlieb v. Miller, 154 Ill. 44, they qualified their previous statement by holding that there was a "quasi trust" only. The United States Supreme Court has long been committed to the "trust fund" doctrine, yet in the recent case of Hollins v. Brierfield, etc. Co., 150 U.S. 371, Justice Brewer practically admits that the expression is figurative; and Justice Bradley, in Graham v. R. R. Co., 102 U. S. 148, while upholding the doctrine, is forced to acknowledge that "if pushed to its logical conclusion, it would lead to results not to be tolerated," and yet he does not seem able to define the limits within which it will be tolerated.

This general haziness that surrounds the whole doctrine leaves the student in a confused state of uncertainty as to what the doctrine really is. Mr. Pepper, however, in a recent able article (2 Am. Law. Reg. & Rev., N. S. 448), clears up much of this uncertainty. He deprecates the use of the expression "trust fund" as a misleading misnomer, and suggests that the courts have used it as a cover for judicial legislation. The cases seem to justify this view, and it must be admitted that justice often demands legislation by the courts in dealing with insolvent corporations.—Harvard Law Review.

POWER OF PROSECUTOR TO ENTER A NOLLE PROSEQUI WITHOUT CONSENT OF THE COURT.

In three recent cases the Supreme Court of Louisiana have lately held, after an extensive review of judicial authorities, that the State's attorney has no power to enter a nolle prosequi in a criminal case, without the consent of the court, after verdict and before judgment. Our learned contemporary, the National Corporation Reporter, approves this decision and gives an excellent certificate of character to Judge Moise, who refused to accede this power to the State's attorney. Doubtless what is said in favor of the character to Judge Moise is well said; but it nevertheless seems that the weight of judicial authority, is, and always has been, to the effect that the power to enter a nolle prosequi in a criminal case is an absolute power in the prosecuting officer of the Crown and of the State before the commencement of trial; that it is suspended during the trial; but that it revives after verdict and until sentence. It may interest our learned friend of the National Corporation Reporter to know that Dr. Joel Prentiss Bishop, certainly the greatest

living master of criminal law, gave an opinion in opposition to the ruling of Judge Moise, which opinion was probably not even read by the Supreme Court of Louisiana. At least we have seen a letter of Dr. Bishop stating his belief that it was not read.—American Law Review.

CONVERSION BY PLEDGER.

Two recent cases, Waring v. Gaskill, 22 S. E. Rep. 659 (Ga.), and Richardson v. Ashby, 38 S. W. Rep. 806 (Mo.), are authority for the proposition that where a pledgee tortiously sells his pledge, or repledges it for a greater sum than the debt for which it is security, the pledgor has an immediate right to bring an action in trover without tendering the amount of his indebtedness. What little law there is on this subject is unsettled. It would seem the more natural step to bring an action for violation of the contract of pledge, or to tender payment before bringing the action of trover. In the action on the contract, at least, an equitable defense would be allowed. The plaintiff's damages would be diminished by the amount of his debt to the defendant, the pledgee.

On the precise question involved in the two cases cited there is a conflict of opinion. In England the law is contrary to these authorities. The first English case on the subject, Johnson v. Stear, 15 C. B. (N. S.) 830, held that the pledgee's act was conversion, but that the amount of damages should be only the pledgor's actual loss-that the pledgee's interest in the pledge at the time of the conversion should be taken into account. Mr. Justice Williams in an able dissenting opinion maintained that the pledgee stood in practically the same position as a factor—that by his act the pledgor regained immediate right of possession, and was entitled to judgment in trover for the full value of the goods. Obviously, if there was conversion at all, full damages should have been awarded. Two later cases, Donald v. Suckling, L. R. 1 Q. B. 585, and Halliday v. Holgate, L. R. 8 Ex. 299, practically overruled Johnson v. Stear by holding that there was no conversion. To support this view, the court maintained that a pledge is something more than a mere bailment, and that the pledgee, by parting with possession, does not lose his special property in the pledge. Mr. Justice Shee dissented in Donald v. Suckling on the grounds put forth by Mr. Justice Williams in the earlier case. Nevertheless, these two cases represent the English law.

In the United States the question is still open. Some courts adopt the English view without question or hesitation. Others maintain the views adopted by Georgia and Missouri courts. The English doctrine would seem to be the less satisfactory. There is no cogent reason for holding that the pledgee gets so much more extended rights than a bare bailee that he can dispose of the article pledged without losing his lien. It would seem more natural and consistent that, apart from the privilege of pledging up to the amount of the original security-a proceeding which in no way affects the first pledgor's position—the pledgee should have no more right than the factor holding his principal's goods, on which he loses his lien in parting with possession. Just as the pledgor may maintain trover for destruction of the pledged goods by the negligence of the pledgee, so should he be allowed trover when the pledgee has repledged the goods for an amount greater than the original pledgor's indebtedness to him.—Harvard Law Review.

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BOOK REVIEWS.

ABBOTT'S SELECT CASES ON CODE PLEADING.

This volume though designed primarily for the use of practitioners in New York State is of value in others of the States which have adopted similar codes of procedure. It contains an admirable selection of the leading New York cases on the subject of pleading under the code, together with notes of recent cases from other States on this subject. The last mentioned are considered and grouped together separately under their particular State thus affording the practitioner from each State an easy means of reviewing those decisions which are of special value to him. The selection of the cases and the notes are by Austin Abbott, Esq., whose qualification for such work is of the highest order. It is a volume of nearly eight hundred pages published by the Diossy Law Book Company. New York.

SEDGWICK'S ELEMENTS OF DAMAGES.

This little book is, as the author states, "an attempt to review the law of damages, to state its principles so far as possible in the form of rules, or propositions of law, such as a court might lay down to a jury · · and to illustrate these by the cases from which they have been drawn." It is not an abridgment of "Sedgwick on Damages," a treatise which has now attained its eighth edition, and which is the most exhaustive and comprehensive work on the subject of Measure of Damages published. The present work is a handbook for students as well as practitioners. It is admirably prepared, states the rules applicable to the subject clearly and concisely and cites as many authorities as are needed to illustrate the propositions of law laid down. It is a volume of 350 pages, and is published by Little, Brown & Co. Boston.

AMBRICAN ELECTRICAL CASES, Vol. 4.

Upon the appearance of preceding volumes of this series we took occasion to call attention to their modern value and usefulness. The cases reported in this volume were decided between Jan. 1, 1892, and April 1, 1894. The great number of them (one hundred and thirty eight) is an evidence of the remarkable growth of the law bearing on electricity and questions akin thereto. In this volume will be found cases on municipal control of electrical companies, placing wires underground, right of abutting land owner in respect to use of highway for electrical purposes, crossing of steam railroads by electric railways, negligence of electrical companies in maintenance or operation of their apparatus, discrimination by telephone companies, the duties of telegraph companies to their patrons and the public and many other kindred topics. There are also annotations by the editor W. W. Morrill. Published by Matthew Bender, Albany, N. Y.

BOOKS RECEIVED.

The Detective Faculty, as Illustrated from Judicial Records and the Actualities of Experience. By W. H. Bailey, Sr., LL. D. Author of "Onus Probandi," "Conflict of Judicial Decisions," "Self-Taught Law," etc. Cincinnati: The Robert Clarke Company. 1896.

A Treatise on the Law of Negligence. By Horace Smith, B. A., Elaborated with Notes and References to American Cases. By W. H. Whittaker, of the Cincinnati Bar. Second American—from

Second English Edition. Re-edited, and Enlarged with the Citation of all the American Cases Brought Down to Date. By James Avery Webb, Editor of the Last Editions of Pollock on Torts and Burrill on Assignments. St. Louis. The F. H. Thomas Law Book Co. 1896.

The French Law of Marriage. Marriage Contracts and Divorce, and the Conflict of Laws Arising Therefrom; Being a Second Edition of "Kelly's French Law of Marriage," Revised and Enlarged by Oliver E. Bodington, B. A. (Lond.), of the Inner Temple, Barrister at Law, Member of the Federal Bar, U. S. A.; Licencie en Droit de la Faculte de Paris. London. Stevens & Sons. Limited, 119 and 120, Chancery Lane, New York: Baker, Voorhis & Co., Law Publishers and Booksellers. 1895.

HUMORS OF THE LAW.

In North Carolina last year the Republicans elected some of their judges for the first time in over twenty years, and one of that party was so delighted that when Judge Robison, one of the new judges, came to hold court, he put on a new suit, including a new pair of shoes, and went to the court house to "see a Republican judge on the bench." He began at the door and his shoes went creak, creaky, creak all the way down till he got near the judge to get a good view and feast his eyes on the novel sight. The judge stopped and eyed him, the proceedings stopped, all eyes were fixed on the newcomer with the creaking shoes, whose nervousness and the sudden stillness made the creaking seem louder than ever. When the owner of the shoes had about reached a vacant seat, the judge stormed at him: "Sit down there, shoes and all." There is now one man in that county who no longer hankers to "see a Republican judge on the bench."

WEEKLY DIGEST

of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resert, and of the Supremé, Circuit and District Courts of the United States, except these that are Published in Full or Commented upon in our Rotes of Recent Decisions.

90, 91, 94, 95, 96, 97, 108, 107, 108, 117

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- 1. ADMINISTRATION—Proceedings—Collateral Attack.
 —An administration, and an administrator's sale of the estate of an immigrant to Texas, who died after the war with Mexico, and was a citizen soldier, are not void, and subject to collateral attack on the ground of fraud, because such fraud may be inferred from the course and result of the proceedings, without other proof, if a want of jurisdiction is not shown.—SHIRLEY V. WARFIELD, Tex., 34 S. W. Rep. 390.
- 2. ARBITRATION AND AWARD—Insurance.—In a suit to set aside an award under an insurance policy plaintiff may allege that defendant apparently agreed to arbitrate the loss, but failed and refused to meet the arbitrators at times set therefor by plaintiff, in order to introduce evidence to show bad faith on the part of defendant.—ROYAL INS. CO. v. PARLIN & ORENDORFF CO., Tex., 34 S. W. Rep. 401.
- 3. Assignment of Prospective Patents—Validity.—To constitute a valid sale at law, the vendor must have a present property, either actual or potential, in the thing sold. The rule in equity is different. The equity in the assignee or vendee attaches to the contemplated thing the instant it comes into being.—McFarland v. Stanton Mfg. Co., N. J., 83 Atl. Bep. 962.
- 4. ATTORNEY AND CLIENT-Authority of Attorney-Burden of Proof.—The presumption is that an attorney appearing in court for a party has authority to do so; and where the want of authority is questioned, the burden of proof is on the party attacking, and such want must be established by positive proof.—BONNI-FIELD v. THORP, U. S. D. C. (Alaska), 71 Fed. Rep. 922.
- 5. Banks—Insolvency.—In the absence of any statute to that effect, one who deposits money in an insolvent bank, believing it to be solvent, and thereby loses his money, has no cause of action against the directors of the bank, unless the deposit was induced by their fraudulent conduct.—MINTON v. STAHLMAN, Tenn., 34 S. W. Rep. 222.
- 6. Benevolent Societies—Constitutional Provisions.

 —Where the constitution of an endowment society provides for a certain procedure as precedent to the suspension of a subordinate lodge and its members from all share in the endowment fund for non-payment of assessments made by the supreme authorities of the society, a member of such lodge cannot be deprived of his share in the fund unless the suspension of the lodge was in accordance with such constitutional requirements.—Young v. Grand Lodge of Sons of Progress, Penn., 33 Atl. Rep. 1088.
- 7. BOUNDARIES-Adjoining Landowners.—Where adjoining landowners agree on an incorrect division line, and the land along a portion of the line is occupied by each for a period sufficient to confirm his title by adverse possession to any land incorrectly awarded, the true, and not the adopted, line controls as the division line beyond the points of actual occupancy.—WARD v. 'IHLER, Mo., 34 S. W. Rep. 251.
- 8. Building and Loan Association—Usury.—The exaction by a loan association from a member, in addition to the principal of the loan, of a sum comprising fines, premiums and interest paid, exceeding 6 per cent. on the principal sum, constitutes usury.—United States Saving & Loan Assn. v. Scott, Ky., 34 S. W. Rep. 235.
- 9. CARRIBES—Limitations in Bill of Lading.—A stipulation, in a bill of lading for the transportation of cotton in bales by steamboat and a railroad as a connecting carrier for hire, that neither shall be responsible for damage which shall be occasioned by fire, does not exonerate either from responsibility for such damage as shall result from fire that is occasioned through the fault or ordinary negligence of the agents, servants or employees of the carrier.—MAXWELL v. SOUTHERN PAC. R. CO., La., 19 South. Rep. 287.

- 10. Carriers of Goods—Foreign Railroad Company—Joint Liability—Evidence.—An action against a foreign railroad company, operating a line and having an agent in El Paso county, and a connecting line, for damages in transporting freight from Chicago to Dallas, was properly brought in Dallas county, where it appeared that the transportation of said freight was solicited by an agent of the latter company at Dallas, on certain terms, over a route composed of both companies, and that the former accepted the freight at Chicago on the terms agreed upon.—GULF, C. & S. F. Et. Co. v. Eqloff, Tex., 84 S. W. Rep. 410.
- 11. OBRTIORARI—Interest of Prosecutor.—In a contest, raised in a certiorari proceeding, between two street railways, each claiming the exclusive right to lay its track in a certain street, the prosecutor failed altogether to show its own interest in such controversy: Held, that the prosecutor had no standing in court to question the right of its adversary.—STATE v. BOARD OF PUBLIC WORKS OF CITY OF CAMDEN, N. J., 33 Atl. Rep. 966.
- 12. CONSTITUTIONAL LAW—Grant by State—Exclusive Privilege.—The provision in art. 4, § 7, par. 11, of the constitution of New Jersey, adopted in 1875, forbidding the grant to any corporation or individual of any exclusive privilege, immunity or franchise, does not affect the validity of an act of the legislature, passed in 1861, authorizing a riparlan proprietor to erect, hold and enjoy a wharf in front of his land, and upon land belonging to the State, under tide water.—ROBERTS V. BROOKS, U. S. C. C. (N. Y.), 71 Fed. Rep. 914.
- 18. CONSTITUTIONAL LAW-Liberty of Contract-Class Legislation.—A statute of Ohio (87 Ohio Laws, p. 149), provides that no railroad company, insurance company or association, or other persons shall require any agreement or stipula-tion with any other person, in or about to enter the employment of a railroad company, whereby such person agrees to waive any right to damages from such railroad company for personal injuries, or any other right whatever, and all such agreements and stipulations shall be void: Held, that such statute violates the fourteenth amendment of the constitution of the United States, by depriving the persons affected by it of their liberty of contract, without due process of law, and also violates art. 2, § 26, of the constitution of Ohio providing that all laws of a general nature shall have uniform operation throughout the State; since such statute is class legislation, affecting only railroad employees, and accordingly that such statute is void .- Shaver v. Pennsylvania Co., U. S. C. C. (Ohio), 71 Fed. Rep. 981.
- 14. CONTEMPT—Power to Punish—Rev. St. § 725.—Bribing a person, who is known to be a material witness in a pending cause, to hide himself and remain away from the court, thereby preventing his testifying in such cause, is a contempt of court, whether such person has been subpœnaed or not, and though punishable by indictment, under Rev. St. § 5599, is also punishable under Rev. St. § 725, as a contempt committed by misbehavior, "so near" to the court "as to obstruct the administration of justice," though the act is done at the residence of the witness, at some distance from the courthouse, in the town where the court sits.—IF RE BRULE, U. S. D. C. (Nev.), 71 Fed. Rep. 944.
- 15. CONTRACT—Chattel Mortgage—What Constitutes.—An instrument executed by one partner, conveying all his interest in the partnership chattels to a firm creditor to secure a firm debt, which provided that the goods so conveyed should remain in the place of business, subject to all the rights of the other partner, that the firm debts should first be discharged, and that only the net interest of the grantor should be subjected to the grantee's debt, is a mortgage securing the individual debt of the grantee, and not a deed of trust, imposing on him the duty to take into his possession the extre interest of (the grantor in order to protect other creditors of the firm.—MILLHISER V. PLEASANTS, N. Car., 23 S. E. Rep. 969.

16. CONTRACT- Construction—Compensation.—Where a contract for a fixed amount is entered into between the owner of property and a builder, according to certain specifications, to which a plan is annexed, as explanatory thereof, no charge, in the absence of an agreement to that effect, can be made as for extra services in the preparation of the plan. The builder appears in the transaction, not as an architect, but as a icontractor.—MAAS v. Hernandez, La., 19 South. Rep. 269.

17. CONTRACT—Damages — Penalty.—A contract for the sale of ties to a railroad company provided that the company should retain 10 per cent. of the monthly payments, which were to be made according to the number of ties delivered, "as agreed compensation for damages" in case the whole number of the ties were not delivered: Held, that the stipulation was for a penalty, and not for stipulated damages.—GULF, C. & S. F. RY. CO. V. WARD, Tex., 34 S. W. Rep. 328.

18. CONTRACT—Gambling Contracts.—Contracts between a stockbroker and a customer for buying or selling stocks upon a margin, in the hope of profit from the fluctuation in price, are not illegal, if either party expects the final balance to be liquidated by a delivery of the remaining stocks.—DILLAWAY V. ALDEN, Me., 83 Atl. Rep. 961.

19. CONTRACT—Suit by Third Party.—The holder of coupons representing interest upon railroad bonds has no right of action on an agreement by the lessee of the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them; such holder of coupons being a stranger to the contract and the consideration.—FREEMAN V. PRIMESILVANIA R. CO., Tenn., 38 Atl. Rep. 1084.

20. CONTRACT FOR ROYALTIES—Manufacture of Steel.—Manufacturers of steel known by a certain name agreed with plaintiffs, who had assisted them in the development of the process of manufacture, to pay the latter one cent per pound for all such steel sold by the former: Held, that plaintiffs were not entitled to the specified royalty upon other steel sold by the same manufacturers merely because, in the process of manufacturing both steels, oxide was reduced into metallic chromium by the same process, the steel referred to in the contract being high in carbon and low in chromium, and very hard and brittle, and the other being high in chromium and low in carbon, and having great cohesion on impact.—TODD v. WHEELER, Penn., 35 Atl. Rep. 1021.

21. CORPORATIONS—Contracts—Accommodation Indorsement.—Const. art. 12, § 6, providing that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and fictitious increase of stock or indebtedness shall be void," does not render the accommodation indorsement on a draft by a corporation void in the hands of a bona fide holder for the value before maturity.—Marshall Nat. Bank v. O'Neal, Tex., 84 S. W. Rep. 344.

22. CORPORATIONS—Dissolution — Non-user of Franchise.—The facts that a corporation disposed of that part of its property which was necessary to carry on its business, and never thereafter elected directors, or otherwise exercised its corporate powers, and that one person acquired ownership of all the stock, did not dissolve the corporation.—Parker v. Bethel Hoteloo., Tenn., 84 S. W. Rep. 209.

28. CORPORATIONS — How Sued.—The United States Express Company is a joint-stock company or association, formed under the laws of the State of New York, which expressly authorize any such company or association to sue and be sued in the name of its president or of its treasurer: Held, that the company possesses such corporate existence and powers that it does not fall within the provisions of the supplement to the practice act of May 23, 1890 (Laws, 1890, p. 858), and an action may be maintained against it in this State in the manner prescribed by the laws of New York, viz:

in the name of its treasurer.—EDGEWORTH V. WOOD, N. J., 33 Atl. Rep. 940.

24. CORPORATIONS — Insolvency — Assignment for Benefit of Creditors.—Where a statute provides that, on "dissolution" of a corporation, its property shall be in the hands of its officers a trust fund for the payment of its debts, after the property, consisting entirely of personalty, of an insolvent corporation, which has abandoned business, has, by unanimous action of its stockholders, been placed in the hands of its officers for distribution among creditors, though without deed, the property is not subject to attachment at the suit of creditors of the corporation. — WRIGHT V. EULESS, Tex., 34 S. W. Rep. 302.

25. CORPORATIONS—Receiver — Actions.—A receiver cannot, in the absence of a statute to the contrary, be sued without leave of the court, which appointed him, granted in the cause in which he was appointed.—LINES v. COMMECTICUT RIVER BANKING CO., Conn., 88 Atl. Rep. 1008.

26. COURTS—Conflict of Jurisdiction—Exemptions.—In a suit in Texas on an insurance policy issued by a foreign corporation, where plaintiff is a resident of the State, and the goods insured and the proceeds of the policy are exempt, and where, prior to the filing of such suit, the insurer, in another State, of which it was also a foreign corporation, was garnished by a creditor residing there for a debt owing by assured, it will be presumed, in the absence of evidence, that the exemptions in the foreign State are the same as those of the local State, and the local court may render judgment for plaintiff.—CALEDONIA INS. CO. V. WENAE, Tex., 34 S. W. Rep. 386.

27. CRIMINAL EVIDENCE—Confession.—In order that a confession may be proven, it is not necessary to repeat the words. It is enough if the substance of the confession be given.—STATE v. DESROCHES, La., 19 South. Rep. 250.

28. CRIMINAL EVIDENCE—Indictment.—Where the indictment for passing a forged instrument alleged, and the proof showed, that such instrument was beyond the jurisdiction of the court, secondary evidence to prove such instrument may be admitted, under a notice in the indictment requiring defendant to produce the original on the trial, or allow secondary evidence to be admitted.—Thornley v. State, Tex., 84 S. W. Rep. 264.

29. CRIMINAL EVIDENCE — Rape. — In a rape case, original evidence by the State of complaint by the prosecutrix must be strictly limited to the facts that complaint was made, when, where, and to whom it was made, and that she accused some one, who must not be named, of the offense; excluding all evidence of the particulars of such complaint.—REDDICK v. STATE, Tex., 34 S. W. Rep. 274.

30. CRIMINAL LAW—Assault.—On a trial for aggravated assault, the fact that prosecutor had been in the habit of spying on persons on other occasions was inadmissible to discredit prosecutor.—PARKER V. STATE, Tex., 34 S. W. Rep. 265.

81. CRIMINAL LAW — False Pretenses—Indictment.— An indictment founded on the statute relating to false pretenses must exhibit a pretense which, under the circumstances stated, must have an apparent tendency to induce the person defrauded to part with his property.—ROPER v. STATE, N. J., 33 Atl. Rep. 970.

32. CRIMINAL LAW—Former Jeopardy.—Const. Bill of Rights, art. 1, 5 14, provides that a person shall not again be put on trial for the same offense after a verdict of not guilty in a court of competent jurisdiction. Code Cr. Proc. art. \$25, provides that a plea that defendant has been before acquitted in a court of competent jurisdiction, whether the acquittal was regular of fregular shall be valid: Held, that where defendant was tried on a defective indictment for murder in the first degree, and convicted of manslaughter, such conviction was a bar to a subsequent trial for murder.—MIXON V. STATE, Tex., 34 S. W. Rep. 290.

- 83. CRIMINAL LAW—Gaming.—A livery stable, or room connected therewith, not being mentioned in the statute prohibiting the playing of cards in a public place, the question whether it is a public place, within the statute, is for the jury.—SISK V. STATE, Tex., 84 S. W. Rep. 277.
- 34. CRIMINAL LAW-Grand Larceny-Possession.—A charge that, if recently stolen property was found in defendant's possession, and he gave an explanation of said possession which appeared reasonably true, the jury could not convict, unless satisfied that the other testimony in the case established the falsity of the explanation, was erroneous, as a charge on the weight of evidence.—Wilson v. State, Tex., 34 S. W. Rep. 284.
- 35. CRIMINAL LAW—Homicide.—If a party, with intent to kill or murder a particular person, illegally and feloniously shoots at him, his will being directed exclusively to that end, but he falls to accomplish his purpose, and unintentionally kills another person, he has no reason to complain if, under an indictment for murder, he is found guilty of mansiaughter, because he may not have had reason to expect that his shot would strike a third person.—STATE V. SALTER, La., 19 South. Rep. 265.
- 36. CRIMINAL LAW-Indictment—Grand Jury.—An indictment will not be set aside because the grand jury regulved the testimony of an incompetent witness for the prosecution.—DOCKERY v. STATE, Tex., 84 S. W. Red. 281.
- 87. CRIMINAL LAW-Instructions.—An instruction to convict defendant if the facts and circumstances cannot reasonably be accounted for by any other reasonable hypothesis than that defendant is guilty is erroneous.—WEBB v. STATE, Miss., 19 South. Rep. 238.
- 28. CRIMINAL LAW-Murder-Proof of Corpus Delicti.

 On a murder trial there was evidence that deceased had lived with defendants, and that witness was taken by them to a thicket near their house, and shown the dead body of deceased lying on the ground; that witness did not see the face, which was covered by a bloody cloth, or any mark of violence on the body; that witness assisted in burying the body, and that he was threatened with injury if the matter became known. It was not shown that the blood on the cloth was that of deceased or whether the body was cold at the time of burial, and it was shown that after the body was exhumed no marks of violence were found: Held, that the corpus delicti was not proved.—CONDE v. STATE, Tex., 34 S. W. Rep. 286.
- 89. CRIMINAL LAW—New Trial—Alien Juror.—Where defendant failed to test on voir dire examination the qualifications of a juror, he cannot object after conviction, on motion for a new trial, that the juror was an alien.—MILLS V. STATE, Tex., 34 S. W. Rep. 271.
- 40. CRIMINAL PRACTICE—Forgery Indictment.—An indictment alleging that defendant forged an indorsement on the back of "a certain draft, described as follows," sufficiently indicates that the said draft is set out in hacverba.—MILLER V. STATE, Tex., 34 S. W. Rep. 267.
- 41. CRIMINAL PRACTICE—Theft from Child—Indictment.—In an indictment for theft of jewels, given by a parent to a child, which, at the time of the larceny, were in a box under the parent's control, but to which the child had access, it is only necessary to charge ownership in the parent.—WRIGHT V. STATE, Tex., 34 S. W. Rep. 273.
- 42. CRIMINAL TRIAL—Robbery.—Defendant and a confederate induced the owner of money to expose it in his hands, and defendant snatched it and passed it to his confederate, who attempted to run off with it. The owner then drew a revolver, and such confederate also drew a revolver to prevent the owner from regaining his property; but defendant, by promising such owner to return the money, pacified him until the confederate had made way with it: Held, that the offense was not robbery.—ROUTT v. STATE, Ark., 34 S. W. Ren. 262.

- 48. CRIMINAL TRIAL—Competency of Jurors.—Jurors who tried a person for playing at a game with cards in a public place, and rendered a verdict of guilty, were incompetent to sit on a subsequent trial of another person for playing with the former at the same game, where the evidence on the second trial was the same as that on the first.—Obenchain v. State, Tex., 54 S. W. Rep. 278.
- 44. CRIMINAL TRIAL Competency of Witness.—Under Code Or. Proc. art. 780, subd. 5, providing that persons convicted of felony shall be incompetent as witnesses, and Pen. Code, art. 27, providing that a person is a convict after final condemnation, one convicted of a felony, but not sentenced, is a competent witness.—EVANS V. STATE, Tex., 34 S. W. Rep. 285.
- 45. DEATH BY WRONGFUL ACT Damages.—In estimating the actual pecuniary value of decedent's life to his surviving children, it is proper to consider his probable duration of life, his health, net income, habits of industry and economy, and reasonable future expectations.—LOUISVILLE & N. R. CO. v. GRAHAM'S ADM'B, Ky., 34 S. W. Rep. 229.
- 46. DEATH BY WRONGFUL ACT Loss of Wife's Society.—A recovery under Gen. St. ch. 57, § 1, by the personal representative of a wife whose death resulted from injuries received through the negligence of a railroad company, or its employees, bars an action by the husband to recover damages for loss of the wife's society from the time the injuries were inflicted until her death.—Louisville & N. R. Co. v. McElwain, Ky., 34 S. W. Rep. 227.
- 47. DECEIT—Purchase of Goods.—The statement by an intending purchaser of goods that his financial condition was at least as good as that shown by a statement made the previous year, is fraudulent if in fact his indebtedness arising from purchases of goods is ten times as great as it was the previous year, though he has the goods so purchased as part of his assets.—WHITE V. ROSENTEAL, Penn., 33 Atl. Rep. 1027.
- 48. DEED—Cancellation.—If a party can read, it is not open to him, after executing a deed, to insist that the terms of it were different from what he supposed them to be when he signed it.—ELDRIDGE v. DEXTER & P. R. Co., Me., 33 Atl. Rep. 974.
- 49. DEED-Proof of Execution.—A deed is not inadmissible in evidence because not recorded in the county where the land conveyed is situated, where no question of notice is involved, and the record is not relied on to prove its execution.—STOOKSBERRY V. SWANN, Tex., 24 S. W. Rep. 369.
- 50. DEED AS MORTGAGE—Purchase with Notice.—One purchasing land with knowledge that the absolute deed which had been given to his grantor was intended as a mortgage is not an innocent purchaser.—BRISTOW v. ROSEKBERG, S. Car., 23 S. E. Rep. 367.
- 51. DRAINAGE—Obstruction—Presumption.—It is the servitude of the lower estate to receive and dispose of the water that flows naturally from the estate above, and no obstruction to that flow can be created by the proprietor of the lower estate.—FOLBY v. GODCHAUX, La., 19 South. Rep. 248.
- 52. ESTOPPEL—Rescission.—At the request of plaintiff, detendant took charge of the estate of a decedent,
 to sell the property for the benefit of the widow.
 Plaintiff failed to disclose to defendant that the estate
 was indebted to him: Held, that plaintiff was estopped, after defendant had paid the proceeds over to
 the widow, to claim that defendant was liable to him,
 as an administrator deson tort, for his claim against
 the estate.—COXWELL V. PRINCE, Miss., 19 South. Rep.
 237.
- 53. EXECUTION—Exemptions.—Two barber chairs, a mirror in front of and a table accompanying each, used constantly for five years in carrying on his trade by a barber, a citizen of the State and head of a family, are exempt from execution, where he is dependent on his trade for support, and has kept another barber

employed to assist him.—Form v. Cooper, Tex., 34 S. W. Rep. 341.

54. FACTOR AND CUSTOMER — Fraudulent Conveyances.—Creditor and debtor having by written agreement established between themselves the relations of factor and customer, and definitely agreed upon the amount of credit which should be given by the former, and the manner in which the latter should discharge the same by the consignment and proceeds of sale of products, other and subsequent creditors of the common debtor are without right to complain.—PHILLIPS v. FELICIANA COTTON OIL CO., La., 19 South. Rep. 258.

55. FALSE IMPRISONMENT — Railroad Detective — Unauthorized Act of Agent.—A railway detective, who was authorized to ferret out crimes against the company, and who had general instructions not to make arrests without first consulting the local attorneys of the road, but who was authorized to make arrests without such consultation, when the proof was clear, and where there was danger of an escape, was acting within the scope of his authority in causing the arrest, without consultation, of a person on a charge of attempting, in the presence of such detective, to pass counterfeit money on a station agent in payment for a ticket.—Eichebnorben v. Louisville & N. R. Co., Tenn., 34 8. W. Rep. 219.

56. FIXTURES—What Constitute.—A heater and range, although but slightly attached to the building, are fixtures, if put in by the owner of the premises with the intention of making them such.—ERDMAN v. MOORE, N. J., 33 Atl. Rep. 958.

57. FRAUDULENT CONVEYANCE—Recording.—A mortgage of land, given by one, while solvent, to secure a debt, though withheld from record by consent of the parties, to avoid injuring the credit of the debtor as a merchant, is not void, as against a creditor, whose debt then existed in the form of a note secured by solvent sureties, the agreement to withhold not having been made to deceive, but in good faith, the holder of the note not having known, till the recording of the mortgage, that the debtor owned the land, and not having extended credit on the note, for any definite time, while the mortgage was withheld from record, but merely delayed obtaining judgment, after the note was dishonored, till the debtor and sureties were insolvent.—Banner v. Robinson, Tex., 84 S. W. Rep. 355.

58. Garnishment—Liability as Garnishee.—The facts that a note on which one was liable as indorser was discharged out of the proceeds of a chattel mortgage given by the debtor to prefer certain creditors, including the holder of the note, which was fraudulent as to creditors in general, and that the indorser participated in the fraud, did not render the latter liable as garnishee, since he neither received through the transaction any of the property of the debtor or any of the proceeds thereof.—Schwartzberg v. Friedman, Tex., \$48. W. Rep. 385.

59. GIFT—Deposit in Savings Bank.—Where an account is opened and money deposited by a father in the joint names of himself and his child in a savings bank whose by-laws provide for the issuing of a pass book to each depositor, and require its production when money is drawn, the question whether the intention of the parent is to create a joint estate, with absolute right of survivorship, or merely to make the child his agent for convenience in drawing the money, is to be determined by the circumstances of the case and the conduct and declarations of the parent.—SKILLMAN V. WIEGAND, N. J., 33 Atl. Rep. 929.

60. GIFT—Solvency of Donor.—A conveyance of land as a gift is valid, as against creditors of the donor, when, at the time it was made, he had sufficient remaining property in the State, subject to execution, to pay all his debts.—WALKER V. LORING, Tex., 34 S. W. Rep. 405.

61. HUSBAND AND WIFE — Antenuptial Contract— Dower.—An antenuptial contract reciting a conveyance to the intended wife "as jointure, and in lieu and full satisfaction of her whole dower" in the husband's estate, precludes the wife from claiming dower, after her husband's death, in land acquired by him during the marriage.—BRYAN v. BRYAN, Ark., 34 S. W. Rep. 260.

62. HUSBAND AND WIFE—Husband as Wife's Agent.—Under Code, § 2298, providing that all business carried on by the husband with the property or means of the wife shall be deemed to be on her account and for her use, and by the husband as her agent and manager, unless a contract changing such relation be executed, acknowledged, and filed for record, a wife, whose husband manages her plantation, is liable for all goods bought by him, within the scope of his agency, whether all are devoted to use in the business managed by him or not.—Gross v. Pigg, Miss., 19 South. Rep. 225.

63. HUSBAND AND WIFE — Wife's Separate Estate—Declarations.—In trespass to try title, declarations of a husband as to ownership of lands the title to which is in the name of the wife are inadmissible to impugn the title.—EVANS V. PURINTON, Tex., 24 S. W. Rep. 350.

64. INJUNCTION—Abutting Owners—Rights in Street.—It is sufficient, in a bill for an injunction to restrain a steam railroad company from laying its tracks on the land of the complainant, to allege that the complainant is the owner and occupant of the premises, giving the boundaries thereof, without introducing the claim of title under which he holds.—LEWIS V. PENNSYLVANIA R. CO., N. J., 88 Atl. Rep. 982.

65. INJUNCTION—Inequitable Contract—Banks and Banking.—A bill which seeks to restrain the sale by a bank of property pledged as collateral security to a note discounted by it, on the ground that the president of the bank secretly agreed that he would see to the payment of the note without sale of the collateral, does not state a case for equitable relief, since such agreement, being against the interest of the bank, should not be enforced for the benefit of a party to it.—BREY-FOGLE V. WALSH, U. S. C. C. (Ill.), 71 Fed. Rep. 899.

66. INSURANCE—Arbitration Clause—Effect of Award.
—Part of the insured property having been totally destroyed and part damaged, the amount of the loss was submitted to arbitration: Held, that since the arbitration clause in a policy has no reference to property totally destroyed, the award of the arbitrators did not preclude an additional recovery for the loss sustained by total destruction of the property.—Liverpool, London & Globe Ins. Co. v. Colgin, Tep., 34 S. W. Rep. 291.

67. INSURANCE—Construction of Policy.—A clause in a policy providing for the insurance of premises for a certain period, "while occupied" for saddlery purposes, does not make a mere change of occupation avoid the policy, where it contains another provision avoiding it if the risk be increased by a change of occupation.—East Texas Fire Ins. Co. v. Kempner, Tex., 348. W. Rep. 898.

68. INSURANCE—Mortgage Clause.—A mortgage clause provision, in a policy payable to a mortgagee as interest may appear, that it shall not be invalidated, as against the mortgagee, by any act or neglect of the mortgagor, by whom it was taken out, does not prevent the forfeiture of the policy, under provisions that the policy "shall be void" in case the property is encumbered, and that it "shall not become valid" if the mortgagor be guilty of any concealment, for concealment by the mortgagor of the existence of other liens. —HANOVER FIRE INS. CO. v. NATIONAL EXCHANGE BANK, Tex., 34 S. W. Rep. 333.

69. INSURANCE COMPANIES—Taxation.—Losses of an insurance company are necessary incidents of its business are constantly occurring, and are provided against in the risk undertaken; and premiums are colected for the purpose of reimbursement.—HOME INS. CO. V. BOARD OF ASSESSORS, La., 19 South. Rep. 280.

70. JUDGMENT—Collateral Attack.—Without resorting to the revocatory action, the judgment creditor may contest the judgment of another against the common



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debtor, when the contested judgment is assailed as a simulation, based on no consideration.—GLADNEY v. MANNING, La., 19 South. Rep. 276.

- 71. JUDGMENT Collateral Attack Injunction.—A judgment valid on its face cannot be collaterally attacked, as in an action to enjoin an execution sale thereunder, by purchasers of land, on which the judgment is a lien, from the judgment creditor 'subsequent to the rendition of the judgment.—KIRK V. DUREN, S. Car., 28 S. E. Rep. 954.
- 72. JUDGMENT—Lien—Scire Facias.—The lien of a judgment existing against a decedent at the time of his death need not be revived every five years as against his heirs and devisees.—Colenburg v. Venter, Penn., 83 Atl. Rep. 1046.
- 73. JUDGMENT—Revival.—Where a judgment is reduced in a scire factas to revive a joint judgment, without all the parties to the original judgment, or their representatives, if any of them be dead, being made parties to such proceeding, the judgment of revival is insufficient to support an execution issued on it.—ROWLAND v. HARRIS, Tex., 34 S. W. Rep. 295.
- 74. LIMITATIONS Adverse Possession.—Where defendant conveyed land to his father, and upon his father's death the land was sold, and a deed thereof, subject to the widow's dower, was executed by the administrator to one from whom plaintiff claimed, the fact that the widow went on the land and occupied the same at defendant's request, and for his benefit, did not cause her possession to inure to defendant's benefit, so as to ripen title in him under the statute of limitations.—Everett v. Newton, N. Car., 28 S. E. Rep. 961.
- 75. LIMITATIONS—Proof of Payments on Notes.—On an issue as to whether such payments were made on notes as will prevent their being barred by limitation, it is not incumbent on the plaintiff to prove that payments were made by the debtor with the intention of continuing the notes in force, or reviving them, such intention being presumed from the fact of payment, if proven.—Young v. Alford N. Car., 23 S. E. Rep. 978.
- 76. MALICIOUS PROSECUTION Probable Cause. —
 "Probable cause" means the existence of such facts
 and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty of the offense
 for which he was prosecuted.—MOSLEY V. YEARWOOD,
 La., 19 South. Rep. 274.
- 77. Marmage.—A marriage is valid without any certificate of intention being obtained as required by law, when solemnized by a duly authorized magistrate.—CITY OF GARDINER V. INHABITANTS OF MANCHESTER, Me., 38 Atl. Rep. 991.
- 78. MASTER AND SERVANT—Assumed Risk.—An employee who has equal facilities with his employer for ascertaining the danger incident to labor which he is directed to perform assumes the risk in its performance.—MISSOURI, K. & T. RY. CO. V. SPELLMAN, Tex., 34 S. W. Rep. 298.
- 79. MASTER AND SERVANT—Assumption of Risk.—In an action for the killing of plaintiff's intestate, where the question of deceased's assumption of a certain risk is to be determined by the facts as to whether defendants were operating a train according to the rules or practices usually adopted by railroad companies, and deceased knew, or ought to have known, that he would incur the risk, expert testimony is inadmissible.—FORDICE V. LOWMAN, Ark., 34 S. W. Rep. 255.
- 80. MASTER AND SERVANT—Negligence.—In an action for personal injuries caused by a locomotive to an employee of a railway company, in the company's switch yard, the fact that the locomotive was being operated within a city in a manner in violation of a city ordinance is prima facie evidence of negligence.—MISSOURI, K. & T. RY. CO. V. MCGLAMORY, Tex., 34 S. W. Rep. 359.
- 81. MASTER AND SERVANT—Negligence—Assumption of Risk.—Where a section foreman of twenty-five years' experience, charged with the distribution of ties along a railroad, was injured by the falling against him of

- ties improperly loaded on the car, on which he took his position to direct the engineer where to have the ties thrown, it is proper to submit the question of whether the danger from the falling of the ties was one of the ordinary risks of his employment, and to charge that if it was he could not recover.—Texas Cehr. By. Co. v. Lyons, Tex., 34 S. W. Rep. 362.
- 82. MASTER AND SERVANT—Negligence of Fellow-servant.—Defendant was a contractor for the erection of a brick building, and employed plaintiff, who was a laborer in attendance upon masons also in defendant's employ. Plaintiff, while engaged in such employment, was injured by the fail of a scaffold constructed by said masons, which fall was due to improper and negligent construction: Held, that the negligence which produced plaintiff's injury was that of his fellow-servants, and his employer was not liable therefor.—MAHER V. MCGRATH, N. J., 83 Atl. Rep. 945.
- 83. MECHANIC'S LIEN Amendment. —The amendments of the mechanic's lien authorized by the four-teenth section of the act can be made at any time before judgment on the claim.—Drinkhouse v. Gregg Mfg. Co., N. J., 83 Ati. Rep. 860.
- 84. MECHANICS' LIEN-Surety on Contractor's Bond.

 —A surety on a contractor's bond conditioned for the performance of the contract and the delivery of the building to the obligee free from all charges, liens, mechanic's liens, or other incumbrances, cannot enforce a lien against the property for materials furnished the contractor.—Examp v. Pittsburg Natator. IUM, Penn., 38 Atl. Rep. 1041.
- 85. MORTGAGE—By What Laws Governed.—A chattel mortgage made in New York by a New York corporation to a creditor of that State, on personalty in Conceticut, is not governed by the laws of New York relative to mortgages given in contemplation of insolvency, the corporation being empowered to do business in Connecticut, its principal business being carried on there, the property mortgaged being machinery in permanent use in its factory in that State, and the mortgage being executed as required by the laws of Connecticut, and being recorded there.—CHILLINGWORTH V. EASTERN TINWARE CO., Conu., 33 Atl. Rep. 1009.
- 86. MORTGAGES—Sale under Power—Notice.—In an action between the purchaser of the mortgagor's equity of redemption and a purchaser at the trustee's sale under the power for default in payments for an accounting, and to redeem because of the alleged invalidity of the sale under the power, the burden is on the former to show that, at the time of the sale, nothing was due on the mortgage.—MCIVER V. [SMITH, N. Car., 23 S. E. Rep. 971.
- 87. MORTGAGE—Subrogation of Second Mortgagee.—A second mortgagee, making payments on the first mortgage, will, under ordinary circumstances, be subrogated under the first mortgage to the extent of such payments, the residue of the claim of the first mortgagee having priority to the lien acquired by such subrogation.—NEW JERSEY BUILDING, LOAN & INVESTMENT CO. V. CUMBERLAND LAND & IMPROVEMENT CO., N. J., 38 Atl. Rep. 964.
- 88. MUNICIPAL CORPORATIONS—Additional Territory.—Where a portion of the territory of a municipal corporation is thrown into a new municipality, the right to use, and to regulate the use of, sewers and hydrans within such territory passes to the new government.—INHABITANTS OF TOWNSHIP OF BLOOMFIELD V. MATOR, ETC. OF BOROUGH OF GLEN RIDGE, N. J., 83 Atl. Rep. 925.
- 89. MUNICIPAL CORPORATION—Assessment under Unconstitutional Law. A street improvement having been made, and the assessments of the costs and expense thereof imposed upon certain lands under and according to the provisions of a statute adjudged to be unconstitutional, the court will not proceed further to examine and determine any other objections arising to the proceedings, but will set the assessment aside for

that reason.—State v. Inhabitants of Township of Verona, in Essex County, N. J., 88 Atl. Rep. 959.

- 90. MUNICIPAL CORPORATIONS Change of Grade—Measure of Damages.—The measure of damages for the change of grade of a street by a municipal corporation, to the injury of abutting property, is the difference between the value of the property immediately before, and that immediately after, the change, and it was hence, error to instruct that the jury might award as damages whatever they believed a fair and reasonable sum.—CITY OF DALLAS v. LEAKE, Tex., 34 S. W. Rep. 338.
- 91. MUNICIPAL CORPORATIONS Injury to Private Property.—The fact that a municipal corporation was incidentally benefited by the cutting of a ditch through private property by private parties without the conservate of the owner did not render it liable in damages therefor.—CITY OF DALLAS V. BERMAN, Tex., 34 S. W. Red. 340.
- 92. MUNICIPAL CORPORATIONS—Ordinance.—Code, § 8802, authorizing town commissioners to pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens, and Id. § 8804, authorizing them to enforce ordinances by imposing penalties, do not authorize an ordinance prohibiting, under penalty, the importation into a town of any second-hand clothing or furniture for purposes of sale, since its prohibits a business lawful in itself.—STATE V. TAFT, N. ORT., 25 S. E. Rep. 970.
- 93. NATURALIZATION.—There is no provision of the federal constitution which requires the courts or judges of a State to perform any duties respecting the admissions of aliens to citizenship.—In RE GILROY, Me., 33 Atl. Rep. 979.
- 94. NEGOTIABLE INSTRUMENT—Note—Transfer of Part Interest.—Separate actions cannot be maintained by different indorsees of part interest in the same note; and ancillary proceedings in such actions, such as writs of sequestration for property covered by a chattel mortgage securing the note are void.—AVERY V. POPPER, Tex., 84 S. W. Rep. 325.
- 95. NEGOTIABLE INSTRUMENT Parol Evidence Stock Certificate.—In an action by a corporation, on a note alleged to have been given by defendant in payment for stock for which a certificate was issued to defendant, parol evidence was admissible to show that the note was accommodation paper, and that the stock was issued to secure it, merely.—Loan Star Leather Co. v. City Nat. Bank of Tyler, Tex., 24 S. W. Rep. 297.
- 96. PARTY WALLS—Contract. Where a party-wall contract, making one-half the cost of the wall erected by one of the parties a lien on the lot of the other party, is filed for record in the office of the county clerk, the facts that it is recorded in the records of deeds, instead of in the record of mortgages, and that after being so recorded it was returned to the builder of the wall, do not affect the constructive notice to purchasers of the lot on which the lien exists.— Knowles v. Ott, Tex., 34 S. W. Rep. 295.
- 97. PRINCIPAL AND AGENT—Powers of Agents.—An agent has no power to accept a discharge of his own individual liability in satisfaction of a debt due his principal from a third person.—CHATTANOOGA FOUNDRY & PIPE WORKS V. GORMAN, Tex., 34 S. W. Rep. 306.
- 98. PUBLIC LANDS Trespass Cutting Timber. Where lands granted to a State to aid in railroad construction have become forfeitable to the United States for non-performance of conditions subsequent, the unauthorized cutting of timber therefrom gives the government no right of action, unless, before the cutting, it has actually declared a forfeiture, and reinvested itself with the title; otherwise, the cause of action is in the State, and remains therein, notwithstanding a subsequent declaration of forfeiture by congress.— United States v. Loughrey, U.S. C. C. of App., 71 Fed. Rep. 931.

- 99. RAILROAD COMPANY—Charter Powers—Relocation of Line.—The charter of a railroad company, containing power of eminent domain, declared the purpose of the corporation to be the construction of a line through and across the State, authorized a survey to determine the most advantageous route, and the laying out and construction of the road, and required the corporation to file a map showing the route as soon as it was located: Held that, after filing a map showing the location of its line, the company had no authority, under its charter, to change or relocate its line.—Lusby v. Kansas City, M. & B. R. Co., Miss., 19 South. Rep.
- 100. RAILEOAD COMPANIES—Municipal Corporations—Occupation Tax.—Where a railroad company owns and operates two connecting lines, under individual names, but under one management, and having but one tagent in a city into which both run, where, for convenience of the public, more than one depot is maintained, the company is liable for one occupation tax only, under the city's ordinance requiring every corporation to pay a special license tax for carrying on business.—Southern Ry. Co. v. City Council of Greenville, S. Car., 28 S. E. Rep. 952.
- 101. RAILROAD COMPANY Negligence Steer Running at Large.—Where a steer, which, owing to its crippled condition, has been removed by a railroad company from a car to be killed, is allowed to recover, and, in an apparently vigorous condition, roam around the railroad yard, which is open to the public, without an attempt to control it, the company is liable for one injured by the steer while passing through the yard.—Texas & P. Ry. Co. v. Juneman, U. S. C. C. of App., 71 Fed. Rep. 939.
- 102. RAILROAD COMPANY—Street Railway—Injuries to Child.—In an action for injuries to a child, caused by a street car, where there is testimony that the motorman, at the time of the accident, failed to see plaintiff because he was looking in another direction, at persons assembled at the side of the street, and there is no question of contributory negligence, the case cannot be withdrawn from the jury.—HARKINS V. PITTS-BURGH, A. & M. TRACTION CO., Penn., 83 Atl. Rep. 1045.
- 108. RAILROAD COMPANIES—Surface Water.—A railroad company is not liable in damages for causing surface water to flow upon the land of another by means of a ditch when it does not cause any greater flow thereon than there was before the construction of the road; and the fact that the road has been maintained for eight years without the ditch does not give the landowner a right to its continuance in that condition.—MISSOURI, K. & T. RY. CO. OF TEXAS V. BISHOP, Tex., 34 S. W. Rep. 828.
- 104. REMOVAL OF CAUSES Appearance.—An action was commenced against a New York corporation, in a Tennessee State court, by service on one M, "as agent and adjuster" for such corporation. The defendant filed its petition for the removal of the cause to the federal court, without in any way limiting the effect of its appearance in so doing, and afterwards filed a plea in abatement on the ground that M was not its agent: Held, that the question whether the defendant, by filing its petition for removal, unaccompanied by a plea in abatement, and without restricting the purpose of its appearance, waived the objection to the jurisdiction of the court for want of service, should be certified to the supreme court.—NATIONAL ACC. SOC. V. SPIRO, U. S. C. C. of App., 71 Fed. Rep. 897.
- 105. Sale—Conditional Sale Resale.—Plaintif sold buggles to C, who was conducting the business of a livery and sales stable, including the sale of carriages and buggles: Held that, they not only being presumptively sold to C for resale, but the contract between plaintiff and C having expressly authorized a resale, defendant, who purchased them from C without knowledge that C was not the absolute owner, obtained a good title, though the contract of sale from

plaintiff to C provided that title should remain in plaintiff till it was fully paid.—Columbus Buggy Co. v. Turley, Miss., 19 South. Rep. 282.

106. Salm-Evidence—Declarations of Agent.—Under Gen. St. § 1041, providing that in all actions for a book debt the entries of the parties in their books are admissible, and Practice Act, § 81, making them admissible in all actions for the recovery of a book debt, an account book kept by the plaintiff in an action for goods sold and delivered is admissible, not only to show that the goods charged to defendant therein were sold, but were sold to him.—Plumb v. Curtis, Conn., 33 Atl. Rep. 998.

107. SALES—Fraud—Rescission.—In an action to rescind a sale for fraud, if appeared that the buyer, at the time of the sale, held himself out as the owner of a business which he was in fact conducting for one H, to protect the property from the creditors of H, and that his assets exceeded his liabilities, which was false: Held, that there was such fraud as warranted a rescission of the sale by the seller.—ABILEME MILL & ELEVATOR CO. v. FINLEY, Tex., 34 S. W. Rep. 511.

108. Salm — Warranty — Special Damages.—Where a harvester is sold under a warranty that it will bind the grain into smooth bundles, and save it well, the purchaser, in an action on the warranty, may plead and prove, as special damages, the waste and loss of grain from imperfect binding.—D. M. OSBORME & CO. v. POINDEXTER, Tex., 34 S. W. Rep. 801.

109. TAXATION.—A corporation may exist under and by virtue of the purchase at a receiver's sale of the charter of another corporation, and the legislative recognition and the assumption of the State that it is a corporation, and yet not have any right to an exemption from taxation granted to the other corporation, because it is not, in law or in fact, the same.—MERCANTILE BANK V. STATE OF TENNESSEE, U. S. S. C., 16 S. C. Rep. 462.

110. Taxation—Bank—Exemption—Shares of Stock.

—A bank's charter, granted by the State of Tennessee in 1856, provided that the bank should "have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes; and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes:" Held, that this charter tax was not on the capital stock, but was on the shares of stock, which were consequently not subject to further taxation.—Bank of Commence v. State of Tennessee, U. S. S. C., 16 S. C. Rep. 456.

111. Taxation — Corporate Charter.—Act Tenn. March 30, 1960, granted to the D Ins. Co. "all the rights, privileges, and immunities" of the B Ins. Co. Act Tenn. March 11, 1967, incorporating the W Ins. Co., gave it "all the rights and privileges" of the D Co.: Held, that the immunity from taxation granted to the two former companies did not pass to the W Co.—PEEMIX FIRE & MARINE INS. CO. OF MEMPHIS V. STATE OF TENNESSEE, U. S. S. C., 16 S. C. Rep. 471.

112. TAXATION—Exemptions.—A graveyard is not exempt from special assessments for local improvements.—BOROUGH OF BELTZHOOVER V. HEIRS OF BELTZHOOVER, Penn., 88 Atl. Rep. 1047.

113. TAXATION — Privilege Tax—Effect on Validity of Contract.—Under Code 1880, § 583 (Code 1892, § 3401), providing that all contracts made with a person who shall violate the law requiring payment of privilege tax, in reference to the business carried on in disregard of such law, shall be null and void so far only as such person may base any claim on them, and no sult shall be maintainable in favor of such person on any such contract, one secured by second deed of trust cannot object to sale under the first deed of trust on the ground that the person secured thereby had not paid his privilege tax; the validity of the deed of trust not being questioned by the one who gave it.—Cuningham Bros. Woolen Co. v. Atlantic Nat. Building & Loan Ass'n., Miss., 19 South. Rep. 234.

114. TOWNS—Liability for Torts of Officers.—A town is not liable for the torts of its selectmen in building a road, when there is no vote authorizing them to take charge of that work.—Goddard v. Inhabitants of Harpswell, Me., 33 Atl. Rep. 980.

115. TOWNSHIP — Defective Bridge — Remote and Proximate Cause.—While crossing a bridge 12 feet wide and 14 feet long, plaintiff dropped her hat from the buggy, and, after having passed 14 feet beyond the bridge, the driver stopped to get the hat, giving the reins to plaintiff's older sister. The horse then took fright, and backed the buggy on the bridge, and off one side thereof: Held, that the negligence of the township in not maintaining guard rails on the bridge was the proximate cause of the injuries received by plaintiff, the possibility of a horse taking fright being something which the township was bound to guard against.—YODERS V. TOWNSHIP OF AMWELL, Penn., 38 Atl. Rep. 1017.

116. TRUST—Equity Jurisdiction.—Where real estate situated in this State has been conveyed by deed in trust, held, that the trust is within the equity jurisdiction of this court, and may be dealt with regardless of the residence of the parties in interest. When the trustee under the conveyance voluntarily submits himself to the jurisdiction of the court, both the rest and the title to it are in court.—DU PUY V. STANDARD MINERAL CO., Me., 38 Atl. Rep. 976.

117. VENDOR'S LIEN — Enforcement.—The failure of the holder of a note secured by vendor's lien to present his claim against the estate of a decedent who purchased the land from the vendee does not defeat the holder's right to enforce the lien against the land.—STRAIM v. WALTON, Tex., 34 S. W. Rep. 293.

118. SALE OF LAND — Existing Incumbrances.—A survey on the ground made by a company invested with the power of eminent domain, followed by selection and proper adoption of a line for the proposed road, fastens a burden upon the property sufficient to relieve a vendee from his contract to purchase free of incumbrances.—JOHNSTON V. CALLERY, Penn., 83 Atl. Rep. 1086.

119. WILL—Life Estate—Fee-simple.—The act of 1833 provided that all devises of real estate shall pass the whole estate of the testator in the premises devised, unless it appear by the will that the testator intended to devise a less estate: Held, that a will giving the husband of testatrix the "whole income while he lives," and also granting him an unlimited power of sale of all her property, with no restriction on the appropriation of the proceeds, gave him, in effect, a fee-simple.—Kieffel v. Keffler, Penn., 33 Atl. Rep. 1043.

120. WILL-Nature of Estate.-Testator directed that the share of each ichild should be given him when he came of age or married. A clause provided that if the executor should sell testator's estate before the mar riage or coming of age of either of the children, they should, on attaining their majority or marrying, be paid their distributive interest; and that "the portion that either of my daughters, may be entitled to, I give to her during the term of her natural life, and at her death, I give and bequeath the same to such issue of her body" as may then be living. Another clanse de-clared that the portion of testator's son should go to him, "absolutely free and discharged from all limita-tions and restrictions whatsoever:" Held that, whether the estate was divided with or without a sale, the daughters were to have only a life interest in their portions, with remainder to their surviving issue in fee-simple.—Wood v. Wood, S. Car., 23 S. E. Rep. 950.

121. WILLS — Revocation of Legacy.—The testator had bequeathed a promissory note to certain legatees named. The note, after the date of the will, was collected, at the imstance of the testator, and the amount placed to his credit. The legacy was of a note, and not of a sum of money. There was a revocation of the legacy.—Succession of Batchelor, La., 19 South, Rep. 283.



Central Law Journal.

ST. LOUIS, MO., MAY 1, 1896.

The unreliable character of the reports of decisions of courts, made by daily newspapers, is generally understood by those who have had occasion to test it, but that there are some members of the profession who do not appreciate the fact that an ordinary reporter without legal training, is not capable of making an intelligent report of legal opinions, is shown by inquiries on the part of a few of our subscribers as to a late decision of the United States Circuit Court of Appeals for the Eighth Circuit wherein it was reported by a St. Louis daily paper to have decided that a contract payable in "gold coin" was not enforceable. The case referred to is American Waterworks Co. v. Farmers' Loan & Trust Co., but there was, of course, no such ruling. The case involved the foreclosure of a mortgage providing for the payment of principal and interest in "gold coin." In the decision of the case were a number of interesting questions as to mortgage foreclosure. In making the decree the court "by consent of parties" provided for payment in any legal tender instead of gold coin. The enterprising reporter, whose qualifications for detailing the account of a fire or a homicide may be first class, was hardly equal to the mental discrimination which the phrase "consent of the parties" rendered necessary.

In a later issue the same newspaper reported an Omaha judge as having recently decided in a "gold coin contract" case that a contract to pay in gold coin was unenforceable, and as having said seriously that "if it came to a question of holding that the note was payable in gold coin or that the contract was illegal and void, as in violation of law, he would hold that it was illegal and void." If that court is correctly reported, which we very much doubt, its view of the law will cause the judicious to grieve or at least that portion of them who are familiar with the decisions of the United States Supreme Court on the subject. In 1868, in the case of Bronson v. Rodes, 7 Wall. 229, a case sharply contested, that court held that a bond for payment of a cer-

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tain sum in gold and silver coin, lawful money of the United States with interest also in coin, at a rate specified, until repayment, cannot be discharged by a tender of United States notes issued under the currency acts of 1862 and 1863, and by them declared to be lawful money, and a legal tender for the payment of debts. The opinion of the court was exhaustive and elaborate, written by Chief Justice Chase, the intent of the parties in making the contract being the turning point of the decision. It is interesting, however, to note that Justice Miller dissented from the view of the court. The same ruling was made in Butler v. Horwitz, 7 Wall. 258, and in 1884 in Trebilcock v. Wilson, 12 Wall. 687, the same court decided that the act of 1862 making United States notes legal tender does not apply to obligations payable in specie or in commodities or obligations of any kind. In that case both Justices Miller and Bradley dissented upon the ground that a contract for gold dollars in terms was in no respect different, in legal effect from a contract for dollars without the qualifying effect specie or gold and that the legal tender statutes had therefore the same effect in both cases. It will thus be seen that, no matter how much men may differ on this question, viewed in the light simply of governmental expediency, there can be no two opinions as to what the law is on the subject.

Another phase of this "gold coin" question came before the United States Supreme Court very recently in a case vet reported which arose in sippi, wherein, reversing the Supreme Court of that State, the Supreme Court of the United States holds in substance that gold coin is money and under the grant by a legislature of a State of an authorization to issue bonds to borrow "money," bonds made payable in gold coin are valid. The Supreme Court of Mississippi declared that when the bonds were issued "gold coin" was not the basis of the business of the country. It was money, but of much greater value than the circulating medium, consisting of United States Treasury notes and of national bank notes. All debts payable in "dollars" generally were, as now, solvable in legal tenders, but, the court said, an obligation payable in gold coin can be discharged only according



to its terms. In ordering the issuance of bonds for \$1,000,000 and in the use of the term "money," the court held that the legislature must be supposed to have meant in the act cited that money which constituted the basis of the general business of the country and was a legal tender for the payment of debts, and that, therefore, there was no authority in the act for the issuance of bonds payable in "gold coin," and they were void for want of authority for their issuance. This, the court said, was a matter of substance involving a departure in a most material feature from the act authorizing bonds to be issued, and rendered them void from the beginning. The Supreme Court of United States on the contrary. "gold coin'' held that was money. and that, therefore, the use of that term in a bond issued under authority to borrow money was not invalid. In deciding the case Chief Justice Fuller, who read the opinion, said that it was only by deciding that these bonds were payable in a particular kind of money of the United States, and that this kind, though money in law had ceased, as the court assumed, to be money in fact, that the State court was enabled to hold them void for want of power, and if that premise were incorrect the conclusion, whether right or wrong, would not follow. But the court said these bonds were not expressly payable in gold coin, and as the coupons were payable specifically in currency the argument was not unreasonable that the corporation intended the purchasers to expect payment in the money in which the indebtedness was stated to have been contracted; but the agreement to pay the designated sums did not specify any particular kind of money, and the obligation was to pay what the law recognized as money when the payment was to be made. The bonds, were therefore, legally solvable in the money of the United States, whatever its description, and not in any particular kind of money, and it was impossible to hold that they were void because of want of power.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS—JURISDICTION — SUIT TO DETERMINE VALIDITY OF WILL.—The United

States Circuit Court for the District of Indiana decides, in Copeland v. Browning, 72 Fed. Rep. 5, that the federal courts have no jurisdiction, either original or upon removal from a State court, of a suit instituted to determine the validity of a will, as a preliminary step in determining whether its probate should be granted or denied. This decision is in harmony with Gaines v. Fuentes, 92 U. S. 10; Ellis v. Davis, 109 U. S. 485; Reed v. Reed, 31 Fed. Rep. 49; In re Cilley, 58 Fed. Rep. 977; Oakley v. Taylor, 64 Fed. Rep. 245.

ATTACHMENT IN ACTIONS EX DELICTO -Validity.—Rev. Stat. Texas, arts. 152, 153, require the affidavit for an attachment to state the amount of the demand. The statute prescribes 11 grounds for attachment; and in every instance in which the cause of action is mentioned, it is denominated a "debt;" and in every instance in which the person to be injured by the action of defendant is mentioned he is called a "creditor." It was held by the Supreme Court of Texas, in El Paso Nat. Bank v. Fuchs, 34 S. W. Rep. 206, reversing the court of appeals, that no attachment can issue on any cause of action founded on a tort, and it is immaterial that the same measure of damages may be applied as for breach of a contract. The following statement of the law is from the opinion of the court:

The question to be determined, upon this statute, is, what is the meaning of the words "debt" and "creditor," as therein used? The rule of construction to be applied is by Mr. Sutherland clearly stated, thus: "The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within its terms." Suth. St. Const. § 398; Elliott v. Jackson, 3 Wis. 649. In the case of Barber v. City of East Dallas, 83 Tex. 150, 18 S. W. Rep. 438, the court defines the word "debt" as follows: "In common parlance, the word 'debt' is sometimes used to denote any kind of a just demand, and has been differently defined, owing to the subject-matter of the statutes in which it has been used; and while, ordi-, narily, it imports a sum of money arising upon a contract, express or implied, in its more general sense it means that which one person is bound to pay or to perform to another. 5 Am. & Eng. Enc. Law, 175." Mr. Drake, in his work on Attachments (section 12), says: "Who may be regarded as a creditor may be often a debatable question. A creditor is defined by a recent writer to be one who has a right to require of another the fulfillment of a contract or obligation. Another writer considers a creditor to be one who gives or has given credit to another, one who trusts another, one to whom a debt is due; in a larger sense, one to whom any obligation is due. Webster defines



the word thus: 'A person to whom a sum of money or other thing is due by obligation, promise, or in law.' The word is susceptible of latitudinous construction, and it is not, perhaps, as important, here, to arrive at its general meaning, as to ascertain the views of it, and of what constitutes an indebtedness, which has received judicial sanction in connection with resort to attachment." He then proceeds to discuss the cases arising in the courts of several States. from the general tenor of which decisions it may be concluded that the debt which will support an attachment is one arising out of a contract, either express or implied by law. 5 Am. & Eng. Enc. Law, 143; Elliott v. Jackson, 8 Wis. 649. "In the absence of statutory provisions allowing attachment to issue in actions founded on tort, it has been uniformly held that, in such actions, it will not lie." Drake Attachm. i 10; Hochstadler v. Sam, 73 Tex. 315, 11 S. W. Rep. 408; Greiner v. Prendergast, 3 La. Ann. 376; Bank v. Turnley, 1 Miles, 812.

CRIMINAL LAW—FORGERY — SIGNATURE AS AGENT.—The Supreme Court of California decides, in People v. Bendit, that when one without authority executes a receipt for money, purporting on its face to be executed by him as agent for the person whose name he signs, he is not guilty of forgery. The court says in part:

We have been referred to no authorities to the point that the signing of another's name as his agent is forgery, while there is a multitude of authorities to the contrary in text-books and adjudicated cases. "If a man accept or indorse a bill of exchange in the name of another, without his authority, it is a forgery. But if he sign it with his own name, per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority." 2 Archb. Cr. Prac. p. 819. The doctrine is fully discussed, and the views hereinbefore stated declared, in Reg. v. White, 2 Car. & K. 404. In that case the defendant brought a bill to a banker as from Tomlinson. The bill was not indorsed, but the defendant said he would indorse it. The banker wrote, "per procuration Tomlinson," beneath which the defendant signed his own name. It was held that this false assumption of authority was not forgery, as there was no false making. It has frequently been held that "the false instrument should carry on the face of it the semblance of that for which it is counterfeited," although it is not necessary that the semblance should be exact. 2 Archb. Cr. Prac. 866. This rule illustrates the nature of forgery. How, in the case at bar, could there be any question about "semblance?"

The American authorities are as pronounced on the subject as the English. In re Heilbonn, 1 Parker, Cr. R. 484, the court, after having referred to other cases, say: "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off at the signature or counterfeit of that other. This cannot be when the party openly, and on the face of the paper, declares that he signs for that other. There he does not counterfeit the name of the other, nor attempt to pass the signature as the signature of that other. The offense belongs to an entirely different class of crimes." In Mann v. People, 15 Hun, 155, the court, in an elabor-

ate opinion, in which the authorities and the arguments for an opposite view are fully reviewed and discussed, holds that, "where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law, or under the statutes of this State, even though he has in fact no authority for such principal to execute the same." (We quote from the syllabus, which is a correct condensation of the opinion.) In Com. v. Baldwin, 11 Gray, 199, the Supreme Judicial Court of Massachusetts say: "It is not, says Sergeant Hawkins, the bare writing of an instrument in another's name without the privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. If the defendant had written upon the note, 'Whilliam Schouler, by his agent, Henry W. Baldwin,' the act, plainly, would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon the signature. He is not decived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature." In Com. v. Foster, 114 Mass. 311, the court say: "The falsity of the instrument consists in its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass as the note of some other party." In State v. Young, 46 N. H. 266, the supreme court of that State say: "To forge or counterfeit is to falsely make; and an alteration of a writing must be falsely made, to make it forgery at common law, or by our statute. The term 'falsely,' as applied to making or altering a writing in order to make it forgery, has reference, not to the contents or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains,-a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not." In State v. Wilson, 28 Minn. 52, 9 N. W. Rep. 28, the court referring approvingly to Mann v. People, supra, say: "The court decided that this did not constitute forgery, and held, in substance, that, when one executes and issues an instrument purporting on its face to be executed by him as agent of a principal therein named, he is not guilty of forgery, although he has in fact no authority from such principal to execute or issue the same. In fact, we found no authority to the contrary, and the text-writers uniformly lay down or approve of the same rule." There are numerous other authorities to the same point, but further citation is unnecessary. Of course, the averment in the information that the appellant uttered and passed the said instrument "as true and genuine" is also, under the above views, unsupported by the evidence.

It is contended that the definition of "forgery" in section 470 of the Penal Code makes the crime different from forgery at common law, but, with respect to the question here under discussion, there is no such difference. At common law there were frequent embarrassing questions as to what kinds of writings were the subjects of forgery, while our Code, to avoid those questions, enumerates a very large number of writings as subjects of forgery. But, as to what con-

stitutes forgery of instruments which are subjects of forgery, the definitions at common law and by our Code are the same. "Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal llability." 2 Bish. Cr. Law (8th ed.), § 523. In the notes to the section of Bishop just quoted, many other definitions are given, and it will be noticed that the leading descriptive words are "false making," or altering. In our Code the words are, "every person who with intent to defraud another, falsely makes, alters," etc., any of the written instruments enumerated. The definition is therefore essentially the same in both instances, and it is the same in the statutes of all the other States to which our attention has been called. But the meaning of the words "false making," when applied to forgery, is that hereinbefore stated. The broad and well-established distinction above set forth cannot be ignored by courts or jurors, even when, in their opinion, a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty.

RIGHT TO PUBLISH LETTERS.

There has been great diversity of opinion in the different States as to whether letters could, by the recipient thereof, or any other person, be published or made public contrary to the wishes of the writer, and when and under what circumstances they could be so treated. The courts have from time to time held both pro and con, it being a very difficult question to determine in some cases the respective rights of author and recipient of letters. Of course there can be no settled law laid down by which all cases of this nature should be governed, but there seems to be, and undoubtedly is, a settled principle generally recognized as governing this important subject. And the law throughout the different States is now well settled, and the weight of authority is to the effect that letters cannot be published, except by consent of the writer, his executors or administrators;1 but there is an exception to this rule when the receiver may publish letters notwithstanding, viz., when it is shown to be necessary to the vindication of his own rights or conduct against unjust claims or imputations, or for purposes of protection or of support of character, or when the purposes of justice, civil or criminal, require the publication. There seems to be grave doubt as to whether the courts of the United States, un-

¹ 2nd Ambler, R., p. 737.

der the act of congress amending the several acts respecting copyrights passed Feb. 3, 1831, have power to restrain by injunction the publication of literary or private letters contrary to the wishes of the receiver, but it is to some extent conceded that the ninth section of the aforesaid copyright act protects the author's right to his manuscript. In the 5th McLean (U. S.), p. 32, it is stated that an author has a common law right in his manuscript, and is entitled to an injunction to restrain the publication of it. The jurisdiction, however, which under the act of congress the federal courts may have acquired has not impaired or affected the original jurisdiction of the State courts.

It is extremely difficult to say what letters are or are not private or literary compositions. In one sense all letters are literary, for they consist of the thoughts and language of the writer reduced to written characters and show his composition. The writer of letters, whether they are literary compositions or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same, and without his consent they cannot be published either by the person to whom they are addressed or any other.2 Letters being entirely in the nature of personal property, the title to which naturally arises through possession, it would seem that with this element and that of the writer voluntarily consigning the letter to anyone, that there would be for all purposes an absolute and indisputable title in the recipient, and that the writer would have no latent rights of any nature whatsoever; but no, the law says the author has an incheate right as to how the contents of such letters shall be used. The receiver of a letter has, at most, only a joint property with the writer, and the possession does not give him a license to publish.8 An abridgment, in which there is a substantial compensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute a piracy of copyright, but an abridgment consisting of extracts of the essential or most valuable portions of the original work is piracy. An author of letters or papers of whatever kind, whether they be

^{3 2}d Atk. 342.



² See 11th How., 49-50; How. Pr., 201, and 4th Duer, 379.

letters of business, or private letters, or literary composition, has a property and an exclusive copyright therein, unless he unequivocally dedicated them to the public, or to some private person; and no person has any right to publish them without his consent. Hence it is that the gift of a letter by the author to the recipient is so restrained that, ultra the purpose for which the letter was sent, the property is in the sender.

New York.

FRANK TRENHOLM.

⁴ See 2d Swanston, p. 418; 2d Story's Equity Jur., Secs. 943 to 949, and 2d Story's R., 100.

SALE-DELIVERY-BILL OF LADING-TRANS-FER BY DELIVERY.

SCHARFF V. MEYER.

Supreme Court of Missouri, Division No. 2, March 17, 1896.

- 1. The delivery of goods by a seller to a carrier designated in the contract of sale, at the place of delivery designated, consigned to the buyer without reservation, is a delivery to the buyer, though the contract provided for payment in cash, and for examination by the buyer before payment; the right of the seller to require payment before the passing of the title to the goods being waived by such consignment.
- 2. The transfer of a bill of lading by delivery without indorsement carries with it all the right of the transferror in the goods represented by it, and extrinsic evidence is admissible to show what such interest is. The fact that a State statute provides for the transfer of bills of lading by indorsement does not restrict their transfer to such method.
- 3. Where a contract for sale of goods shows that they were to be delivered at the termination of a carrier's lien, their delivery by the seller to the carrier, though consigned to the buyer, will not pass the title, and a transfer of the bill of lading by the seller will vest the transferee with the right of possession of the goods; but where delivery to the carrier, operates, under the contract of sale, to pass title to the buyer, the retention and transfer of the bill of lading by the seller will carry no right in the goods, though, by statute, the carrier is forbidden to deliver the goods without the presentation of the bill of lading.
- 4. The equitable rule as to the marshaling of securities between lienholders has no application to a controversy between one claiming the right to possession of property by transfer of a bill of lading, and one who has levied an attachment thereon as the property of the transferror of the bill of lading, where the validity of the attachment lien depends on the invalidity of the transfer.

BURGESS, J.: This is an action by attachment. Under the writ, 619 barrels of sugar were seized as the property of defendants. The sugar was sold under order of the court, and the proceeds arising from said sale paid into court. The Union National Bank of New Orleans interpleaded,

claiming the fund. The controversy is between the plaintiffs, as attaching creditors, who seized the sugar, by attachment, as the property of V. & A. Meyer & Co., while on the vessel upon which it was shipped, and the interpleader, who claims the fund under assignment of the drafts and transfer of the bills of lading for the sugar. The trial was had before the court, who found for the interpleader, and plaintiffs appealed.

No question is made with respect to the pleadings, or the admission or exclusion of evidence.

The facts are about as follows:

Defendants, who were merchants at the City of New Orleans, having, through their broker, theretofore sold fourteen different lots of sugar to as many different purchasers in the City of St. Louis on the 30th day of November, 1890, shipped it to them, in compliance with their contracts. The carrier issued to defendants bills of lading, in which they were named as the shippers, and the several purchasers named as consignees. Defendants then drew a separate draft on each of the consignees for the value of the sugar shipped to them. The drafts were drawn payable to defendants' order, and were indorsed by them. To each draft was attached the corresponding bill of lading, and on the 1st of December, 1890, all the drafts, with the bills of lading attached, were transferred and delivered to the interpleader, for their full face value and the full aggregate value of all the sugar, being about \$10.000. On presentation of the drafts to the respective drawees, payment was refused, and they were not paid. The drafts are in the ordinary form of bills of exchange. They are all dated at New Orleans, December 1, 1890; are drawn by V. & A. Meyer & Co. The bills of lading were not indorsed. The bills of lading are dated at Cora Plantation, La., November 30, 1890, and it is recited on the face of each of them that the shipment is for account of V. & A. Meyer & Co. They are all in the following form:

"Received in good order from Cora Plantation, on board the steamer City of St. Louis, * * * to be delivered without delay, unless unavoidably prevented, on the levee at St. Louis, unto consignee as below. * * Freight at 15c. per 100 lbs.

Marks.	Articles.	Consignee.	Whose Accu't.	Weights
Nina Y. C. No. 15.	Fifty-three brls. Y. C. sugar.	Fink & Nasse, St. Louis.	V. & A. M. & Co.	17,839.

There are fourteen of the bills of lading, each naming as consignee one of the concerns against whom the drafts were drawn. Along with each of the bills of lading is a certificate dated at Cora Plantation November 29, 1890, showing the weight of each barrel, and the gross weight and net weight of each lot. There was also pinned to each of the bills of lading a slip of paper on which were written the words, "Allow parties to have B. L. and examine goods." It appears that,

on the 1st of December, Adolph Meyer, a member of the firm of V. & A. Meyer & Co., took these fourteen drafts, with the bills of lading and other papers attached, into the Union National Bank, and requested a discount; that Chalaron, the cashier, accepted them at the current rate of discount for St. Louis exchange (one-fourth of 1 per cent., or \$24.29 in the aggregate), and caused the net proceeds, \$9,719.91, to be placed to the credit of Meyer & Co. in their account current; that the bank paid checks of Meyer & Co. on their account current to the amount that day of \$39,772.21, the next day \$70,277.27, and each succeeding day for greater or less sums; that from the day when the fourteen drafts above mentioned were delivered to the bank, up to and including the day when they were dishonored at St. Louis and the Union National Bank was notified, the defendants had on deposit in the bank, and to their credit, more than enough money to pay all these drafts; that after that time there were, up to December 25th of that year, daily balances to defendants' credit, on most days more than sufficient, though on six of those days not sufficient, to pay all the drafts; when the deposition of Mr. Chalaron was taken, on February 5, 1891, there was still more than enough money on deposit to the credit of the defendants to pay all the drafts; that this discount was made in the usual and ordinary course of business, and on the faith of the bills of lading and certificates of weight, and not on the personal credit of Meyer & Co.; that the transaction was an out and out purchase; and that the drafts were not taken for collection for account of Meyer & Co. It also appears that the drafts were received by the St. Louis National Bank from the Union National Bank, and, with the other papers attached, presented to the several drawees for payment, and payment refused.

The contracts, in pursuance of which the shipments were made, are all dated at St. Louis, and call for "Y. C." (yellow clarified). Their terms are as follows: (1) F. Mitchell & Bro. "Price 5 cents delivered on the levee here; to be drawn for, bill of lading attached; sugar to be received before payment of draft." (2) Wulfing, Dieckriede & Co.: "Price 5 cents, delivered here; to be drawn for, subject to examination of sugar before payment." (3) Adolph Moll: "Price 5 1-8, delivered here, on the levee, by next Saturday's boat from New Orleans." (4) O. H. Peckham Candy Company: "Price 5 cents, delivered here; to be drawn for, bill of lading attached; bill of lading to be surrendered by bank, so sugar may be received in the usual way." (5) Goebel, Wetterau & Co.: "Price 4 7-8, sold at plantation; to be shipped Anchor Line, and insured; to be drawn for, bill of lading attached; sugar to be examined and received in the usual way before payment." (6) Dodge & Seward: "Price 4 7-8, f. o. b. plantation; ship Anchor Line, and insure; to be drawn for, bill of lading attached; subject to approval before payment." (7) Alkire Grocery Company: "Price 4 7-8, f. o. b. plantation; ship

Anchor Line, and insure; to be drawn for, bill of lading attached; sugar to be accepted before payment of draft." (8) Scudder, Miltenberger, Reinhart & Co.: "Price 4 7-8, f. o. b. plantation; ship Anchor Line; no insurance; to be drawn for, bill of lading attached; sugar to be accepted before payment." (9) Gildehaus, Wulfing & Co.: "Price 4 7-8, f. o. b. plantation; ship Anchor Line, and insure; to be drawn for, subject to approval of goods before payment." (10) Greely-Burnham Grocer Company: "Price 4 7-8, sold at plantation; ship Anchor Line, and insure; to be drawn for, bill of lading attached; bill of lading to be surrendered by bank, so the sugar may be received in the usual way." (11) J. H. Kaiser & Co.: The same as in No. 10. (12) Adam Roth Grocery Company: The same as in No. 10. (13) Goddard-Peck Grocery Company: "Price 4 7-8, f. o. b. plantation; ship Anchor Line; no insurance; cash on receipt of sugar." (14) Fink & Nasse: "4 7-8 per pound, f. o. b. 12 1-2 cents freight to St. Louis; cash on arrival." It also appears that some of the sugars were sold subject to approval by the purchasers before payment.

Plaintiffs gave in evidence sections 2482, 2485, Voorhies' Rev. St. La. 1876, which read as follows:

"Sec, 2482. Cotton press receipts given for any goods, wares, merchandise, grain, flour or other produce or commodity stored or deposited with any cotton press, wharfinger or other person, or any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company, may be transferred by endorsement thereon, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour or other produce or commodity therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons, but no property shall be delivered except on surrender and cancellation of said original receipt or bill of lading with the indorsement of such delivery thereon; in case of partial delivery all cotton press receipts or bills of lading. however, which shall have the words 'Not negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this section."

"Sec. 2485. All receipts, bills of lading, vouchers or other documents, issued by any cotton press owner or lessee, wharfinger, forwarder or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by indorsement in blank or by special indorsement in the same manner and to the same extent as bills of exchange and promissory notes now are."

It further appears that the defendants, V. & A. Meyer & Co., were, and for some time before these transactions had been, and thereafter remained, depositors in the Union National Bank, and that one of the firm, Adolph Meyer, who

transacted the business of the firm with the bank, then was, and for some time had been, a stockholder and a director and the vice-president of that bank. The following articles of the by-laws of the Union National Bank were also read in evidence:

"Art. 20. All notes discounted by the bank, that are not taken up before the closing of the bank, on the last day of grace, shall be charged to the account of the parties to the same, provided there are funds in the bank to the credit of such person or persons."

"Art. 8. If any bill or note belonging to this corporation shall not be paid before the closing of the bank, on the last day of grace, such bill or note shall be forthwith protested; and while such bill or note remains unpaid, no discount or accommodation shall be granted to any drawer, acceptor or indorser of the same. No note or bill held by this bank as collateral security shall be discounted by the bank until the note or bill for which it is pledged shall be paid."

"Art. 16. The bank shall take charge of the cash, notes or bills of exchange of such persons who may place them there, as the directors or officers may think proper, free of expense, and shall keep them there subject to their order. * * **'

"Art. 21. All notes discounted to meet the payment of any note or bill due to the bank shall not be drawn for, nor applied to any other purpose whatever."

Interpleader gave in evidence the following statutes of the State of Louisiana (Voorhies' Rev. Civ. Code 1889):

"Art. 2210. Compensation takes place, whatever be the cause of either of the debts, except in case: (1) Of a demand of restitution of a thing of which the owner has been unjustly deprived. (2) Of a demand of restitution of a deposit and of a loan for use. (3) Of a debt which has for its cause, aliments declared not liable to seizure."

"Art. 2956. The depositary cannot withhold the thing deposited on pretense of a debt due to him from the depositor on an account distinct from the deposit, or by way of offset, but he may retain the deposit until his advances are repaid, as well as any other claims which he may have arising from the deposit."

Chalaron, the cashier of the interpleader, testified that section 20 of the by-laws was considered a dead letter, that the decisions of the courts of Louisiana make it so, and that the bank has sustained loss by reason of its inability to enforce it. Kohn, president of the bank, testified substantially to the same effect.

The court, at the instance of the interpleader, gave the following declaration of law: "The court declares the law to be that if the court shall find from the evidence that the Union National Bank, in good faith, bought from Meyer & Co. the drafts read in evidence, with the bills of lading attached, and, relying upon the security of said bills of lading, placed to the credit of said Meyer & Co., in their account current, the price paid

for said drafts,-being the face value of the drafts, less a small sum retained by the bank for interest and exchange,-then the said bank acquired title to the sugars specified in said bills of lading, and the finding and judgment must be for the interpleader." The court, at the instance of the plaintiffs, gave the following declaration of law: "If the court, sitting as a jury, believes from the evidence that the drafts put in evidence were not sold bona fide by V. & A. Meyer & Co. to the Union National Bank of New Orleans, but were understood, between said firm and said bank, to be placed in the hands of said bank merely for collection by or through said bank, as the agent of said firm, and that the bills of lading put in evidence were merely sent along with said drafts for the purpose of enabling said bank, or its St. Louis correspondents, to collect said drafts for the benefit of said firm, then you will find for the plaintiffs." The plaintiffs requested the court to give the following declaration of law, which was refused: "If the court, sitting as a jury, believe from the evidence that at the time when the interpleader, the Union National Bank, was advised of the dishonor at St. Louis of the drafts put in evidence, the said bank had on deposit, to the credit of the firm of V. & A. Meyer & Co., money sufficient to pay said drafts, and that, according to the laws of Louisiana and the by-laws of said bank in force at that time, said bank had the right to pay said drafts out of said deposit, and if the court, sitting as a jury, further believes that said bank was at that time advised of the plaintiffs' claim and attachment upon the sugars covered by the bills of lading put in evidence, then, in such case, it was the duty of said bank to the plaintiffs to pay said drafts out of said deposit, and your verdict must be for the plaintiffs."

Plaintiffs' first contention is that the title to the sugar passed when delivered on board the boat at Cora Plantation. La., to the vendees, under the original contracts of sale; that the bills of lading were necessarily made to the vendees as consignees; that they were not assignable or negotiable without indorsement; that they were not indorsed, and the vendors were without authority to either indorse or negotiate them; and that, by merely attaching them to drafts for which credits were received, the vendors neither did nor could transfer title to the sugar, and therefore the sugar, and all proceeds thereof, at the time of the attachment, did not and do not belong to the interpleader; and that, as the evidence shows that the title is not in the interpleader, it cannot recover. Upon the other hand, the interpleader contends that the delivery of the bills of lading to it passed to it the title to the sugar, notwithstanding they were made out in the name of the St. Louis merchants as consignees, and were not indorsed by them. While plaintiffs occupy the position of claiming that the sugar in question was not defendants' when the interpleader claims to have acquired it by transfer of the bills of lading, on the 1st day of December, 1890, but was defendants' when subsequently attached by them, it needs no citation of authority to show that the interpleader must recover, if at all, upon the strength of its own title; that is, the interpleader must show title to the sugar, otherwise it is not entitled to the fund arising from its sale. As a general rule the delivery of goods by the vendor to the carrier or master of a vessel, when the goods are to be sent in that way, is equivalent to delivery to the purchaser, subject only to the right of stoppage in transitu. 2 Kent, Comm. 499; State v. Wingfield, 115 Mo. 428, 22 S. W. Rep. 363; Kerwin v. Doran, 29 Mo. App. 397; Garbracht v. Com., 96 Pa. St. 449; Dunn v. State (Ga.), 8 S. E. Rep. 806. Especially is this so when, by the terms of the contract of sale, the goods are to be delivered to the carrier. By the terms of the contracts in the case in hand, all sugars, except lots 1, 2, 3, and 4, were to be delivered on board of boat at Cora Plantation, and all sugars delivered to the carrier in pursuance of said contracts were, in legal contemplation, delivered to the consignees, and prima facie the title vested in them immediately on such delivery. It is so held in Hening v. Powell, 33 Mo. 468; Armentrout v. Railway Co., 1 Mo. App. 158. And those cases are in accord with the great weight of authority. "It is well settled that the delivery of goods to a common carrier— a fortiori, to one specially designated by the purchaserfor conveyance to him, or a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent; the latter, in employing the carrier, being considered as agent of the former for that purpose." Benj. Sales (1st Am. Ed.), pp. 130-514. If, under such circumstances, the consignor wishes to prevent the title from vesting in the consignee, he must, by bill of lading, make the goods deliverable to his own order. 1 Benj. Sales, § 455, p. 348. "If, then, the title to the sugar passed to the consignees when delivered on board the vessel at Cora Plantation, nothing passed to the interpleader by the transfer of the bills of lading, even admitting that they were transferable by delivery, and vested in the transferee all of defendants' interest in the property. It is true, this was matter of intention on the part of the vendors of the sugar, with respect to which the bills of lading are prima facie evidence only, and extraneous evidence was permissible for the purpose of showing the real intent of the parties. But as to these sugars, notwithstanding lots 5, 6, 7, 8, and 9 were sold subject to approval by the consignees before payment, when the facts that they were sold at 4.7-8 cents per pound, while other sugars sent by the same shipment were to be delivered on the levee in the city of St. Louis at a less price; that they were weighed, marked with consignees' names, put on board the vessel in accordance with the contract, and the bills of lading made out to the consignees, respectively,—are taken in

connection with all the other evidence in the case, it is almost conclusive that the title to these sugars vested in the consignees when shipped.

But it is insisted that the sales were for cash. and that the property remained in the vendors until paid for. In answer to this position, it is sufficient to say that payment was waived, as a condition precedent to investing the title in the consignees, when the goods were shipped to them without any intention, in so far as appears from the record, on the part of the consignors to retain title to them until they were paid for. Tied. Sales, §§ 85-207, and authorities cited. In Emery v. Bank, 25 Ohio St. 360, it is said: "If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the jus disponendi. And, on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property." Again, in the same case, it is said: "A consignor who has reserved the jus disponendi may effectuate a sale or pledge of the property consigned by delivery of the bill of sale to the purchaser or pledgee as completely as if the property were, in fact, delivered. If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have acquired by reason of his possession. But if the bill of lading be transferred, by way of sale or pledge, to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him." See, also, Hobart v. Littlefield, 13 R. I. 341. In passing upon the transferability of bills of lading by delivery, in Allen v. Williams, 12 Pick. 297, Shaw, C. J., in delivering the opinion of the court, said: "Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs." That case was followed with approval in Bank v. Dearborn, 115 Mass. 219. In each of those cases the consignor had simply taken the carrier's receipt for the goods, and it was held that the transfer of the receipts by delivery without indorsement was a symbolical delivery of the goods covered by the receipts, and transferred to the transferee all interest the consignors had in the goods at the time of the transfers of the receipts. In Bank v. Crocker, 111 Mass. 163, it was held that a bill of lading transferred by delivery passed to the transferee all of the interest of the pledgor or consignor in the goods covered by the bill. A similar ruling was

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made in Bank v. Bangs, 102 Mass. 291; Railroad Co. v. Phillips, 60 Ill. 190; Phelps v. Bank, 2 Mc-Gloin, 19.

If the title to these sugars vested in the purchasers when delivered on board of the vessel in pursuance of the contracts of purchase, then the fact that the bills were retained by the vendors could not and did not affect the title to property which had already passed from them; and it matters not that, both by the statutes of Louisiana and Missouri, the carrier is forbidden to deliver goods to any one but the person having the bill of lading. This is a question between purchasers of the goods and the carrier.

The right to examine the sugar by the consignee in the one instance, and of approval in others, before payment of the purchase price, was not a condition in favor of the vendors, or of which they could avail themselves, but was a condition in favor of the purchasers only. The vendors had done all, under the circumstances, they could do, or that the law requires, to complete the sales on their part.

When goods are consigned, and the right of disposition is retained in the consignors by the bill of lading, then the delivery of the bill without indorsement, for value, transfers the property in the goods included in the bill. Such is the legal effect of a bill of lading for goods consigned to a factor for sale on account of the consignor, as in such case there is no sale of the property before the transfer of the bill. Bank v. Homeyer, 45 Mo. 145; Valle v. Cerre's Adm'r, 36 Mo. 576; Holmes v. Bank, 87 Pa. St. 525; Bank v. Jones, 4 N. Y. 497; Bank v. Wright, 48 N. Y. 1; Allen v. Williams, 12 Pick, 297; Jordan v. Pennsylvania Co., 31 Alb. Law J. 250; Emery v. Bank, supra. The same rule applies in case of sale, if the right to dispose of the property is retained in the consignor by the bill of lading. Weyland v. Railroad Co., 75 Iowa, 578, 39 N. W. Rep. 899.

Under the contracts with respect to lots numbered 1, 2, 3, and 4, the first two lots were to be delivered on the levee in St. Louis, and the last two in said city, no other place being named. Notwithstanding the bills of lading for these sugars were also made in favor of the respective consignees, the contracts not only show that they were to be delivered in St. Louis, but also show that they were sold at about one cent on the pound in advance of others sugars shipped at the same time under contracts to be delivered on the vessel, which tended to show, aside from other facts and circumstances in evidence, that the consignors retained title thereto, and that they were shipped at their risk. If so, while in transit the carrier was their agent. 2 Benj. Sales (3d Am. Ed.), § 925; Dunlop v. Lambert, 6 Clark & F.600. This, however, is a matter depending largely upon the intention of the consignors, and a question for the consideration of the court or jary. A bill of lading is understood to be a symbol of the property for which it is given, and,

when in favor of the consignor, his agent or factor, is transferable by delivery without indorsement, for value, and when so transferred, carries with it the property in the goods which it covers. Authorities supra. This is according to the law merchant, which prevails in the State of Louisiana, as in the State of Missouri. Phelps v. Bank, 2 McGloin, 19. By it the bills of lading are the representatives of the property for which they were given, and their delivery to the interpleader a symbolical transfer to it of whatever title, if any, the consignors had in the sugars at the time; subject, however, to any legal or equitable defenses the consignees may have had as against the consignors. And if a bill of lading in favor of the consignee, although such consignee be the agent or factor of the consignor, may be transferred by the consignor by delivery for a valuable consideration, we can conceive of no reason, in the absence of statutory inhibition, why such bill in favor of a consignee who is a purchaser, when retained by the consignor, may not be transferred in the same way. We can see no difference in principle. If extraneous evidence is admissible in the one case to show the real intent of the consignor as to the retention of the title of the goods covered by the bill in the one case, it must be in the other. Section 2482, Rev. St. La., does not, as supposed, provide that the only means of the transfer of a bill of lading shall be by indorsement. The law merchant is part of the common law. By it bills of lading are transferable by delivery, and statutes in derogation thereof should be strictly construed. Crowell v. Van Bibber, 18 La. Ann. 637. Therefore the statutes of the State which provide that indorsement and delivery of bills of lading shall pass title should not be so construed as to mean that such bills may not be transferred by delivery for a valuable consideration. Our conclusion is that the bills of lading were transferable by delivery, subject to the conditions hereinbefore

It is further contended by plaintiffs: That the "interpleader is, at best, in the position of a creditor holding for its security two separate funds, on one of which, only, plaintiffs have a claim. And so, if the defendants had the right to ship, and had shipped, the goods to their own order, and had taken bills of lading accordingly, thus reserving to themselves the jus disponends, and if they had drawn drafts against the bills of lading, and had discounted the drafts, with the bills attached, thus giving the interpleader a lien on the goods, still, when interpleader received notice of the plaintiffs' claim on the goods, it held in its hands money of defendants, which it had the right to apply to payment of the dishonored drafts, and it was bound so to apply it. The interpleader, under such .circumstances, cannot touch the property on which the plaintiffs have a lien until it bas exhausted the other fund on which plaintiffs have no lien." That the bank did not obtain absolute title to the goods, and



will hold, if it gets the fund, in trust for Meyer & Co.; and, as such trustee or baflee the bank is subject to all equitable rules in its treatment of its trust, and its relations to its beneficiary. The rule, in case one lienor has a lien on two different funds, for a debt, and another lienor has a lien on one of the funds only, for a diferent deht, is announced by Mr. Story, in his work on Equity Jurisprudence (13th Ed. § 633), as follows: "The general principle is that if one party has a lien on or interest in two funds, for a debt, and another party has a lien on or interest in only one of the funds, for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the doubled fund." But it does not seem as if plaintiffs are in position to invoke the aid of this equitable doctrine. The fact that they have attached the sugars, and have obtained a judgment against the defendants by publication only, subjecting the sugars to their demand, certainly does not confer upon them any such right. Interpleader claims the sugars by reason of the transfers of the bills of lading, while plaintiffs claim them under attachment levied upon them as the property of defendants. If they were transferred by the bills of lading by defendants to interpleader, then they were not subject to attachment as the property of defendants, and interpleader must recover in this action. Upon the other hand, if they were not transferred the result must be favor of plaintiffs. There can be no such thing as a lien on the sugars, under the circumstances in this case, in favor of both the interpleader and plaintiffs. Moreover, plaintiffs are only general creditors, having no lien on the property save by attachment, and will hold the proceeds arising from the sale of the property, except that portion, if any, interpleader can show it was the owner of at the time of its seizure under the attachment write It would therefore seem to logically follow that plaintiffs are in no position to ask that interpleader be first required to apply any amount in interpleader bank to the credit of defendants to the payment of their indebtedness to interpleader, before being permitted to recover in this action.

The declaration of law given on the part of interpleader is not in accord with the views herein expressed, and is, we think, erroneous. The judgment is reversed, and the cause remanded to be tried in accordance with this opinion.

Gantt, P. J., and Sherwood, J., concur.

NOTE.—The Legal Character of a Bill of Lading.—Unless my judgment is seriously at fault, the broad gauge opinion of the Missouri court in the preceding case merits wide circulation and careful perusal. It impresses me as being not only directly in line with the current and weight of authority, but, also, what is

still more to the purpose, thoroughly sound in legal principle. For this jurisdiction at least it ought to settle one of the vexatious questions of the present day, namely: What is really the legal character of a bill of lading? Without devoting as much space to that problem as some other expounders have done, Judge Burgess has, I think, announced a rule to which the entire profession may safely tie, more especially if his opinion is read in connection with that of Judge English in the West Virginia case of Neil v. Rogers, 28 S. E. Rep. 702. Both cases arose at about the same time, late in the year 1890; both have been decided within a few days of each other, and there are many points of resemblance between them. As a matter of fact, the West Virginia case was decided in November last, but the opinion was published only within the past month, having been held back for a syllabus by the court. In the Missouri case the material facts were substantially these: The principal defendant, Meyer, a New Orleans merchant, sold about six hundred barrels of sugar, in fourteen different lots, to fourteen different merchants of St. Louis. The goods were all shipped at the same time and by the same carrier, which had been designated by the vendees. The carrier issued fourteen bills of lading, one in favor of each buyer, and delivered them all to the consignor. Attached to each bill of lading was a slip of paper reading thus: "Allow parties to have bill of lading and examine goods." The consignor then drew fourteen drafts, payable to his order, one on each buyer. These drafts were discounted by a New Orleans bank, and, at the same time, the several bills of lading were merely delivered to the bank without indorsement. At Cairo, while in transit, the sugar was attached by Scharff, as being still the property of Meyer. The bank, as holder of the bills of lading, replevied the goods, and reshipped them to St. Louis. Thereupon Scharff again attached the sugar, as being still the property of Meyer, and at the same time garnished each consignee, whereupon the bank intervened, claiming ownership of the goods under the bills of lading. Judge Burgess, in clean and clear cut terms, states the substance of the issue to be adjudicated thus: "The controversy is between the plaintiff, who seized the sugar by attachment as the property of Meyer, and the interpleader, who claims under assignment of the drafts and transfer of the bills of lading." . . . "If the title to this sugar passed to the consignees, when delivered on board the vessel, then nothing passed to the interpleader by the transfer of the bills of lading, even admitting that they were transferable by delivery and vested in the transferee all of defendant's interest in the property." The trial court had found that, as a matter of law, the mere delivery of these bills of lading, even though they were not indorsed, and even though they were not drawn in favor of the consignor but were drawn in favor of the consignees, transferred the title of the goods to and vested the same in the bank. The supreme court, on the contrary, holds that, as a matter of law, the title vested in the consignees, by delivery to the carrier. In this, I think, Judge Burgess is clearly right, and that his position is bulwarked on every side by an overwhelming array of judicial authority. Without assuming either to improve upon or to repeat what has been so well said by him, I merely subjoin a few extracts from our latest text-writers, together with the authorities collated by each. For example: At page 542 of his recent treatise on Contracts, Mr. Clark says this: "As regards the negotiability of a bill of lading it differs in some respects from the ne-



gotiable instruments which we have heretofore discussed. Its assignment transfers rights in rem, rights to specific goods, and these, to a certain extent, wider than those possessed by the assignor. Negotiable instruments, on the contrary, merely confer rights in personam. Though the assignee of a bill of lading is relieved of one of the liabilities of the assignor-the liability of the goods to stoppage in transitu—he does not acquire proprietary rights independently of his assignor's title. A bill of lading which has been transferred without authority of the person really entitled gives no (rights even to a bona fide indorsee; and, again, the contractual rights conferred by statute are, as a rule, expressly conferred subject to equities. A bill of lading, then, may be called a 'contract' assignable without notice, partaking in some respects of conveyance, inasmuch as it gives a title to property, but incapable of giving a better title, whether proprietary or contractual, than is possessed by the assignor; subject, always, to this exception: that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage in transitu, which might have been exercised against the consignee," citing Tison v. Howard, 57 Ga. 410; Saltus v. Everett, 20 Wend. 267; Brower v. Peabody, 13 N. Y. 121; Downs v. Perrin, 16 N. Y. 825; Bank v. Shaw, 61 N. Y. 283; Emery v. Bank, 25 Ohio St. 360; Strause v. Wessel, 30 Ohio St. 211; Duncan v. Shipper, 85 Pa. St. 289; Shaw v. R. R., 101 U. S. 557.

Prof. Lawson, at page 240 of his work on Bailments, just from the press, speaks of a bill of lading thus: "It is at once a receipt and a contract. So far as it is a receipt, the bill of lading may be varied or controlled by parol evidence. So far as the agreement to carry and deliver is concerned it is a contract. Like all other contracts the writing becomes the sole evidence of the final understanding, and all antecedent agreements or undertakings are merged therein and extinguished thereby. And like all other contracts it is to be construed according to the legal import of its terms, and cannot be varied, explained or controlled, by oral evidence," citing Wayland v. Mosby, 5 Ala. 430; Cox v. Peterson, 30 Ala. 608; Oppenheimer v. Exp. Co., 69 Ill. 62; R. R. v. Remmy, 18 Ind. 518; Snow v. R. R., 109 Ind. 422; Bank v. R. R., 67 Iowa, 526; Bank v. R. K., 20 Kan. 519; Hopkins v.R. R., 29 Kan. 544; Roberts v. Riley, 15 La. Ann. 103; Wetzler v. Collins, 70 Me. 290; Grace v. Adams, 100 Mass. 325; Pemberton v. R. R., 104 Mass. 144; R. R. Co. v. Cleary, 77 Mo. 684; Wells v. Steam Nav. Co., 8 N. Y. 475; Dorr v. Steam Nav. Co., 11 N. Y. 485; Lang v. R. R., 50 N. Y. 76; Belger v. Dinsmore, 51 N. Y. 166; Collender v. Dinsmore, 55 N. Y. 200; Hinckley v. R. R., 56 N. Y. 429; Kirkland v. Dinsmore, 62 N. Y. 171; Fire Ins. Co. v. R. R., 72 N. Y. 90. And speaking of the circumstances under which, and the time at which title passes from vendor to vendee, Tiffany, at page 83 of his very recent treatise on Sales, says this: "By the modern English rule, when an unconditional bargain is made for the sale of goods in a deliverable state, if nothing is said about payment or delivery, the property passes immediately, so as to cast upon the buyer all future risk, though he is not entitled to possession without payment of the price. In other words, the property passes subject to the seller's lien," citing Simmons v. Swift, 5 B. & C. 862; Tarling v. Baxter, 6 B. & C. 360; Dixon v. Yates, 5 B. & A. 313; Barr v. Gibson, 5 M. & W. 390; "and the general rule in this country is the same," citing Leonard v. Davis, 1 Black, 476; Blunt v. Little, 8 Mason, 107;

Morse v. Sherman, 106 Mass. 430; Haskins v. Warren. 115 Mass. 514; Townsend v. Hargrave, 118 Mass. 825; Wing v. Clark, 21 Me. 366; Phillips v. Moor, 71 Me. 78; Olyphant v. Baker, 5 Denio, 879; Bissell v. Balcom, 39 N. Y. 275; Johnson v. Elwood, 53 N. Y. 431; Brook v. O'Donnel, 45 N. J. 441; Jenkins v. Jarrett, 70 N. C. 255; Sweeney v. Owsley, 14 B. Mon. 413; Barrow v. Winslow, 71 Ill. 214; Bertelson v. Brewer, 81 Ind. 512; Powers v. Dellinger, 54 Wis. 389; Rall v. Lumber Co., 47 Minn. 422. Again, at page 100, he tells us that when a buyer orders goods to be sent to him at his expense, and the seller delivers goods, conforming to the contract to a carrier, for transmission to the buyer, reserving no right of disposal, the appropriation is complete upon such delivery, and title vests at once in the buyer; and in support of this proposition he cites Finch v. Mansfield, 97 Mass. 89; Bank v. Bangs, 102 Mass. 291; Odell v. R. R., 109 Mass. 50; Frank v. Hay, 128 Mass. 263; Smith v. Edwards, 156 Mass. 221; Torrey v. Corliss, 38 Me. 888; Arnold v. Prout, 51 N. H. 587; Hobart v. Littlefield, 13 R. I. 341; Krudder v. Ellison, 47 N. Y. 36; Bailey v. R. R., 49 N. Y. 70; Pac. Iron Works v. R. R., 62 N. Y. 272; Schmertz v. Dwyer, 53 Pa. St. 885; Kelsey v. Ramsey, 55 N. J. L. 320: Magruder v. Gage, 38 Md. 344; Watkins v. Paine, 57 Ga. 50; Pilgreen v. State, 71 Ala. 368; Diversey v. Kellogg, 44 Ill. 114; Ellis v. Roche, 78 Ill. 280; Ranney v. Higby, 4 Wis. 174; Sarbecker v. State, 65 Wis. 170; Garrretson v. Selby, 37 Iowa, 520; Barton v. Baird, 44 Ark. 556. For most obvious reasons, the decision .in Scharff v. Meyer is clearly within the general doctrines laid down by these several text writers. There is no mistaking the meaning of Judge Burgess; no flaw in his reasoning; no escape from his conclusions. As held by him the carrier was the agent, not of the consignor but of the respective consignees. taking the bills of lading Meyer acted, not in his own behalf, not as an owner exercising a proprietary right, but rather, as agent for his respective vendees. Each bill of lading, bearing upon its face the simple legend "allow parties to have B L, etc.," was clearly a muniment of title; but of title in the consignee in whose favor it was drawn, not the consignor to whom it was originally delivered. Meyer received each bill of lading, not as owner thereof, but merely as bailee. By virtue of the dealings between Meyer and the carrier the latter became bailee of the goods, for the respective buyers. By virtue of the dealings between Meyer and the bank, the latter became merely a bailee of each bill of lading, for the consignee in whose favor it was drawn. Such would have been the legal effect of those dealings, even had it not appeared upon the face of each paper that it was to be delivered into the actual and exclusive possession of the buyer. The right of a buyer to inspect and examine the goods he has bought by sample, before being called upon for payment, is incident to every sale. It is a clear legal right, which, can neither be enlarged nor restricted by any peculiarities in the wording of a bill of lading. Had the intervening bank taken any one of those bills of lading as owner thereof, and not merely as bailee, as a muniment of title in itself, and not as a muniment of title in the consignee, there is no principle of natural justice, no rule of the law merchant, by virtue of which the bank could have been required to surrender that muniment of title into the keeping of an-H. S. PRIEST. other.

St. Louis, Mo.



JETSAM AND FLOTSAM.

FEDERAL COURTS FOLLOWING STATE DECISIONS.

The Circuit Court of Appeals of the Seventh Circuit has lately refused to yield its own opinion to a contrary decision of the Supreme Court of Indiana, rendered on the same transaction after the argument and before the decision of the cause in the circuit court of appeals, since that decision seemed to the latter court to be in plain conflict with the weight of authority on the subject, and distinctly inconsistent with the previous decisions of the State court, and the question presented seemed to it to be one that was not balanced with doubt, but clearly to require a decision contrary to that of the State court. Forsyth v. City of Hammond, 71 Fed. Rep. 443.

The question on which the State and federal court differed was the constitutionality of a statute giving an appeal to the courts from the decision by the board of county commissioners of the question of the annexation of a territory by a city; the former holding it constitutional, the latter unconstitutional and void, on the ground that the decision of the question of annexation under the statute involved the exercise of legislative discretion, making its action the performance of a legislative function, which could not be performed by the courts.

In Burgess v. Seligman, 107 U. S. 20, the Supreme Court of the United States laid down briefly the rules defining the extent to which the federal courts are bound by State decisions.

According to these rules, which have been followed implicitly ever since they were thus promulgated, the federal courts decide all questions of general law for themselves, irrespective of the decisions of the State courts on the same questions, giving the latter only so much weight as they choose to allow them. For instance, the question of what is or is not a navigable stream is one of general law, on which the federal courts may exercise an independent judgment. Chisolm v. Caines, 68 Fed. Rep. 285. So is the question whether a carrier can stipulate from exemption from liability for its own negligence. Ellis v. St. Louis, Kansas & Northwestern Ry. Co., 52 Fed. Rep. 903; and whether two employees of the same master are fellow-servants. Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 868. But when the federal courts are called on to construe the general commercial law of a State, in respect of a question which is new to them, they should give due weight (to the prior decisions of the courts of that State, though they are not absolutely bound thereby. Farmer's Natl. Bk. of Valparaiso v. Sutton Mfg. Co., 52 Fed. Rep. 191. So, if rights have accrued before the decision of the State courts on a matter of local law, the federal courts are not bound by the latter, though they are entitled to their consideration. Enfield v. Jordan, 119 U.S. 680; Bolles v. Brimfield, 120 U.S. 759; Barnum v. Okolono, 148 U. S. 393.

On the other hand, questions arising under the local laws of the different States, which are of purely local interest, or which establish a rule of property, are to be decided by the federal courts in conformity to the State decisions; and this is so, even though the States are at variance among themselves on these points: Peters v. Bain, 133 U. S. 670; Randolph v. Quidnick Co., 135 U. S. 457; Chicago Union Bk. v. Kansas City Bk., 136 U. S. 223; May v. Tenny, 148 U. S.:60. Accordingly, if a statute of one State, which has

there received a settled interpretation, is adopted in another State, and there construed differently, the latter construction will be accepted by the federal courts as the true interpretation for that State: Chicago, R. I. & P. Ry. Co. v. Stahley, 62 Fed. Rep. 363.

This rule as to comity is so carefully followed, that the Supreme Court of the United States will follow the construction given to a State statute of limitations by the State courts, before the decision of the State court; Bauserman v. Blunt, 147 U. S. 647, and a lower federal court will reverse its decision that a State statute is unconstitutional in deference to a subsequent decision of the State Supreme court that it is constitutional, if a final decree has not yet been entered in the federal court. Western Union Tel. Co. v. Poe, 64 Fed. Rep. 9. If, however, the right of a litigant in a federal court have arisen under decisions of a State court establishing a rule of property, which has been impaired or overthrown since the accrual of those rights by a later decision of the State Supreme court, the federal court will not consider itself bound by the latter decision but will exercise its own judgment. Chisolm v. Caines, 67 Fed. Rep. 285 .- American Law Register.

WITHDRAWAL FROM BUILDING AND LOAN ASSOCIATION.

Ordinarily a member of a building society is entitled to give notice to withdraw the money he has invested in the society, and upon the notice maturing he ceases to rank as a member of the society. He becomes a creditor, and as such he is entitled to payment in priority to the members. But this right he is entitled to exercise only so long as the building society can be treated as a going concern, and the exact time at which the option to withdraw ceases to exist has been the subject of several decisions, the most recent being the decision of Vaughan Williams, J., in Re The Ambition Investment Building Society, 44 W. R. 141. In Brownlow v. Russell, 8 App. Cas., p. 254, Lord Selborne, C., observed that a winding up order takes away the option which otherwise, if the concern had been a going one, would have belonged to each member, because it puts a close to the whole concern, and cuts off all chance of profit which, if the business had gone on, the members might have had. But it is not necessary that the business should be actually stopped by a winding-up order. It is inequitable that members should be allowed to withdraw after the affairs have got into such a state that the business must inevitably stop. In Carrick v. North British Building Society, 22 Sc. L. Rep. 883, it was held that the rights of members could not be altered inter se so soon as the business must come to and end. In Re Sunderland Building Society, 38 W. R. 509, 24 Q. B. D. 394, Mathew, J., seems to have somewhat altered this statement by saying that the right to withdraw ceased as soon as there was a state of things which, to the knowledge of all concerned, rendered liquidation inevitable; and elsewhere be used the test that it had become "notorious" that the society could not meet its liabilities. The same view was taken by North, J., in Barnard v. Tomson (1894, 1 Ch. 374), but it, of course, makes a great difference whether the date in question is to be fixed by the mere fact of impending cessation of business—a fact which must be known to the officers of the society—or by the members' knowledge of this fact. In point of principle it does not seem that the knowledge of the members is material. It is the

actual state of the affairs of the society which makes it inequitable for one member any longer to gain priority over another, and such actual state of affairs may not be known outside the management of the society. Hence, in Re The Ambition Investment Building Society (supra), Vaughan Williams, J., departed from the test which seems to have been established by recent cases, and held that the right to withdraw ceases so soon as there has been either an actual stoppage of business or a recognition by the officers of the society of the necessity to stop business.—Solicitors Journal, London.

BOOK REVIEWS.

LAWSON ON BAILMENTS.

This is a companion to the same author's work on contracts, and is in style and appearance similar to it. It embraces within one volume a concise statement of the principles of the American law of bailments. After tracing the history of the law of bailments the author hits upon a happy, though not new, division of the subject. First he treats of the ordinary bailment under which is included: 1st. The ballment for the bailor's sole benefit, which includes depositum and mandatum. 2d. The bailment for the bailee's sole benefit, which includes commodatum. 3d. The bailment for the mutual benefit of bailor and bailee, which includes pignus and locatio conductio, with its four divisions. The second division includes the cases of innkeepers, common carriers and other public agencies, upon whom, for reason of public policy, the law has placed a somewhat different liability. Whatever Mr. Lawson does, in the way of authorship, he does well, and the present treatise in no respect creates an exception to the general rule of merit which pervades all his works. Though not an elaborate treatise, it is quite as full as need be for the purpose for which it was undoubtedly designed, viz: to furnish to students a means of acquiring the elementary principles of this very important subject. It is clear in statement and logical in construction. Many cases are cited and discussed. It is a handsome volume of six hundred and fifty pages. Published by the F. H. Thomas Law Book Co., St. Louis.

AMERICAN STATE REPORTS, Vol. 46.

This volume contains a useful note on the subject of limitations upon argument of counsel appended to the report of the case of Yeldell v. State (Ala.). There is also an exhaustive note to the case of Bank of Newport v. Cook (Ark.), on subject of what transactions are usurious. There are also many other cases of importance reported in the volume. Published by Bancroft Whitney Co., San Francisco.

HUMORS OF THE LAW.

A curious typographical error recently appeared in a daily paper. In giving an account of an inquest it was stated: "The deceased bote an accidental character, and the jury returned a verdict of excellent death."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Besort, and of the Supreme, Circuit and District Courts of the United States, except these that are Published in Full or Commented upon in our Notes of Becent Decisions.

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- 1. ACCIDENT INSURANCE—Death by Inhaling Gas.—A provision of an accident policy that it "does not insure against death or disablement arising from anything accidentally taken, administered, or inhaled, contact of poisonous substances, inhaling gas, or any surgical operation," does not relieve the insurer from liability for death caused by inhaling illuminating gas which accidentally escaped into an hotel room where the insured was sleeping.—MENNEILLEY V. EMPLOYERS' LIABILITY ASSUR. CORP., N. Y., 43 N. E. Rep. 54.
- 2. ACTION Venue.—An action to recover the purchase price of land, to have such amount declared a lien thereon, and the property sold in satisfaction of the claim, is properly brought in the county where the land is situated, though defendant resides elsewhere.—MACKEY V. CRAIG, Ind., 48 N. E. Rep. 6.

- 3. ADMINISTRATION Administrator of Mortgagee.—
 An administrator receiving as assets of the estate of his decedent a promissory note secured by mortgage, and having obtained a judgment on the note and a decree of foreclosure, may bid in the land at the foreclosure sale as administrator in satisfaction of the indebtedness, wholly or in part, and the sheriff's deed will pass the title to him as administrator.—BRIGGS V. CHICAGO, K. & W. B. CO., Kan., 48 Pac. Rep. 1181.
- 4. ADMINISTRATION—Appointment of Temporary Administrator.—Under Rev. St. 1889, § 18, providing that, if a will be contested, letters of administration shall be granted to some person, who shall take charge of the estate during the time of such contest, the probate court has jurisdiction to suspend an executor and appoint a temporary administrator, pending a contest of the will in the circuit court.—ALDERSON v. MOEHLEN-KAMP, Mo., 34 8. W. Rep. 468.
- 5. ADMINISTRATOR-Estates in Two Commonwealths. -An intestate who lived in Connecticut owned real and personal property there, and real property in Massachusetts. An administrator was appointed, to act as such in both States. A debtor living in Massachusetts presented his claim in Connecticut, but the court refused to allow it, except subject to the priorities of the Connecticut debts; and, after payment of claims to Connecticut creditors, the balance of the estate there was distributed. Afterwards the administrator obtained a license from the probate court in Massachusetts to sell the property for payment of debts, and the heirs had notice of the petition, as well as of the distribution of the Connecticut property. The property was sold, and applied to payment of such debt, and others, in Massachusetts: Held, that the sale could not be attacked in a collateral proceeding to confirm a report of the administrator .- COWDEN V. JACOBSON, Mass., 48 N. E. Rep. 96.
- 6. ADMINISTRATOR Executors—Settlement.—Where two names are signed to a note, the presumption is that the signers are comakers, and equally bound, and therefore, in the absence of proof that they were not comakers, the executrix of one is not entitled to a credit for money paid the other to reimburse him for a payment of one-half the note.—JACKSON v. WOOD, Ala. 19 South. Rep. 812.
- 7. ALTERATION OF NOTE Reception in Evidence.—Where a promissory note is offered in evidence, and it is apparent from an inspection that there has been a material alteration of it, generally it may be received. Whether so altered prior or subsequent to its execution and delivery is a question, finally, for the determination of the trial court or the jury, as is any controverted fact in the case, from a consideration of all the competent evidence adduced by the parties explanatory or tending to settle the disputed point.—GOODWIN V. PLUGGE, Neb., 66 N. W. Rep. 407.
- 8. APPEAL-Review-Inadequate Damages.—In a personal action for damages a new trial will not be granted on the sole ground of the smallness of the damages awarded, unless the verdict appears to have been the result of passion or prejudice.—Dowd v. Westinghouse Air.-Brake Co., Mo., 24 S. W. Rep. 498.
- 9. ARBITRATION AND AWARD Terms of Submission.
 —In an action on an award, where it appears that the
 arbitrators were required to make the award in writing under their hands, and deliver to the parties a
 copy thereof, on or before a certain date, it is incumbent on plaintiff to establish these several facts, or
 show a waiver by defendant.—Anderson v. Miller,
 Ala., 19 South. Rep. 302.
 - 10. Assignment for Benefit of Creditors.—Sess. Laws 1885, p. 43, § 4, providing that in general assignments the assent of the creditor shall be presumed, does not raise a conclusive presumption of assent, and thereby prevent a creditor from acquiring by attachment, before notice of the assignment is recorded in the county in which the attached land is situated, a lien superior to the title of the assignee.—THATCHER v. VALENTINE, Colo., 43 Pac. Rep. 1082.

- 11. ASSUMPSIT—Pleading—Admissions.—In an action for labor performed, an answer admitting that the labor was performed, but alleging payment and denying that defendant owed plaintiff the amount sued for, or any part thereof, does not admit that the sum sued for is due plaintiff, so as to entitle him to judgment.—Young v. Green, S. Car., 23 S. E. Rep. 981.
- 12. Assumpsit Pleading and Proof.—In an action solely for money alleged to have been collected by the defendants, to whom, as attorney at law, the collection of the same had been intrusted, a recovery for damages resulting from an unauthorized appearance by defendants as attorneys at law in an action entirely independent of the aforesaid collection cannot be sustained.—Scott v. Kirschbaum, Neb., 66 N. W. Rep. 443.
- 18. ATTACHMENT—Debt not Due Garnishment.—An action can be brought, under section 280 of the Code, on a claim, before it is due, only for the purpose of having an attachment of the property of the defendant on the grounds specified in the statute. If there is no attachment of property the action fails.—CHARLES P. KELLOGG & CO. V. HAZLETT, Kan., 43 Pac. Rep. 967.
- 14. ATTACHMENT Intervention Evidence.—One claiming ownership of property as against attaching creditors of a former owner, there being no actual change of possession, must prove not only an actual sale and transfer of the property to him, but also that it was made in good faith and upon sufficient consideration.—Tullis v. McCall, Kan., 43 Pac. Rep. 980.
- 15. Bail Bond Defenses Demurrer.—This action was instituted in the name of the State, as plaintiff, upon a bail bond given by the defendants in a criminal action. A demurrer to the complaint was interposed by the defendants, which was by the court, on motion, stricken out as frivolous, and judgment rendered for the plaintiff: Held, that the demurrer was so clearly and plainly without merit that the court was justified in treating it as frivolous, and rendering judgment upon the complaint.—STATE v. NEWSON, S. Dak., 66 N. W. Rep. 468.
- 16. Banking Collections Negligence.—A bank, which has a draft for collection, will not be excused for negligence in sending it direct to the drawes, instead of through a third person, if it would have been collected had it been sent, at the time it was sent, to a third person, though, had the bank delayed sending it as long as it might have without negligence, it would not have reached its destination in time to be collected.—First NAT. BANK OF CORSICANA V. CITY NAT. BANK OF DALLAS, Tex., 34 S. W. Rep. 459.
- 17. Banks—Charter Exemption from Taxation.—A provision in a bank charter that it shall pay to the State an annual tax of one-half of 1 per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes, exempts the shares, but not the corporation and its property, from further taxation.—Shelby County v. Union & Planters' Bank, U. S. S. C., 16 S. C. Rep. 558.
- 18. Banks—Stockholders' Liability.—Under Constart. 12, § 11, providing that stockholders "of any banking corporations shall be individually and personally liable for all contracts, debts due or engagement of such corporations accruing while they remain stockholders, to the extent of the amount of their stock, in addition to the amount invested in such shares," a stockholder's liability is secondary, and cannot be enforced by the corporate creditors, independent of any action against the corporation.—Wilson v. Boote, Wash., 43 Pac. Rep. 989.
- 19. BOND—Evidence.—In an action on a bond, where the bond is not offered in evidence, and there is no proof of its contents, the court should direct a verdict for defendants.—HERROD V. STATE, Ind., 43 N. E. Rep. 145.
- 20. BOND—Pleading—Admissions.—In an action on a bond conditioned on the accounting by a public officer of public funds intrusted to him, a special pleasileging that the instrument was not a bond, but merely

a private writing, does not admit liability thereon as a private writing, and waive the defense under the general issue, which was pleaded, that the defalcation did not occur during the term of office for which the bond was given.—BOARD OF ADMINISTRATORS V. Mc-KOWEN, La., 19 South. Rep. 528.

21. CANCELLATION.—An assignee in insolvency has no standing to maintain an action to set aside an absolute deed, made without consideration, by the insolvent, at a time when he had no creditors, there being no allegations of fraud, nor any upon which to found an express or implied trust—BABCOCK V. CHASE, Cal., 34 S. W. Rep. 1105.

22. Carrier is not liable for loss or injury to property after delivery to a succeeding carrier, where the contract expressly limits its liability to its own line.—SMITH v. AMERICAN EXP. Co., Mich., 66 N. W. Rep. 479.

23. CARRIERS OF PASSENGERS—Passenger Stations.—A railroad company was liable for injury to one who fell through a hole in the floor of the toilet room of its passenger station, opening off the waiting room, where the person had frequently used the toilet room before, and did not know of its dangerous condition, and was at the station to take a train, for the departure of which the station had been opened, though the toilet room was without any light, except that from a light in the ticket office, adjoining the waiting room.—Jordan v. New York, N. H. & H. R. Co., Mass., 48 N. E. Red. 111.

24. CARRIERS—Passenger Carried Beyond Destination.—A railway passenger carried beyond the point of destination is still entitled to be treated as a passenger; but, unless the occurrence was due to the fault or negligence of the carrier, it is entitled to collect fare, and on refusal, may rightfully eject the passenger, who has no right to demand to be carried to a station.—SCOTT V. CLEVELAND, C., C. & ST. L. RY. CO., Ind., 48 N. E. Rep. 183.

25. CARRIERS—Passengers—Contributory Negligence.—While the conductor is supreme in authority on a railway train, and may by force compel a passenger to remain in the cars provided for passengers, yet his duty to the passenger does not require him to do so. A request is sufficient, and, if unheeded, and an injury to the passenger results, the carrier is not liable therefor.—Aufdenburg v. St. Louis, I. M. & 8. Rt. Co., Mo., 34 S. W. Rep. 485.

26. CARRIERS—Trespassers—Authority of Brakeman.—A freight train brakeman has implied authority to eject trespassers and apparent trespassers from the freight cars of the train.—BREWIG V. CHICAGO, ST. P., M. & O. RY. CO., 66 N. W. Rep. 401.

27. CHATTEL MORTGAGE — Chattels—Right to Use.—One who takes possession of mortgaged chattels in order to satisfy his lien thereon by means of notice and sale in the manner prescribed by law does so with the implied obligation to proceed without unreasonable delay, and with due regard for the rights of the mortgagor.—MURRAY V. LAUSHMAN, Neb., 66 N. W. Bep. 413.

28. CHATTEL MORTGAGE—Increase of Stock.—A chattel mortgage on all the cows and calves of the mortgagor, or that may be "raised" on his farm during the season, is broad enough to cover calves from the cows mortgaged, which they carried at the time the mortgage was given.—CLEVELAND v. KOCH, Mich., 66 N. W. Rep. 376.

29. CHATTEL MORTGAGE—Retention of Possession.—A chattel mortgage on three stallions, kept for breeding purposes, in which it is provided that the mortgaged property until default, or the purchaser deems himself insecure; and which also contains the following provision: "Party of the first part has the privilege to sell one or all of said stallions, the proceeds of said sale to be applied in payment of said notes," —where possession of the mortgaged property

is retained by the mortgagor, is inoperative and void as to other creditors.—RICHARDSON v. JONES, Kan., 43 Pac. Rep. 1127.

80. CHATTEL MORTGAGE — Validity of Affidavit.—A chattel mortgage had annexed thereto an affidavit made in Pennsylvania before a notary public of that State, but the jurat did not contain a recital that the officer taking the affidavit was a notary public, as provided for in section 5 of the oaths act (Revision, p. 740): Held, that the mortgage had annexed thereto an affidavit, within the meaning of section 4 of the chattel mortgage act (Supp. Revision, p. 491), and was not void, as to the creditors of the mortgagor, for lack of such recital in the jurat.—MAGOWAN v. BAIRD, N. J., 33 Atl. Rep. 1064.

81. CHATTEL MORTGAGES—Rights of Mortgagee.—The holder of a chattel mortgage on property which is sold by another creditor of the mortgagor, under atachment proceedings, by order of court, before judgment, does not lose his rights under his mortgage by buying the property at such sale, and may intervene in the attachment suit, and have his lien applied to the proceeds of the sale.—Ballinger Nat. Bank v. Bryan, Tex., 34 S. W. Rep. 461.

32. CLAIM AND DELIVERY—General Denial.—Under a general denial in an action in claim and delivery against a sheriff, the defendant may show that the goods in controversy are the property of a third person, and that his possession is rightful by virtue of a writ of attachment under which said property was seized.—CONNER V. KNOTT, S. Dak., 66 N. W. Rep. 461.

83. CONFLICT OF LAWS — Contracts. — Plaintiff sold horses to defendant in New York State, the price to be paid in that State. Subsequently defendant sent to plaintiff, from Massachusetts, part of the price in cash and his notes, made and payable in Massachusetts, for the balance, which were subsequently renewed: Held, in an action for the balance of the price, in determining whether the notes were taken as payment, the law of New York governed.—Tarbox v. Childs, Mass., 48 N. E. Rep. 124.

34. Conflict of Laws—Liability of Wife's Separate Estate.—Where a married woman domiciled in North Carolina makes a contract solvable in another State her liability thereon can be enforced in North Caroline only in the same cases in which it could be enforced if the contract were solvable in such State.—HANOVER NAT. BANK V. HOWELL, N. Car., 23 S. E. Rep. 1005.

35. CONTEMPT — Evidence.—Proceedings for a contempt of court, being essentially criminal in their character, a conviction cannot be sustained unless the acts complained of constitute the offense.—BURDICK V. MARSHALL, S. Dak., 66 N. W. Rep. 462.

36. Contract—Performance—Waiver of Objections.—Where, under a contract, plaintiff was to construct an ice house of certain dimensions, and to furnish the ice, and pay the cost of filling the same, and defendant was to do the work of filling, and take the ice at a fixed price per ton, defendant cannot object that there was a variance from the contract in the size of the house, after having used the ice, with knowledge of its true dimensions, without objection.—HUTCHINS v. WEBSTER, Mass., 43 N. E. Rep. 186.

37. CONTRACT—Pleading and Proof.—Where a complaint in an action to recover for work and materials alleges that they were furnished under a contract, which fact is not denied by defendant, the only issue made being as to the contract price, it is error to admit evidence of reasonable value.—FLADUNG v. Dawson, Cal., 43 Pac. Rep. 1107.

38. CONTRACT — Tender of Performance.—Under a contract for the exchange of stocks on the demand of one party, his demand and offer to produce the stocks on his part—his ability to do so being shown—is a sufficient tender of performance, where the other party refuses the exchange and denies the contract.—EAMES V. HAVER, Cai., 43 Pac. Rep. 1120.

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- 89. CONTRACT—Waiver of Conditions.—In an action on a contract for cutting, skidding, and drawing logs, where it appeared that plaintiff had not completed the drawing, it was error to instruct that defendant's default in payment excused the plaintiff from further performance, where there was evidence that plaintiff had waived the contract conditions for payment by continuing performance after default was made, and accepting part payment of sums due under the contract.—BEAN V. BUNKER, Vt., 83 Atl. Rep. 1069.
- 40. CONTRACT WITH DECEDENT Specific Performance—Marriage.—A parol agreement between a man and woman, in contemplation of their marriage, that the man shall have the control and custody during minority of the infant son of the woman, and, in return, shall make the child his heir, sharing equally with his own children, when followed by the marriage, and under which the man received the services of the child during his minority, may be enforced by the child as to its testamentary provision, against the legal heirs of the promisor.—NOWACK v. BERGER, Mo., 34 S. W. Rep. 489.
- 41. CONTRACTS—Attorney's Lien.—An offer by an attorney to his client, in regard to contemplated actions against certain insurance companies, provided for certain fees, and recited that "these respective sums are to be full compensation for all services growing out of or rendered in the insurance matter:" Held, that such offer covered all work performed by the attorneys not only in the trial court, but also in the appellate court, on appeal by the insurance companies.

 —NIAGARA FIRE INS. Co. v. HART, Wash., 43 Pac. kep.
- 42. CONTRACTS—Performance—Architects.—Under a contract with an architect to furnish the necessary drawings, specifications, and details for the construction of a building for a certain percentage on the total cost of the construction of the building, the architect, after furnishing the drawings, etc., is not limited, in case his employment is terminated before the construction of the building is completed, to a recovery of the percentage on the cost of the building in so far as it was at the time completed.—HAVENS V. DONAHUE, Cal., 43 Pac. Rep. 962.
- 43. CONTRACTS—Personal Liability. Where, in a building contract, "the parties of the first party herewith promise and agree for themselves, their heirs, executors, administrators, to pay," etc., they are individually liable, though the contract recite that it is "by and between the trustees and building committee," of a church and the party of the second part.—LANDY-SKOWISKI V. LARK, Mich., 66 N. W. Rep. 372.
- 44. Constitutional Law-Auditing Claims Against State.—The exercise by a State of the power to repeal a grant of authority to its courts to audit claims against itself does not violate the obligations of contracts entered into by the State at a time when the power existed.—Baltizer v. State of North Carolina, U. S. S. C., 16 S. C. Rep. 500.
- 45. CONSTITUTIONAL LAW—Legislative Powers—Office.

 —The office of county treasurer having been, under the law existing previous to the adoption of the constitution of 1863, recognized as a county office, and that office not having been abolished, but on the contrary recognized by that constitution, it became and was thereby established as a constitutional office, and could not thereafter, while that constitution was of force, be abolished by an act of the legislature.—MASSENBURG V. BOARD OF COMMES. OF BIBB COUNTY, Ga., 28 S. E. Red. 988.
- 46. Constitutional Law—School Districts—Indebt-edness.—Const. art. 8, \$6, declaring that no school district shall become indebted, to an amount exceeding 11-2 per centum of its taxable property, "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose," does not require the express assent of the legislature to the holding of such election, but is self-executing, so far as to allow

- the question of extending the debt limit to be voted on at an election called by the officers of the school dis trict, in accordance with existing general enactments regulating the holding of annual and special school district elections.—HOLMES & BULL FURNITURE CO. V. HEDGES, Wash., 48 Pac. Rep. 944.
- 47. CONSTITUTIONAL LAW—Special Legislation—Elections.—St. 1895, p. 207, regulating the holding of primary elections, which is made applicable only to counties which cast a certain number of votes at the last election, which makes it applicable to only two counties, is unconstitutional as special legislation.—Marsh v. Hanley, Oal., 43 Pac. Rep. 975.
- 48. Constitutional Law-Title of Act.—Sess. Laws 1887, p. 289, § 10, providing that "the money or other benefit, charity, relief or aid to be paid, provided or rendered by any corporation authorized to do business under this act, shall not be liable to attachment or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder, or any beneficiary named therein," is germane to the subject expressed in the title—"An act relating to life and casualty insurance on the assessment plan"—and is therefore constitutional.—Burton v. Snyder, Colo., 43 Pac. Rep. 1005.
- 49. CONVERSION—Buying or Selling Stolen Property.

 —One who buys or sells stolen property, though on commission, acting for another as a broker, is liable to the true owner for its conversion. The question of good faith is not involved, a wrongful intent not being an element of the conversion.—FORT V. WELLS, Ind., 43 N. E. Rep. 155.
- 50. CORPORATION Account Stated Services by Director.—In an action by a director of a corporation for compensation for services rendered by him to the corporation under an implied contract, evidence is admissible on the part of defendant corporation to show to what extent plaintiff was interested as stockholder, usage of defendant as to compensation paid to directors, and an agreement between the original incorporators that no salaries should be paid to officers.—MCCAETHY V. MT. TECARTE LAND & WATER CO., Cal., 43 Pac. Rep. 956.
- 51. CORPORATION Foreign Insurance Companies—Right to Sue.—A foreign insurance company, which has failed to comply with the laws so as to authorize it to do business in the State, cannot sue to recover premiums on policies issued in another State on property situated in the State.—COWAN V. LONDON ASSURANCE CO., Miss., 19 South. Rep. 298.
- 52. CORPORATION—Liability of Third Persons Aiding Promoters.—Appellants entered into an agreement with their codefendants whereby the latter were to form a corporation to purchase a tract of land; the promoters to represent to the stockholders that they would be compelled to pay \$23,000 for the land, whereas in fact the land was to be purchased for about \$13,000; appellants to receive as a consideration a portion of the \$10,000 profits made by the promoters: Held, that appellants were, equally with the promoters, liable to the corporation for the money received from it by the fraud in excess of the \$13,000.—FOUNTAIN SPRING PARK CO. V. ROBERTS, Wis., 66 N. W. Rep. 399.
- 58. CORPORATION—Non-resident Corporation—Voluntary Appearance.—A non-resident corporation which cannot be served, and which does not intend to become a party, is not to be considered as making a voluntary appearance so as to justify the court in making it a party to the record merely because it assumes the defense of the suit for the actual defendant pursuant to previous contract, and conducts the same by its own attorneys, and in part by witnesses who are under salary from it at the time of testifying.—BIDWELL V. TOLEDO CONSOL. ST. BY. CO., U. S. C. C. (Ohio), 72 Fed. Rep. 10.
- 54. CORPORATIONS—Authority of Officers.—Authority to an officer of a warehouse company to sign receipts

for cotton deposited with the company does not authorize him to issue receipts in his own favor, even for cotton actually deposited by him.—HANOVER NAT. BABK OF CITY OF NEW YORK V. AMERICAN DOCK & TRUST CO., N. Y., 48 N. E. Rep. 72.

- 55. CORPORATIONS—Debts Due Laborers—Stockholders.—Rev. St. § 1769, providing that the stockholders of every corporation, other than railroad corporations, shall be personally liable for all debts that may be due and owing to laborers for services performed for such corporation, is not restricted in its operation to services performed in the State of Wisconsin.—CLOKUS V. HOLLISTER MIN. CO., Wis., 66 N. W. Rep. 396.
- 56. CORPORATIONS—Diverse Citizenship.—A bill by the stockholders of a corporation, filed to impeach the decree of foreclosure and sale on the ground of collusion and fraud and want of jurisdiction in the court to make it, is an ancillary suit, and a mere continuation of the main suit, so far as the jurisdiction of the circuit court, as a court of the United States, is concerned.—CARRY V. HOUSTON & T. C. RY. CO., U. S. S. C., 16 S. C. RED. 537.
- 57. CORPORATIONS—Insolvency—Trust Fund.—A corporation, while insolvent in fact, is a "going concern," so that its assets are not a trust fund for creditors in general; but a creditor may, by proper and diligent proceedings, acquire a priority thereon, where, though its mill and contents have been burned, it is transacting its business in the ordinary way, so far as it can under the circumstances, collecting what is owing it, paying debts from time to time when demanded, though not paying in every instance, holding corporate meetings, and at those meetings considering its affairs.—Buchaman v. Barnes, Tenn., 34 S. W. Rep. 425.
- 58. CORPORATIONS—Summons—Service.—A return on a summons in an action against a corporation, reciting a service upon C, "a trustee, being the defendant named in said summons," by delivering to C, trustee, a copy of the summons, for the defendant, is fatally defective, for failure to show that C was a trustee of the defendant corporation.—MATHIAS V. WHITE SUL. PHUR SPRINGS ASSN., Mont., 48 Pac. Rep. 921.
- 59. CORPORATIONS—Stock Issued Without Authority.—Where brokers, before selling a certificate of stock on account of the corporation's transfer clerk, by whom it was delivered to them, inquired of the corporation, and were informed that the certificate was genuine, when in fact it was not, the corporation is liable for damages sustained by the brokers, who guaranteed the genuineness of the certificate as required by a rule of the stock exchange.—JARVIS V. MANHATTAN BEACH CO., N. Y., 48 N. E. Rep. 68.
- 60. COUNTIES—Commissioners—Court House.—There being no statutory authority, the commissioners of a county have no power to rent the court house, owned by the county, or any part of it, for private use, or in any manner to bind the county to assume the relation and responsibility of landlord in respect thereto.—STATE v. HART, Ind., 43 N. E. Rep. 7.
- 61. COUNTIES—Repair of Bridges—Contracts.—Rev. St. 1894, § 2375 (Rev. St. 1881, § 2885), requires county commissioners, when they think public convenience requires a bridge to be repaired, to cause a survey and estimate to be made, and to direct the work to be done; and Rev. St. 1894, § 3276, authorizes them, if the estimate exceeds the ability of the road district in which the bridge is located, to make an appropriation therefor out of the county treasury: Held, that a contract by county commissioners for repairs to a bridge, obligating the county to pay for the same, was void, where it was made without any survey or estimate having been made.—Deweese v. Hutton, Ind., 43 N. E. Red. 14.
- 62. CRIMINAL LAW.—A conviction in a case of assault with intent to rape will not be reversed because the prosecuting attorney offered to show that defendant on several occasions before the commission of the offense charged had committed similar acts, where

- the court refused to permit him to do so.—PEOPLE V. RICKETTS, Mich., 66 N. W. Rep. 483.
- 68. CRIMINAL LAW Adulteration.—An affidavit to charge a violation of the Act of March 20, 1884 (Glauque's Rev. St. § 8805), "to provide against the adulteration of food and drugs," need not charge that an adulterated article of food is sold to be used as human food.—STATE V. KELLY, Ohio, 43 N. E. Rep. 163.
- 64. CRIMINAL LAW—Appeal.—An order denying a motion for a new trial, made after judgment (Rev. St. § 4719), is not a final judgment, nor an order in the nature of a final judgment.—JAOKSON V. STATE, Wis., 66 N. W. Rep. 598.
- 65. CRIMINAL LAW—Assault—Rape.—In a prosecution for assault with intent to commit rape, the intent with which the assault was committed is a question for the jury.—People v. Webster, Cal., 43 Pac. Rep. 1114.
- 66. CRIMINAL LAW—Bail—Corporal Punishment Defined.—Construing Gen. St. 1883, § 972, empowering the supreme court, or a justice thereof, to grant a supersedeas, and also to admit a prisoner to bail in certain criminal cases pending review, "provided, however, that in cases where corporal punishment is inflicted the prisoner shall in no case be bailed," the words "corporal punishment," in the proviso, do not include imprisonment, but are used in the restricted sense denoting punishment upon the body, such as whipping, the statute having been copied from that of an older State, and the proviso being probably of ancient origin.—RITCHEY V. PROPLE, Colo., 48 Pac. Rep. 1026.
- 67. CRIMINAL LAW Bringing Stolen Property from a Foreign Country.—One who steals property in another country, and brings it into this country, is guilty of larceny here, on the principle that the legal possession of the property remains in the true owner, the taking having been felonious, and that every asportation is a fresh taking.—STATE v. MORRILL, Vt., 33 Atl. Rep. 1070.
- 68. CRIMINAL LAW-Dying Declarations.—An instruction that a dying declaration "is given all the sanction of evidence which the law can give to evidence" is erroneous, such declaration not being entitled to as much weight as though the declarant had stated the same facts on the trial, and an opportunity had been given to cross-examine him, and to observe his demeanor.—PEOPLE V. KRAFT, N. Y., 48 N. E. Rep. 80.
- 69. CRIMINAL LAW-Forgery Evidence.—Where accused becomes a witness in his own behalf, and denies writing a document alleged to be a forgery, he may be required on cross-examination to write in the presence of the jury for the purpose of comparison.—BRADFORD V. PEOPLE, Colo., 43 Pac. Rep. 1013.
- 70. CRIMINAL LAW Former Acquittal.—Mill's Ann. 8t. § 1461, providing that on the arraignment of a prisoner it shall be sufficient, without complying with any other form, to declare orally that he is not guilty, does not dispense with former acquittal being pleaded specially, it being necessary at common law, and being provided by section 1467, that all crimes for criminal offenses shall be conducted according to the course of the common law, except when this chapter points out a different mode.—GUENTHER V. PEOPLE, Colo., 43 Pac. Rep. 999.
- 71. CRIMINAL LAW Former Jeopardy.—An acquittal for arson under an indictment alleging the building burned to be that of C is a bar to a prosecution for the burning of the same building under an indictment alleging it to be the building of E, used by C for storing grain therein, as an indictment for arson may allege the building to be the property of either the owner or the person in possession thereof.—STATE v. COPELAND, S. Car., 23 S. E. Rep. 980.
- 72. CRIMINAL LAW—Former Jeopardy.—When the defendant in a criminal action is convicted of the crime charged, and subsequently, on writ of error sued out by himself, procures in this court a reversal of the judgment of conviction, for errors in the charge of the trial court to the jury, he is not entitled to be discharged on the ground that he has once been put in



jeopardy.—STATE v. REDDINGTON, S. Dak., 66 N. W. Rep. 464.

78. CRIMINAL LAW — Homicide — Self-defense.—On a trial for murder, evidence that deceased provoked the quarrer by striking defendant; that defendant, who thereupon bicked up an iron poker to strike deceased, was prevented from doing so, and compelled to lay it down; that defendant, after deceased had started away (intending, in good faith, to depart), picked it up again, followed him, and, on his turning about with an open knife in his hand, when overtaken, struck the fatal blow with the poker,—warrants an instruction denying defendant the right to invoke the doctrine of self-defense.—STIDWELL V. STATE, Ala., 19 South. Rep. 322.

74. CRIMINAL LAW-Incest-Force.—A person may be convicted of incest though he accomplished his purpose by such force as to render him also guilty of rape.

—SMITH V. STATE, Ala.. 19 South. Rep. 306.

75. CRIMINAL LAW—Indictment — Duplicity.—An indictment under Pub. St. ch. 202, § 26, punishing whoever, "with intent to commit larceny, confines, maims, injures, or puts in fear any person for the purpose of stealing from a building," is not bad for duplicity because the allegations as to the acts done contain all the elements of an assault and battery. — COMMONWEALTH V. HOLMES, Mass., 48 N. E. Rep. 189.

76. CRIMINAL LAW-Indictment.—Const. Art. 1, § 11, giving an accused the right to demand the nature and cause of the accusation against him, does not render unconstitutional Hill's Ann. Laws, § 2011, abolishing the distinction between principal and accessory before the fact, and providing that both shall be indicted, tried, and punished as principals, and prevent an accused who procured the commission of a homicide, but who was not present at the killing, from being convicted on an indictment merely charging him with the commission of the overt act.—STATE V. STEEVES, Oreg., 43 Pac. Rep. 347.

77. CRIMINAL LAW—Malice.—"Malice, in common acceptation, means ill will against a person; but, in its legal sense, it means a wrongful act done intentionally, without just cause or excuse."—STATE v. WEEDEN, Mo., 34 S. W. Rep. 473.

78. CRIMINAL LAW—Murder.—If a party brings on a quarrel with another, with no felonious intent or malice, or premeditated purpose to kill or do great bodily harm, and a difficulty results, in which the person with whom he brought on the quarrel assaults the provoking party, or, by overt act, so menaces him as to endanger his life or threaten him with great bodily harm, or so as to induce the belief of the party thus assailed or menaced that he was in danger of death or great bodily harm, and upon reasonable grounds, and he thereupon kills his assailing or menacing adversary, it is not murder.—STATE v. FOUTCH, Tenn., 34 S. W. Rep. 423.

79. CRIMINAL ILAW—Perjury.—In a prosecution for perjury in testifying in a criminal case before the circuit court, it is sufficient to prove for the State, as to the authority of the deputy clerk administering the oath to defendant, that he was acting as cierk.—MASTERSON V. STATE, Ind., 43 N. E. Rep. 189.

80. CRIMINAL LAW — Trespass on Land—Burden of Proof.—It is incumbent on a person indicted, under Code, § 1120, for willful trespass on land, to show by way of defense that he entered under a license, or a bona fide claim of right.—STATE V. GLENN, N. Car., 28 S. E. Rep. 1004.

81. CRIMINAL PRACTICE — Murder — Indictment.—An indictment which charged the making of an assault upon the deceased with premeditated malice and intent to kill, and which charged the shooting, striking, and penetrating and the mortally wounding of the deceased, all with the deliberate and premeditated malice of the defendant, is insufficient to sustain a conviction for murder. To be sufficient it must charge that the unlawful acts by which the homicide was perpetrated, and the killing itself, were all done with the

premeditated design or intention to effect the death of the deceased.—HOLT v. TERRITORY, Okla., 48 Pac. Rep. 1088.

82. CUSTOM—Evidence.—Proof of knowledge is required, to give effect to a custom, unless it is so widely and generally known and so well established as that knowledge thereof may well be presumed.—UNION STOCK YARDS CO. V. WESCOTK, Neb., 66 N. W. Rep. 419.

83. DEED—Delivery—Pleading.—An allegation in a pleading that the grantor "made and executed" a deed includes all acts essential to the completion of the muniment of title—the delivery of the instrument to the grantee, as well as the signature of the grantor.—BROWN V. WESTERFIELD, Neb., 66 N. W. Rep. 439.

84. DEED-Municipal Corporations.—After a conveyance in fee of a strip of land known as a certain avenue, subject only to an easement in the public for road purposes, the grantor has no interest therein which he can convey to a subsequent grantee.—SOUTHERN CAL. RY. CO. V. SOUTHERN PAC. R. CO., Cal., 43 Pac. Rep. 1128.

85. DEED — Reservation.—A deed in which the description of the property is followed by a reservation of a portion of that described, to be used for a specified purpose, as an alley, operates as a conveyance of the fee of the portion reserved, subject only to the easement declared.—Towne v. Salentine, Wis., 66 N. W. Rep. 895.

86. DEPOSITION - Refusal to Answer Questions .-While the statute governing witnesses subposned to testify in the courts authorizes the imposition of a penalty upon a witness who fails to appear and testify, and talso the commitment of a witness who appears, but refuses to answer proper questions, the latter provision is omitted from that part of the statute relating to witnesses whose testimony is to be taken by deposition (Code, §§ 2801-2822), which applies alike to depositions taken to be used in the courts of the State, and, under certain conditions, to those taken for use in those of another State; and there exists no statutory authority for a court to compel a witness whose deposition is being taken for use either in the courts of this or of another State to answer questions.-Ex PARTE RUCKER, Ala., 19 South. Rep. 814.

87. DESCENT AND DISTRIBUTION — Inheritance per Stirpes.—A died intestate, leaving surviving thim neither issue, nor father, mother, brother, or sister. There were surviving four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister: Held, that under our statute of descent the 12 surviving nephew and nieces took each one-twelfth part of the intestate's per capita, and that the grand nephews and nieces took nothing.—Douglas v. Camberon, Neb., 68 N. W. Rep. 481.

88. DIVORCE—Decree.—A decree granting a divorce may be opened, notwithstanding the person obtaining the divorce has in the meantime been married.—MEDINA V. MEDINA, Colo., 48 Pac. Rep. 1001.

89. EASEMENTS—Construction of Deed.—A deed providing that the grantor, as part consideration, "agrees to open and use as a private alley" a specifically described strip of land, across other land belonging to him to the land conveyed, "to be used as a private alley" as long as the grantee required it, and reserving title to the strip in the grantor, conveys an easement of a private alley way.—Shannon v. Timm, Colo., 43 Pac. Rep. 1022.

90. EJECTMENT — Rights of Holder of Invalid Tax Deed.—In an action for the recovery of possession between the holder of a tax deed and the owner of the land, if the tax deed be adjudged invalid, the holder of the deed if entitled to recover, and the successful party should be adjudged to pay, the full amount of all taxes paid on such land, with interests and costs as allowed by law up to the datejof said tax deed, including the cost of such deed and the recording of the same, with interest on such amount at the rate of 20

per cent. per annum.-Boogs v. RITCHIE, Kan., 48 Pac. Rep. 1144.

- 91. EJECTMENT—Title—Purchase at Sheriff's Sale.— A purchaser of land at sheriff's sale cannot sue for possession of the land before delivery of the sheriff's deed thereto.—Bank of Charleston Nat. Banking Assn. v. Dowling, S. Car., 28 S. E. Rep. 382.
- 92. ELECTION AND VOTERS.—Sess. Laws 1891, art. 190, § 21, provides that no person shall be allowed within the railing of an election room except to vote, or to assist an elector, as thereinafter provided. Section 31 provides that, "in case of necessity," an interpreter may be employed: Held, that where, in a county election, an interpreter hostile to one of the candidates was allowed within the railing of the polling place and conversed freely with foreigners, who only understood their own language, after they had been admitted to vote, although they had not applied for an interpreter, the vote of the entire township should be excluded, where its exclusion would change the result of the election.—MAINARD v. STILLSON, Mich., 66 N. W. Rep. 388.
- 98. EMINENT DOMAIN—Condemnation of Mortgage Lien.—The right of eminent domain cannot be exercised by a railroad corporation with respect to a right of way, when it is already the absolute owner of the land included therein; and condemnation proceedings, had under such circumstances, are ineffective against a mortgage lien placed thereon by a former owner.—CHICAGO, K. & W. RY. CO. v. NEED, Kan., 43 Pac. Rep. 997.
- 94. EMINENT DOMAIN Compensation Damages.—Where land has been condemned for levee purposes, and compensation paid, the owner is not entitled, in the subsequent condemnation of additional land, to damages for injuries to houses allowed by the levee commissioners to remain upon the land theretofore condemned by the subsequent uses to which the land then condemned is required to be put.—BOARD OF LEVEE COMMRS. V. BRINKLEY, Miss., 19 South. Rep. 296.
- 95. EQUITY-Setting Off Judgments.—The jurisdiction of courts of law to set off judgments against each other under the statute does not divest courts of equity of jurisdiction in the same cases.—WHITEHEAD V. JESSUP, Colo., 43 Pac. Rep. 1042.
- 96. ESTOPPEL IN PAIS.—Purchasers of land at foreclosure sale conveyed it by warranty deed to N, who, by like deed, conveyed it to plaintiff. The mortgagor obtained a decree setting aside the decree of foreclosure, the sheriff's deed and the deed to N, for want of jurisdiction by the court rendering such decree, paying into court the amount due on the mortgage, which sum was received by N and paid to plaintiff: Held, that plaintiff and N were estopped from maintaining an action on the warranty in the deed to N's grantors.—SMITHSON LAND CO. v. BRAUTIGAM, Wash., 43 Pac. Rep. 1096.
- 97. ESTOPPEL IN PAIS-Contract.-Plaintiff sold defendant two lots, and delivered to him a deed which he had received for one of them, with a blank for the name of the grantee, and a deed of the other, in which there was also a blank for the name of the grantee. Plaintiff received in exchange a bond of a corporation, which defendant guaranteed. Defendant afterwards sold the lots to plaintiff's grantor, delivering to him the deed which plaintiff had received from such grantor, with the blank for the name of the grantee; and he and his wife executing a deed to such grantor for the other lot after his wife's name had been filled in the deed executed to him by plaintiff: Held, that defendant was estopped from claiming that there was no consideration for his guaranty of such bond, whether the deeds received by him from plaintiff were valid as legal conveyances or not.—GIBBS V. CRAIG, N. J., 88 Atl. Rep. 1052.
- 98. ESTOPPEL—To Claim Conveyance Fraudulent.—A creditor of a vendor is not estopped to assert that the sale was fraudulent because after the sale he made a

- contract with the purchaser to paint buildings on one of the tracts conveyed, and was paid therefor by the purchaser, he having, before the sale, had a contract with the vendor to do such painting; and if it should be assumed that he was estopped as to the property relative to which he contracted, he would not be estopped as to other and distinct pieces of property embraced in the same conveyance.—Geiler v. Little-FIELD, N. Y., 43 N. E. Rep. 66.
- 99. EVIDENCE—Personal Injuries—Res Gestæ.—In an action by an employee against a railroad company for personal injuries caused by being run over by cars, statements by plaintiff as to how the accident happened, made five minutes after he was taken from under the cars, is inadmissible in his favor, as res gestæ.—EASTMAN V. BOSTON & M. R. R., Mass., 48 N. E. Rep. 115.
- 100. EXECUTION SALE—Action to Redeem.—An action to redeem from a sale on execution after the time for redemption has expired cannot be sustained where no facts are alleged tending to show that the proceedings in obtaining the judgment and making the sale were irregular, and there is no averment of an offer or attempt to redeem within the statutory period.—BRYANT V. STETSON & POST MILL CO., Wash., 48 Pac. Rep. 981.
- 101. EXECUTION SALE-Notice.—Under a statute that requires public notice to be given for at least 10 days before an officer can sell property levied upon by virtue of an execution, a sale and delivery thereof upon 8 days' notice is unauthorized, and renders the seizure and all subsequent proceedings the acts of a trespasser from the beginning.—BOWMAN v. KNOTT, S. Dak., 66 N. W. Rep. 467.
- 102. FEDERAL COURTS.—A federal court has no jurisdiction to punish, as a contempt, an act of disobedience to an order which the court intended to make, but which in fact was never entered; or an act which is a violation of a mere oral stipulation made in open court between the attorneys of the parties. Nor can the court make so punishable an act not forbidden by any order or decree at the time it was committed, by afterwards entering a nunc pro tunc order forbidding such act.—Ex Parte Buskirk, U. S. C. C. of App., 72 Fed. Rep. 14.
- 103. FEDERAL OFFENSE—Improper Use of Malls—Scheme to Defraud.—Rev. St. § 5480, as amended by Act March 2, 1889, provides that if any person, having devised or intending to devise any scheme or artifice to defraud by correspondence through the mails, shall, in executing such scheme, place any letter or circular in the post-office, he shall be liable to prosecution: Held, that the fact that the communication placed in the mails by the promoter of a fraudulent investment company contained merely statements as to the future profits which would accrue to investors, and not misrepresentations as to existing facts, did not affect his liability.—Durland v. United States, U.S. S. C., 16 S. C. Rep. 508.
- 104. FRAUDS, STATUTE OF—Leases—Part Performance.—In case of a parol lease of land for a year, to begin at a future date, taking possession and monthly payments of rent thereunder is such part performance as will take the contract out of the statute of frauds.—A. G. RHODES FURNITURE CO. v. WEEDON, Ala., 19 South. Rep. 318.
- 105, FRAUDS, STATUTE OF Surrender of Written Lease.—An executed verbal agreement to surrender a written lease is not within the statute of frauds.—GOLD-SMITH V. DARLING, Wis., 66 N. W. Rep. 397.
- 106. FRAUDULENT CONVEYANCES—Evidence—Possession.—A prima facie case of a sale in fraud of creditors is shown by proof that a husband, after selling property to his wife, continued in full possession and management thereof, as her agent.—HIGGINS V. SPAHE, Ind., 48 N. E. Rep. 11.
- 107. FRAUDULENT CONVEYANCES—Partial Illegality of Consideration.—That a transfer by a debtor in pay-

ment of a just debt was also in consideration that the transferee should not prosecute him for a crime does not render the transfer subject to attack at the instance of creditors as fraudulent.—TRADERS' NAT. BANK V. STEERE, Mass., 43 N. E. Rep. 187.

108. GARNISHMENT—By Whom Maintainable.—Under 8 How. Ann. 8t. § 8058, providing that, "in all cases" where there remains any sum unpaid on "any" judg. ment or decree, garnishment may issue on affidavit of the "plaintiff," his agent, etc., the word "plaintiff" refers to the party moving in the garnishment proceedings, and therefore a defendant who has recovered judgment against the plaintiff may sue out a writ of garnishment.—ESLER v. ADSIT, Mich., 66 N. W. Rep. 485.

109. GARNISHMENT-Interest in Joint Debt.—The defendant's interest in a debt owing to him and another, but not as partners, is subject to garnishment; and upon payment by the garnishee of the full amount of the debt into court, and the appearance of all parties claiming an interest in the money, the court should determine the interest of the defendant, and hold it subject to the garnishment proceedings.—PERRY V. BLATCH, Kan., 43 Pac. Rep. 989.

110. GARNISHMENT — When Lies—Judgment.—Where chattels were sold under an agreement that a third person should pay therefor, and look to the buyer for reimbursement, and that title should remain in the seller, as against such third person, until payment of the price, the buyer is not subject to garnishment by a creditor of such third person to the extent of the price, while it remained unpaid by such third person.—LOCK-WOOD V. RAINEY, Miss., 19 South. Rep. 294.

111. INFANT—Purchase—Necessaries.—A barber shop and chair, and other articles of furniture designed to be used in furnishing a barber shop, purchased by a minor having no means of support, except what he earned, are not necessaries, and he may, therefore repudiate his contract.—RYAN V. SMITH, Mass., 43 N. E. Rep. 109.

112. Injunction—Complainant as a Wrongdoer.—The closing of a private aliey will not be enjoined where it appears that complainant, to enable him to secure the injunction, destroyed the fence closing the aliey, and after it was rebuilt by defendant, without knowledge that the preliminary injunction had issued, again destroyed the fence, and then served the injunction.—DE SALE V. MILLARD, Mich., 66 N. W. Rep. 481.

113. INJUNCTION—Landlord and Tenant—Alteration of Premises.—A lessee will not be enjoined from using openings which he has cut in two floors of the leased building, where the lessor has an adequate remedy by action for breach of contract, and the right to terminate the lease for a violation of its terms.—Brown v. NILES, Mass., 43 N. E. Rep. 90.

114. INSURANCE — Contract — Insurable Interest. — Where a policy of insurance is based on the condition that the assured is the owner in fee-simple, but makes the application a part of the policy, and the insurer accepts a risk, though the application shows that the assured is not the owner in fee, the insurer cannot set up a want of such title to defeat an action on the policy. —DAVIS V. PHEMIX INS. CO., Cal., 43 Pac. Rep. 1115.

115. INSURANCE—Execution of Policy.—An agent holding a commission from an insurance company authorizing him to take risks generally, without placing any limitation thereon, either as to the kind of risks, or as to the territory within which they may be, is a general agent; and the facts that the policy provides that, in any matter relating to the insurance, no person shall be deemed the agent of the company unless authorized in writing, and that the agent's commission states that he shall be subject to the rules of the company, and to such instructions as may be given him from time to time, do not impose on one dealing with the agent a duty to ascertain his authority to issue a policy on a risk extrahazardous, and located in a place other than the town in which is situated the agent's

office.—German Fire Ins. Co. v. Columbia Encaustic Tile Co., Ind., 48 N. E. Rep. 41.

116. INSURANCE—Iron Safe Clause—Warranty.—Where a fire policy is accepted subject to the iron safe clause, set out in a slip attached to it, containing the only description of the insured property, and providing that a failure to comply therewith shall avoid the policy, the provision constitutes a warranty by the insured.—PALATINE INS. CO. V. BROWN, Tex., 34 S. W. Rep. 462.

117. INSURANCE—Live Stock.—A provision in a policy of insurance on a horse, that "if the animal shall become sick or disabled the insured shall notify the company within 15 hours," is valid, and a failure to give the notice within the required time after the sickness is known to an agent of the insured in charge of the horse will preclude a recovery for its death.—SWAIN V. SECURITY LIVE STOCK INS. CO., Mass., 43 N. E. Rep. 165.

118. Insurance—Live Stock — Premature Action.—Under a live stock insurance policy providing that the company, on receiving satisfactory proof of death of the animal, would pay the amount of the policy "in 60 days after the approval of the claim by its executive board," proof of death being waived, and liability being denied by the company on other grounds, action may be brought at once.—WHITTEN v. NEW ENGLAND LIVE STOCK INS. CO., Mass., 43 N. E. Rep. 121.

119. Insurance — Mortgage Clause. — A mortgage clause provision in a policy payable to a mortgagee as interest may appear—that the policy, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor—does not prevent the policy from being invalidated as to the mortgagee on account of misrepresentation by the mortgagor in the application for the insurance; he having, in such matter, acted as the agent of the mortgagee.—American Cent. Ins. Co. v. Cowan, Tex., 34 S. W. Rep. 460.

120. Intoxicating Liquors—Saloons—Evidence.—An affidavit which states that defendant allowed a person under the age of 21 "to loiter and be" in and about a room where intoxicating liquors were sold as a beverage, charges an offense under Acts 1895, p. 250, § 5, which prohibits a person engaged in the sale of intoxicating liquors from allowing any person under the age of 21 years "to loiter" in the saloon or place of business.—Armstrong v. State, Ind., 43 N. E. Rep. 143.

121. JUDGMENT—Collateral Attack—Presumption.—In a collateral attack on a judgment on the ground that defendant was a non-resident of the State, where it appears that the court might have had jurisdiction over him as a transient person within the limits of the State, every presumption will be indulged in favor of the validity of the judgment.—Hambel v. Davis, Tex., 34 S. W. Rep. 439.

122. JUDGMENT—Res Judicata.—A judgment in an action wherein the board of commissioners of a county are plaintiffs is not a bar to another action based on the same facts, but brought by a taxpayer as plaintiff.

—PRICE v. GWIN, Ind., 48 N. E. Rep. 5.

123. LANDLORD AND TENANT—Tenancy—Termination.—A landlord will be held not to have waived defects in a notice given by defendant, his tenant, or to have released him, though he knew the notice was intended to terminate the tenancy, where he continued to make out bills against defendant monthly for rent, and present them, as usual, at the rented store, and gave credit to defendant for payments, and claimed that defendant was still the tenant, though he received payments from defendant's vendee.—WHICHER V. COTTRELL, Mass., 43 N. E. Rep. 114.

124. LIFE INSURANCE—Gift.—A policy of life insurance payable to "the legal representatives of the assured" may be made the subject of a gift, in the same manner as a bond or other moneyed obligation, with the same results.—TRAVELERS' INS. CO. OF HARTFORD, COMM. V. GRANT, N. J., 33 Atl. Rep. 1060.

125. LIFE INSURANCE—Security for Outlawed Debts.—
Though certain notes, to secure which an insurance
policy was taken out on the maker's life, were out-

lawed at the time of the insured's death, they are within a clause in said policy providing that the proceeds thereof were to be applied to the payment of the payee's "then subsisting pecuniary demands."—TOWESEND V. TYNDALE, Mass., 48 N. E. Rep. 107.

126. LIMITATIONS—Concealment of Cause of Action.—
Where moneys of complainant's intestate were fraudulently obtained by defendant by means of an apparent indorsement of a certificate of deposit by intestate, a few days before her death, and when she was incapable, on account of old age and physical and mental infirmity, of transacting business, and the possession thereof was fraudulently concealed by defendant, and not discovered by complainant until a short time before he brought suit for the recovery thereof, as belonging to his intestate's estate, the cause of action was not barred by limitations.—STEBBINS V. PATTERSON, Mich., 66 N. W. Rep. 484.

127. Mandamus—Jurisdiction.—In mindamus against a city treasurer to compel him to pay money on hand in a special fund to the holder of city warrants against such fund, where defendant's term of office expires pending the proceeding, judgment cannot be rendered against him.—Fox v. Trinidad Water Works Co., Colo., 43 Pac. Rep. 1051.

123. MASTER AND SERVANT—Death of Servant.—An employer was not liable for the death of an employee by his falling after having been caught and raised by a rope, part of a hoisting apparatus, which commenced to tighten up just as he was stepping over it, where the employee was fully acquainted with the apparatus, and it was working as usual on the day of the accident, and the servant had been forbidden, and his duties did not require him, to cross the rope.—O'BRIEN V. STAPLES COAL CO., Mass., 43 N. E. Rep. 181.

129. MASTER AND SERVANT—Injury to Employee—Negligence.—When the master intrusts to the superintendent in charge of an excavation the matter of notifying the employees of any latent danger, the foreman in charge of the gangs engaged in the work of excavation are not vice-principals in the absence of said superintendent, so as to render the employer liable for their failure to notify the employee of such danger.—DURST V. CARNEGIE STEEL CO., Penn., 33 Att. Rep. 1102.

180. MASTER AND SERVANT-Injury to Employee-Negligence of Foreman.—Where there was evidence that plaintiff was directed by his foreman to assist in moving certain machinery, and that such foreman assisted personally in the moving, the question whether the latter was a fellow-servant or superintendent was for the jury.—GELONECK v. DEAN STEAM PUMP CO., Mass., 48 N. E. Rep. 55.

131. MASTER AND SERVANT—Negligence.—Where, in an action by a servant for personal injuries alleged to be due to the negligent manner in which defendant loaded timber on a carriage, and also for its failure to keep its "ways" (St. 1887, ch. 270, § 1) in repair, there is evidence to show negligence in loading the timber, refusal of a request for an instruction to find for defendant on the whole evidence does not bring up for review the question whether the road over which the timber was being transported was a part of defendant's ways.—Gagnon v. Seaconnet Mills, Mass., 43 N. E. Rep. 82.

182. MASTER AND SERVANT—Term of Employment—Discharge.—Under Civ. Code, § 2010, providing that "a servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages, a hiring at a yearly rate is presumed to be for one year," an employment at a stated yearly salary, without other agreement as to the time, constitutes a contract for one year, and this will not be changed by the fact of the monthly payment of salary, nor by the custon of the employer, a railroad company, or of all railroad companies, to employ only by the month.— ROSEMBERGER V. PACIFIC COAST RY. Co., Cal., 43 Pac. Beb. 263.

183. MECHANIC'S LIEN - Jurisdiction.-Under Laws 1885, ch. 342, § 7, providing that a mechanic's lien may

be enforced "by a civil action in a court of record in the city or county where the property is situated, which would have jurisdiction to render a judgment in an action founded upon a contract, for a sum equal to the amount of the lien," a county court has jurisdiction to foreclose such lien on property within the county, though defendant resides elsewhere.—RAVEN V. SMITH, N. Y., 48 N. E. Rep. 63.

134. MECHANICS' LIENS—Contract—Abandonment.—Under Pub. St. ch. 191, § 1, giving a lien to a person performing labor or furnishing materials for a building under an agreement with the owner or by his consent, or by the consent of any person acting for such owner, where persons furnish labor and materials with the knowledge of such owner, under an agreement with the contractor, they are not barred of a lien by a provision in the contract that the contractor shall not let any interest in it without the written consent of the architect, though such architect did not give written consent to the contract between the claimants and the contractor.—Wahlstrom v. Trulson, Mass., 43 N. E. Rep. 183.

135. MECHANICS' LIENS—Enforcement—Limitation.—Gen. St. § 2151, providing that no mechanic's lien shall hold the property longer than six months, unless an action be commenced within that time to enforce the same, and section 2152, providing that persons claiming liens on the property may be brought in at any time before trial, merely fix the time within which the action must be brought as against the owner of the land, and do not require, as against third persons claiming liens on the property, that the action to foreclose the lien be brought within the six months.—San Juan Hardware Co. v. Carrothers, Colo., 48 Pac. Rep. 1053.

186. MECHANICS' LIENS — Foreclosure of Mortgage.— When the mortgagor, after foreclosure, remains in possession, under agreement with the purchaser, and contracts for the construction of a building thereon, one furnishing material for the contractor cannot acquire a mechanic's lien therefor, against the purchaser, after the mortgagor has in good faith paid the contractor, as provided by the building contract, for the work done.—ROBBINS V. ARENDT, N. Y., 48 N. E. Rep. 165.

187. MINING PARTNERSHIP.—To constitute a mining partnership, under the provisions of Civil Code 1895, §§ 3850-3859, two or more persons must not only own or acquire a mining claim for the purpose of working it, but must actually engage in working the same; and the fact that one part owner of a claim is charged by another with wrongfully extracting ore from a portion of a vein, the apex of which is alleged to be within the claim, does not create the relationship of mining partners between the partles.—ANACONDA COPPER.MIN. Co. v. BUTTE & B. MIN. Co., Mont., 43 Pac. Rep. 924.

138. MONOPOLY — Action for Accounting.—One who acquired certificates of trust in an illegal monopoly cannot maintain an action against the trustees thereof, for an accounting, where said trustees did not seek to derive any advantage from the illegal agreement, but, in compliance with the wish of the other holders of the trust certificates, the trust was reorganized in the form of a legal corporation, to which said trustees transferred the property in their hands.—UNCKLES v. COLGATE, N. Y., 43 N. E. Rep. 59.

189. MORTGAGE—Construction.—A note and the mortgage securing the same should be construed as parts of one transaction, and the conditions of the mortgage, when not in conflict with the terms of the note, as to the effect of a default in the payment of interest when due, govern the rights of the parties respecting that matter.—Kansas Loan & Trust Co. v. Gill, Kan., 43 Pac. Rep. 991.

140. MORTGAGE FORECLOSURE — Defective Notice.—
Mere inaccuracies in a notice of a mortgage foreclosure
under a power of sale, not calculated to be misleading, are insufficient to invalidate a title acquired thereunder, when the recitals of said notice readily convey

to the mind all that the statute requires to be published.—IOWA INV. CO. v. SHEPAED, S. Dak., 66 N. W. Rep. 457.

- 141. MORTGAGE Husband and Wife—Effect of Signature by Husband.—The signing by the husband of the mortgage by his wife on her separate land bars his right to claim an estateby the curtesy as against the mortgagee and his assigns.—HAYDEN V. PEIRCE, Mass., 43 N. E. Rep. 119.
- 142. MORTGAGE OF WIFE'S SEPARATE ESTATE.—Where a wife gives a mortgage on her land to secure the note of her husband and others, and, on foreclosure of the mortgage, one of the parties buys the land, his purchase inures to the benefit of the wife.—MCCOLLUM V. BOUGHTON, Mo., 34 S. W. Rep. 480.
- 143. MORTGAGE Personal Liability of Mortgagor.— There may be a mortgage without personal liability on the part of the mortgagor, as the mortgagee may agree to look to the land for payment, and may remain liable to account to the mortgagor for any surplus which he receives above his debt, and the estate conveyed may continue subject to redemption, though the mortgager is under no personal liability to the mortgagee.—COOK v. JOHNSON, Mass., 43 N. E. Rep. 96.
- 144. MORTGAGES Foreciosure Sale—Growing Crops.
 —Growing crops pass with the soil to a purchaser at a mortgage sale, where there is no reservation or waiver of the right to the crops at such sale.—SHOCKEY V. JOHNTZ, Kan., 43 Pac. Rep. 998.
- 145. MORTGAGES Forgeries Recording.—Where a mortgagee, after assigning his mortgage and secured notes, forges a like mortgage and notes, and assigns them, one taking them in good faith acquires no rights as against the assignee of the genuine instruments, though the assignment of the genuine mortgage was not recorded till after the assignment of the forged instruments.—LEE v. Kelloge, Mich., 66 N. W. Rep. 380.
- 146. MORTGAGES Growing Crops of Tenant—Estoppel.—Where one became tenant of a defaulting mortgagor without consent of the mortgagee, and the mortgagee, without notice that the tenant had paid part of the rent, agreed with the mortgagor to waive foreclosure if he paid up back taxes and turned over the rent, and, on his offer being rejected, foreclosed, the mortgagee was not estopped from claiming title under his deed as purchaser at the foreclosure sale to crops raised by the tenant, and growing on the land when the deed was delivered.—REED v. SWAN, Mo., 34 S. W. Rep. 483.
- 147. MORTGAGES—Quitclaim as Release.—A quitclaim deed to a mortgagor, by the mortgagee, of the premises covered by the mortgage, cannot be urged as a release thereof, because dated later than the mortgage, where it appears that they were both delivered on the same date, as part of one transaction.—KELLY V. E. F. HALLACK LUMBER & MANUFACTURING CO., Colo., 48 Pac. Rep. 1003.
- 148. MUNICIPAL CORPORATIONS Change of Street Grade.—When the grade of a street is changed, and abutting property damaged by the change, together with all the other property on the street, increases in value from other reasons than the change of grade, until it becomes worth as much after the change as before, that fact does not prevent the owner from recovering damages.—COLE v. CITY OF ST. LOUIS, Mo., 34 S. W. Rep. 469.
- 149. MUNICIPAL CORPORATIONS Contracts of Officers Power.—City authorities having charge of the sale of buildings cannot bind the city by a guaranty giving a permit of removal on conditions different from those prescribed by the city ordinances and the regulations of the board of aidermen.—OSGOOD v. CITY OF BOSTON, Mass., 43 N. E. Rep. 108.
- 150. MUNICIPAL CORPORATIONS Liability on Warrant.—A city warrant, issued in payment for a sidewalk built by the city in front of a lot of a private

- owner, creates an absolute liability against the city, which is payable without regard to the making or collecting of an assessment against the lot improved.—King v. CITY OF FRANKFORT, Kan., 43 Pac. Rep. 988.
- 151. MUNICIPAL CORPORATIONS—Misnomer in Pleadings.—While a municipal corporation should always be sued in its proper name, where it is not so sued, but is sued by an incorrect name, and the defendant answers, and goes to trial without objection, and judgment is rendered, without objection, against the municipal corporation in its proper name, there is no error.—CITY OF KINGFISHERV. PRATT, Okla., 43 Pac. Rep. 1069.
- 152. MUNICIPAL CORPORATION—Ordinance—Licensing Vehicles.—An ordinance licensing vehicles driven on the streets of a city, the revenue therefrom to be used in repairing the streets, is a lawful exercise of police power, though it exacts the same fee from non-resident owners of vehicles as from those residing within the city limits.—Tomlinson v. City of Indianapolis, Ind., 43 N. E. Rep. 9.
- 158. MUNICIPAL CORPORATIONS Public Improvements.—A city, by merely authorizing a contractor to raise the grade of a street, is not liable for the act of the contractor in placing earth on the land of an abuting property owner in making the slope of the fill, in the absence of negligence on the part of the city in the plan of the improvement.—CITY OF BLOOMINGTON V. WILSON, Ind., 43 N. E. Rep. 37.
- 154. MUNICIPAL CORPORATIONS—Treasury Warrants—Payment.—One who deals with a municipal corporation deals with it with reference to the laws regulating the manner in which such corporation shall pay its obligations; and when such person takes a warrant on the city treasury, he is bound to know the law authorizing such city to bond said warrant, and that payment of his warrant may be postponed thereby.—Diggs v. LOBITZ, Okia., 48 Pac. Rep. 1069.
- 155. NATIONAL BANK Distribution of Assets.—The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to Rev. St. §§ 5236, 5242, requiring the assets of an insolvent national bank to be distributed ratably among the creditors, and is therefore inapplicable in the case of a national bank.—DAVIS V. ELMIRA SAV. BANK, U. S. S. C., 16 S. C. Rep. 502.
- 156. NEGLIGENCE Damages from Escaping Gas—Evidence.—In an action against a gas company for damages caused by an explosion of gas escaping from a main broken by reason of the soil settling from underneath the main, evidence of the existence in the street of holes and depressions is admissible to show that the company knew, or should have known, that the street was likely to settle and cause the main to break.—Lewis v. Boston Gaslight Co., Mass., 48 N. E. Rep. 178.
- 157. NEGLIGENCE—Dangerous Premises—Liability of Landlord to Third Person.—One who leased a building for four nights to one whose understood purpose was to give public exhibitions, with the provision that the lessor should take charge of the box office each night until the nightly rental was paid, was liable for injuries, to one about to become a spectator, who was waiting, on a raised platform in front of the building, for the doors to open, which resulted from the fall of the platform because of defects therein.—Oxford v. Imathe, Mass., 48 N. E. Rep. 93.
- 158. NEGLIGENCE Opinion Evidence.—A question asking a witness, in an action based on the contention that defendant was negligent in operating an electric car with but one person in charge, to state from his experience what the general custom was among electric roads, as to the number of men found necessary to manage a car under similar circumstances, does not call for the opinion of witness as an expert, but practically for the opinion of others as inferred from their conduct.—REDFIELD V. OAKLAND CONSOL. ST. EY. CO., Cal., 43 Pac. Rep. 1117.



159. NEGLIGENCE—Scope of Employment.—In an action for personal injuries, it appeared that plaintiff, a boy line years old, was invited by the teamster to ride on defendant's dump cart; that, by request, plaintiff took the reins; that the teamster went to sleep, and plaintiff, having dropped one of the reins, in trying to eatch it, feil off, and was hurt: Held, that the invitation was not within the scope of the teamster's employment.—DRISCOLL V. SCANLON, Mass., 43 N. E. Rep. 100.

160. NEGOTIABLE INSTRUMENT—Indorsement — Parol Evidence.—The words "without recourse," following the name of the first, and preceding the name of a second, indorser of a bill or note, may be shown by parol evidence to apply to the former instead of the latter.—COBBETT v. FETZER, Neb., 66 N. W. Rep. 417.

161. NEGOTIABLE INSTRUMENT—Note—Parol Evidence.
—Where a note is executed by a corporation, and is signed by the board of trustees, extrinsic evidence is admissible between the original parties to show that such trustees executed the instrument in their official capacity as officers of the corporation, and that they signed for the corporation, and that it was the intention of all the parties to the note to make it the obligation of such corporation.—SHAFFER v. HOENSCHILD, Kan., 43 Pac. Rep. 979.

162. NEGOTIABLE INSTRUMENTS—Indorser—Transfer.—The writing on the back of a note by the payee, when transferring the same, of an assignment, above his signature, in the following form "I hereby assign the within note to——," does not exclude or affect his liability thereon as indorser.—Markey v. Corey, Mich., 66 N. W. Rep. 493.

163. NEGOTIABLE INSTRUMENTS—Indorsement Without Recourse.—L and G were the president and the cashier, respectively, of plaintiff bank, and part owners of the negotiable note sued on, which was taken in the name of S by the procurement of L and G, who had full knowledge of the transaction in which it was given: Held, that the indorsement of the note by S without recourse did not operate to transfer it to the bank free from defenses existing as between the original parties to it.—HARDY V. FIRST NAT. BANK OF NEWTON, Kan., 43 Pac. Rep. 1125.

164. NEGOTIABLE INSTRUMENTS—Payable at Bank.—An indorser on a note made "payable at any bank in Boston," is not held by its presentment to a loan and trust company, which is neither a national nor State bank, in the absence of evidence showing a well-established custom to present such notes to trust companies for payment.—NASH v. BROWN, Mass., 43 N. E. Rep. 180.

165. NEGOTIABLE INSTRUMENTS—Signed in Blank.—Where one without authority fills out a note signed in blank, and delivers it to the payee, in an action against the maker ratification of the unauthorized acts by the maker is a complete defense to a plea of non est factum.—BREMNER v. FIELDS, Tex., 24 S. W. Rep. 447.

166. NEW TRIAL—Newly-discovered Evidence.—A new trial for newly-discovered evidence should not be granted on an affidavit which fails to allege that the evidence is not merely cumulative. Nor on one which fails to allege that the evidence could not by diligence have been discovered by affiant in time for trial.—MC-LBOD V. SHELBY MANUF'G & IMP. CO., Ala., 19 South. Rep. 236.

167. NON-NEGOTIABLE NOTE—Election to Declare Due.

—Under a provision in a non-negotiable note that any failure to pay interest when due shall, at the election of the payee, make the principal and interest at once due, the election may be exercised by an assignee thereof.—SEASTRUNK V. PIONEER SAVINGS & LOAN CO., Tex., 34 S. W. Rep. 466.

188. OFFICE AND OFFICERS—Election.—Term of Of-See.—The time of the election of a public officer is the day on which the votes are cast, and not on the day on which the result is officially ascertained and announced.—Proplev. Foldy, N. Y., 43 N. E. Rep. 171.

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169. OFFICER—Clerks of Probate Courts—Acknowledgments.—Under Code. § 7945, cl. 6, authorizing probate judges to employ clerks at their own expense, for whose official acts they shall be responsible, and with certain enumerated powers, such clerk must act in all matters in the name of the judge; and a certificate of the acknowledgment of a mortgage before one as "clerk probate court" does not render the instrument admissible in evidence.—PIONEER SAVINGS & LOAN CO. V. BARCLAY, Ala., 19 South. Rep. 308.

170. OFFICER-Funds-Deposit in Bank.—A county trustee, who is a custodian of public funds, is not an insurer of such funds against loss, but his obligation is to discharge his trust with diligence and good faith; and for a failure to do so, resulting in loss, he and his sureties are liable. It is neither negligence nor want of proper business prudence and caution for a public officer to deposit funds in his custody in a bank of undoubted standing and reputation.—STATE v. COPELAND, Tenn., 34 S. W. Rep. 427.

171. PARTNERSHIP — Ostensible Partner. — Where a person is estensibly, but not actually, a member of a partnership, a creditor of the ostensible firm may maintain a personal action against the ostensible partner for the satisfaction of the claim.—BROADWAY NAT. BANK V. WOOD, Mass., 48 N. E. Rep. 100.

172. PLEDGE — Collateral Security.—The fact that a debtor authorizes his creditor, in case of his death, to take certain life insurance policies from among his private papers, and hold the same as collateral, where such policies are neither actually delivered nor authorized to be taken in his life-time, does not constitute a piedge of the policies as collateral, entitling the creditor to their possession after the death of the debtor.—Heilbeon v. Guarantee Loan & Trust Co., Wash., 43 Pac. Rep. 392.

173. PRINCIPAL AND AGENT—Authority of Agent.—A non-resident agent, authorized by his principal and charged with the exclusive management of a real estate loan business in this State, including the examination of titles and foreclosure of mortgages, has implied authority to direct a local subagent, through whom all the business has been transacted, to retain a lawyer, whenever the interests of his principal demand professional attention.—Davis v. Matthews, S. Dak., 66 N. W. Rep. 456.

174. PRINCIPAL AND SURETY.—A corporation principal, to whom an agent has given bond, owes to his sureties the duty of good faith in informing them of facts coming to its knowledge which may affect their future liability; and while mere negligence of the agent in accounting will not charge it with such duty of giving notice, if it continues him in his position after knowledge of his embezzlement, or of other acts for which the sureties would be liable, without informing them of the facts, it cannot hold them for losses resulting to it from his subsequent misconduct.—ÆTNA INS. CO. V. FOWLER, Mich., 66 N. W. Rep. 470.

175. PRINCIPAL AND SURETY—Action on Appeal Bond.

—The issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain an action against the surety on an appeal undertaking given to enable the judgment debtor to appeal.—JOHNSON V. REED, Neb., 66 N. W. Rep. 405.

176. PRINCIPAL AND SURETY—Right to Securities.—A surety is entitled to the benefit of all securities which the creditor holds against the principal, as indemnity against loss by reason of his suretyship. The surety's right in this respect may be modified or controlled by contract between him and his principal, but does not require any contract for its support. It is a right which results from the relation of surety and principal, independent of contract, and is founded on the principle of natural justice, of placing the charge where, in equity, in belongs.—KIDD v. HURLEY, N. J., 38 Atl. Rep. 1067.

177. Public Land-Mortgages-Homestead.—Rev. St. U. S. § 2296, providing that no lands acquired under the homestead act "shall in any event become liable to



the satisfaction of any debt contracted prior to the issuing of a patent therefore," does not prohibit a voluntary incumbrance by mortgage.—ORR v. ULYATT, Nev., 48 Pac. Rep. 916.

178. PUBLIC LAND-State Lands-"Suitable for Cultivation."—The fact that land does not produce "ordinary agricultural crops in average quantities" does not render it unsuitable for cultivation, within Const. art. 17, § 8, impliedly allowing lands of such character to be granted to persons not actual settlers, but expressly providing that State lands "suitable for cultivation," can be granted only to actual settlers.—ALBERT v. HOBLER, Cal., 43 Pac. Kep. 1104.

179. PUBLIC LANDS—Contest Between Settlers—Jurisdiction.—Since Rev. St. § 2278, gives the land department exclusive jurisdiction of contests involving rights of pre-emption arising between settlers, if the secretary of the interior, on the passage of a special act of congress confirming the entry of one of the parties to such a contest, suspends the contest proceedings, and a patent issues, the other party to the contest caunot, by mandamus, compel the secretary to proceed with the contest on the ground that the special act was unconstitutional and void.—In RE EMBLEN, U. S. S. C., 16 S. C. Rep. 187.

186. QUIETING TITLE-Removal of Cloud-Execution Sale.-In an action to cancel as a cloud on title sheriff's deed made November 18, 1892, to land in M county, sold under execution issued July 1, 1892, on a judgment rendered in K county against J, June 12, 1889, it appeared that the levy was made July 18, 1892. The petition, after showing the source of the title and describing the land, alleged that plaintiff, "on the -, 1892, in good faith and for full value," purchased such land of J, who executed and delivered a deed to plaintiff on the same day, and plaintiff paid J the purchase money, and immediately placed such deed on record in the recorder's office in M county, and took possession, and ever since has been, and is now, the owner in fee in possession: Held, that the petition failed to state facts showing that plaintiff was an innocent purchaser .- Young v. SCHOFIELD, Mo., 34 S. W. Rep. 497.

181. RAILROAD COMPANIES — Constitutional Law — Stock Killing Act.—Laws 1891, p. 281, amendatory of Laws 1885, p. 304, an act imposing liability on railroad companies for the killing of live stock, does not change the act amended in principle, and as it does not require the fencing of railways, there is no basis for the penalty fixed therein, and the mode prescribed, of enforcing liability as a matter of indemnity, is in violation of constitutional rights.—Sweetland v. Atchison, T. & S. F. R. Co., Colo., 43 Pac. Rep. 1006.

182. BAILROAD COMPANIES—Discrimination Against Express Companies.—St. 1994, ch. 469, § 1, requiring a railroad company to give to "all persons and companies now engaged in only a local express business" terms, facilities and accommodations for transportation of merchandise reasonable and equal to those furnished other companies doing business over the railroad, having regard to the amount and character of the service, inures to the benefit of one engaged in the local express business, who, at the time the act was passed, was having his packages carried on the freight trains of a railroad, as well as to one who was using the passenger trains of the railroad for such purpose.—KIDDER v. FITCHBURG E. Co., Mass., 43 N. E. Rep. 115.

183. RAILROAD COMPANIES—Killing Stock.—When, in an action for damages against a railway company, a material fact to be determined is whether the railway company was guilty of negligence in failing to construct a cattle guard across its track where it intersects a public highway, it is error for the court to permit witnesses to testify that in their opinion a cattle guard could not be constructed and maintained at such place without endangering the lives and limbs of the railway employees.—CHICAGO, R. I. & P. RY. CO. V. CLONCH, Kau., 43 Pac. Rep. 1140.

184. RAILROAD COMPANIES—Negligence—Employee.—A rule of defendant railroad company having been read in evidence, instructing its employees "not to go between the cars to make couplings unless they are moving at a slow and safe speed," and a witness having testified that there may be a safe rate of speed for such purpose, it was not assuming a fact which had not been proven to ask another witness "what was a safe and slow rate of speed to do coupling and uncoupling."—HOLLEMBECK V. MISSOURI PAC. RY. CO., Mo., 34 S. W. Rep. 494.

185. RAILROAD COMPANIES — Negligence of Street Railway Company.—Inasmuch as negligence in operating a street car at an excessive rate of speed depends upon the facts connected with the accident which is claimed to have been occasioned thereby, and the place where it occurred, it was not error to submit to the jury the issue as to whether the car that caused the injuries to plaintiff was moving at rapid speed, where the evidence disclosed that the rate thereof was from three and one-half to five miles an hour.—Van Natta v. People's Street Railway, Electric Light & Power Co., Mo., 34 S. W. Rep. 505.

186. RAILROAD COMPANIES—Street Railways—Abutting Property Owners.—Abutting property owners may require that a street railway be built in the center of the street, if possible, as required by the ordinance granting the company permission to lay its tracks upon the street.—Kennedy v. Detroit Ry., Mich., 66 N. W. Rep. 495.

. 187. REAL ESTATE AGENT—Commissions—Occupation Tax.—Sayles' Civ. St. art. 4665, imposing an occupation tax on real estate agents, and article 4669c, providing that no person shall pursue his occupation unless he has a receipt for his occupation tax, does not prevent one who has not paid his tax from enforcing a claim for commissions for a sale.—AMATO V. DREYFUS, Tex., 34 S. W. Rep. 450.

188. RECORD OF MORTGAGE.—When a mortgaged deposits his mortgage, duly signed and acknowledged, with the register of deeds of the proper county, and the same is filed for record, a subsequent purchaser is presumed to have notice of the contents thereof, notwithstanding, by the mistake of the register, the amount of the mortgage is incorrectly stated upon the record.—ZEAR v. BOSTON SAFE DEPOSIT & TRUST CO., Kan., 48 Pac. Rep. 977.

189. RES JUDICATA.—Where vendees of land, claiming the right to rescind for fraud, tender a deed of conveyance, and demand the repayment of the part of the purchase money paid, and the vendors deny the right to rescind, and then foreclose a mortgage given them by the vendees for the balance of the price, the judgment in the proceeding on the mortgage is not a bar to a bill subsequently filed by the vendees to rescind the contract and to obtain the return of the purchase money.—SCHWAN V. KELLY, Penn., 33 Atl. Rep. 1107.

190. RES JUDICATA.—Order of the circuit court of the United States for the district of Nebraska, denying a deficiency judgment in a foreclosure proceeding upon the cause of action herein alleged, held to involve the merits of the cause, and not the question of jurisdiction only.—TZSCHUCK v. MEAD, Neb., 66 N. W. Rep. 428.

191. RES JUDICATA—Void Condemnation Proceedings.
—An owner of real property who, with knowledge of proceedings to condemn it for railroad purposes, and of the compensation awarded therefor, voluntarily accepts and retains the sum so awarded, is bound thereby, though such proceedings be invalid; and he cannot thereafter, by action, recover possession of such property.—ALLEN V. COLORADO CENT. R. Co., Colo., 43 Pac. Rep. 1015.

192. SALE—Default in Payment—Possession.—Under a contract of sale providing that title to the goods should remain in the seller till all the purchase price was paid as provided by the contract, and that the purchaser should have the right of possession of the

goods, and might sell the same at retail, provided that they should not at any time be reduced below a certain amount, the seller is entitled to possession on default in payment.—RYAN v. WAYSON, Mich., 66 N. W. Rep. 370.

193. SALE — Delivery of Commodity — When Title Passes.—Under an agreement for the sale of all of a certain grade of wool produced by plaintiff's mills during 30 days, plaintiff weighed the product of each day, but did not separate it from that produced at other times, and on a shipment to the buyer sent a larger quantity than that made under the contract, all of which was rejected: Held, that the wool covered by the contract not having been separated and set apart so that it could be identified from other wool of plaintiff, there was no delivery, and the title to none passed to the buyer so as to support an action for goods sold and delivered.—New England Dressed Meat & Wool Co. v. Standard Worsted Co., Mass., 43 N. E. Rep. 112.

194. SALE—Appropriation.—Where a person accepts by telegram another's offer to sell him certain goods at a stated price, and the seller thereupon sets apart and appropriates to the purchaser the goods called for, and sends him the bill, the sale is complete.—MITCHELL V. LE CLAIR, Mass., 43 N. E. Rep. 117.

195. SALE—Parol Evidence—Pledge.—Where property was transferred by bill of sale, and a receipt given by the transferee, stating that it was to be credited at a certain price to the account of the seller, it cannot be shown by parol that the transfer was merely as collateral security.—STEVENS v. WILEY, Mass., 43 N. E. Rep. 177.

196. SALE—Standing Timber.—Timber sold to be removed from land within a specified time, and which remains uncut at the expiration of the time limit, reverts to the owner of the realty. MACOMBER V. DETROIT L. & N. R. CO., Mich., 66 N. W. Rep. 377.

197. SCHOOLS—Wrongful Exclusion.—Under Pub. St. ch. 47, § 12, making a town or city liable in damages for the unlawful exclusion of a child from one of its schools, an action will lie where the fault for which the child was suspended was a disputed fact, and the school committee refused the application of the father for a hearing, and excluded the child ustil he acknowledged his fault.—BISHOP V. INHABITANTS OF ROWLEY, Mass., 48 N. E. Rep. 191.

198. SPECIFIC PERFORMANCE—Parol Contract as to Land.—A parol contract by a husband with his wife, who was about to leave him, that she should take certain personal property of his, and that, in consideration, he should have the right to occupy for life certain rooms in the house they then occupied, title to which was in her, and that he should have the use of a grapery and barn on the rear of the premises, is taken out of the statute of frauds, so as to be entitled to specific performance; he having taken possession of the rooms, grapery and barn, and abandoned possession of the other part, and she having left him in possession, and taken possession of the other part, and rented it, and taken the personal property.—SIGLER v. SIGLER, Mich., 66 N. W. Rep. 489.

199. TAX DEED-Validity.—A tax deed is not invalid from the mere fact that a part of the taxes for which the land was sold was a tax levied for the preceding year, but not executed upon the tax rolls for that year, if such tax was otherwise a legal charge upon the land.—WALKER V. DOUGLAS, Kan., 43 Pac. Rep. 1148.

200. Taxation of Corporations — Investment in Stock.—When a domestic corporation, in compensation for its grants of patent rights to local corporations, some of which are formed within and some without the State, receives and holds certificates of stock issued by such corporations, the capital of such domestic corporation, to the extent of the stock of foreign corporations so held by it, is not taxable as "capital stock employed within this State."—EDISON ELECTRIC LIGHT CO. V. WEMPLE, N. Y., 43 N. E. Rep. 176.

201. TAXATION—Tax Sale — Liability of County.—In the absence of direct statutory authority making a county liable for the tortious acts of its officers, it is not liable to a landowner because its officers assessed untaxable property, levied an illegal tax, and sold the property for failure to pay the same.—BOARD OF COM'RS OF PITKIN COUNTY V. BALL, Colo., 48 Pac. Rep. 1000.

202. Taxation-Trust Property-Constitutional Law.—Pub. St. ch. 11, § 20, cl. 5, providing in regard to the taxation of personalty held in trust by a non-resident, the income of which is payable to a resident, that it shall be assessed to the cestui que trust at the place where he resides, applies to a trust created by the will of a non-resident testator, dying in another State, where the will was proved and allowed.—HUNT v. PERRY, Mass., 48 N. E. Rep. 108.

203. TELEGRAPH COMPANY — Mental Anguish — Evidence.—Telegrams reciting, "Father fatally hurt; come if you can," and, "Father died this morning; buried at four this evening,"—furnish all the proof necessary that the addressee was a beneficiary in the contracts to transmit and deliver.—WESTERN UNION TEL. CO. V. RANDLES, Tex., 34 S. W. Rep. 447.

204. TELEGRAPH COMPANIES—Failure to Deliver Message.—In an action against a telegraph company to recover damages for a failure to deliver to plaintiff a message announcing the illness of her brother until after the latter's death, by reason of which she was prevented from seeing him alive, and suffered great mental distress, proof of statements made by the brother shortly before his death, and communicated to plaintiff afterwards, tending to show that he wished very much to see plaintiff, is not admissible to show the increased distress caused plaintiff thereby.—Western Union Tel. Co. v. Stiles, Tex., 34 S. W. Rep. 438.

205. TENANCY IN COMMON — Mining Claims—Purchase by Cotenant.—A tenant in common in a jun'or mining claim cannot buy in the title of a senior conflicting mining location, and assert it against his cotenant in the junior claim.—Franklin Min. Co. v. O'BRIEN, Colo., 43 Pac. Rep. 1017.

206. TENDER—Contract of Pledge.—A tender to the attorneys of a pledgee of the amount necessary to redeem the pledge, being coupled with the condition that the pledge be given up, is not good; the attorneys having informed the person making the tender that the pledge was not in their possession, but that the pledgee had it.—MALONE v. WRIGHT, Tex., 34 S. W. Rep. 455.

207. TRESPASS — Exemplary Damages.—In an action of trespass, where the injury is inflicted with a reckless and wanton disregard of the rights of the party injured, exemplary damages may be recovered.—TRAINER V. WOLFF, N. J., 33 Atl. Rep. 1051.

- 208. TRIAL — Exceptions to Instruction.—An exception to a refusal to instruct the jury to find for defendant is waived if made by defendant without resting his case.—UNION PAC. RY. CO. v. CALLAGHAN, U. S. S. C., 16 S. C. Rep. 493.

209. TRIAL—Instructions.—While instructions should not be submitted to the jury with authorities noted thereon, still prejudice will not be presumed from the mere citation or the instruction of a volume and page of the reports.—Herzog v. Campbell, Neb., 66 N. W. Rep. 425.

210. TRIAL—Venue — Place of Trial.—A party may waive, expressly or by implication, the right to have a cause tried in a particular county.—HEARNE V. DE YOUNG, Cal., 46 Pac. Rep. 1108.

211. TRUSTS — Evidence.—Where C contributed the entire costs and expenses of locating a mine and acquiring title thereto, and the title was taken in the name of J, and afterwards C paid all the costs of development, and J conveyed the mine to C's brother, who reconveyed to J, and he to C, and there was no consideration for any of the transfers, except the ad-

vances made by C, who was recognized as the owner and entitled to dispose of the property as he saw fit, a resulting trust is shown in favor of C.—CAMPBELL V. FIRST NAT. BANK OF DENVER, Colo., 43 Pac. Rep. 1007.

212. VENDOR AND PURCHASER—Constructive Notice—Defective Record.—When a vendor of land, having a purchase-money mortgage for practically the value of the property, obtains a decree setting aside his deed to the purchaser, he stands in the position of a bona fide purchaser for value, as against one claiming under an equitable mortgage given by the purchaser, of which the vendor has no notice.—LYNCH V. MURPHY, U. S. S. C., 16 S. C. Rep. 523.

213. VENDOR AND PURCHASER—Contract Exchange.

—A contract whereby defendant's testator agreed to pay plaintiff a certain sum in money, and to convey to plaintiff lands to be selected by him, in consideration of certain lands to be conveyed by plaintiff to testator, does not constitute an absolute sale of plaintiff's land, with the privilege on testator's part to pay therefor in either money or land, but is merely a contract of exchange at fixed valuations, the difference to be paid in money.—Lingeman v. Shiek, Ind., 48 N. E. Rep. 83.

214. VENDOR AND PURCHASER — Failure of Consideration.—Where a grantor conveys land in consideration of a certain sum in cash and all of the notes which he has made to the grantee, and the grantee, without the knowledge of the grantor, omits from the list of notes one which he had transferred to a stranger, the grantor may sue to recover the value of the outstanding note.—REED V. REED, Mich., 66 N. W. Rep. 381.

215. VENDOR AND PURCHASER—Lien.—In an action to enforce a vendor's lien, a defense setting up an outstanding incumbrance as constituting a failure of consideration is supported by evidence of a trust deed on the land, recorded prior to defendant's deed, and that plaintiff, though he agreed to have the same released of record, neither had a release recorded, nor offered to show that the same had been satisfied.—Brown v. Montgomery, Tex., 34 S. W. Rep. 443.

216. VENDOR AND PURCHASER—Rescission—Fraud.—
One who, as an inducement to a sale of land, in good faith states to the vendee that reliable third persons had represented the land to him as being of a certain character, and who at the same time states that he has no personal knowledge in regard to the land, does not thereby adopt such representations as his own, and rescission cannot be had merely because they prove false.—MOORE v. SCOTT, Neb., 66 N. W. Rep. 441.

217. VENDEE — Change. — Under the provisions of sections 4890, 4891, Comp. Laws, the right of a defendant to have the place of trial changed to the proper county is absolute, if the demand and motion therefor are duly made, and the court cannot retain the case on the ground of the convenience of witnesses.—SMAIL V. GILRUTH, S. Dak., 66 N. W. Rep. 452.

218. WAREHOUSEMEN — Receipts — Pledge. — Where produce is left with a weigher, who stores it without charge, a receipt given by the weigher merely reciting that the produce had been weighed, and stating its weight, is not a "warehouse receipt," the transfer of which as security constitutes a delivery of the produce, rendering the pledge valid as against attaching creditors of the pledgor.—Sinsheimer v. Whitely, Cal., 43 Pac. Rep. 1109.

219. WATERS-Irrigation—Contract Rights.—The law regulating water rights, being in the exercise of the police powers of the State, is paramount to a private contract, though such contract antedates the passage of the law, and rights given by the contract must yield where they are in contravention of the provisions of the statute.—WHITE V. FARMERS' HIGHLINE CANAL & RESERVOIR CO., Colo., 43 Pac. Rep. 1028.

220. WATERS-Irrigation-License.—A parol license to construct and maintain an irrigating ditch over the lands of the licensor, when executed by the construction of the ditch, is not revocable.—TYNON V. DESPAIN, Colo., 43 Pac. Rep. 1039.

221. WATERS-Obstruction — Estoppel.—A complaint which alleges an injury to plaintiffs by reason of a stone dam erected by a canal company, thereby so changing the volume of the water of the Savannah river alongside of plaintiffs' lands as to render them useless for cultivation, and subject to overflows in times of ordinary freshets, states a good cause of action.—TOWNES v. CITY COUNCIL OF AUGUSTA, S. Car., 28 S. E. Rep. 984.

222. WILL—Devise of Life Estate.—Where a testator gives an estate for life only, by express words, and annexes to it an absolute power of disposal, the devisee takes a life estate only, and not a fee; and this rule is applicable to bequests of personalty as well as to devisee of realty.—WOOSTER v. COOPER, N. J., 38 Atl. Rep. 1050.

223. WILL-Execution-Evidence.—After a will has been duly proven by its two witnesses before the register, its execution cannot be disproved by the uncorroborated testimony of one of the witnesses directly contrary to that given by him under oath before the register.—IN RE RICE'S ESTATE, Penn., 88 Atl. Rep. 1100.

224. WILL—Powers of Trustee and Beneficiaries.—Testator devised land to his widow in trust for the maintenance and education of herself and children during her life; the land to be divided between the widow and children according to the rules of descent; each child, on reaching its majority, to receive one-half of the share it would be entitled to on division, and the balance after there is no possibility of litigation against the estate: Held, that the children, on reaching majority, before there was any division of the estate, could quitclaim their interest to the widow and enable her to mortgage the estate, as against persons furnishing her necessaries for the maintenance of herself and children.—Stern v. Hampton, Miss., 19 South. Rep. 800.

225. WILLS—Delusion of Testator—Undue Influence.
—To invalidate a will because testator's father was excluded, evidence that testator had quarreied with his father because of an alleged attempt to cheat him of bequests from his mother, and that afterwards he cherished an insane delusion against his father, is not admissible, where the will in suit was made many months before testator's controversy with his father, and no delusion existed at that time.—Sharp v. Meeriman, Mich., 66 N. W. Rep. 878.

226. WILLS—Devise to Widow.—Testator died leaving a widow, a daughter, and grandchildren by a daughter, deceased. His mansion and certain city property were devised to the daughter; to the widow and grandchildren, the farm lands, which had been divided into two equal parts, of which the widow was to have her choice. The devise to the widow was for her life, with remainder over in equal parts to the daughter and grandchildren. The widow dissented from the will, and her dower interest, which exceeded the value of the lands devised to her, was allotted from property devised to the daughter. The personal property was consumed in the payment of debts: Held, that the remainder over in the lands refused by the widow was not accelerated in favor of the grandchildren, and the daughter was substituted to the rights of the widow under the devise.—Latta v. Brown, Tenn., 34 S. W. Rep. 417.

227. Witness—Transactions with Decedent.—Code, § 590, prohibiting parties in interest from testifying to "communications and transactions" with deceased persons as against their personal representatives, does not preclude plaintiff, in an action against an administrator for fees incurred as witness for his intestate, from testifying that he attended courts as witness for the intestate, and the number of days he so astended (it appearing that his witness tickets, issued to him, and filed with the cierk, had been lost by burning of the court house), since they were facts of which others equally with the intestate had knowledge.—JOHESON V. RICH, N. Car., 23 S. E. Rep. 1007.



Central Law Journal.

ST. LOUIS, MO., MAY 8, 1896.

In a recent issue (42 Cent. L. J. 154) we reported the opinion of the Supreme Court of Illinois in Campbell v. People, which decided that proof of all the elements of the corpus delicti may be made by presumptive or circumstantial evidence. That was a case where it was alleged that a newly born child had been murdered and the court was of opinion that such kind of evidence might be sufficient although it did not appear that any person had ever seen the supposed child. Though the case was perhaps decided correctly on the facts and is sustained by some authorities, we cannot agree with an eastern law exchange which says that "it tends to lay down principles of common sense." Precedents afforded by cases of that character are, in our opinion, very dangerous. A more recent Texas case, Condee v. State, 34 S. W. Rep. 286, on the same point, is more conservative.

In a recent case (Bridges v. Stevens, 34 S. W. Rep. 555), six of the seven members of the Supreme Court of Missouri divide by a vote of three to three on the question whether when a debtor, before the debt is barred, orally agrees, in consideration of the creditor's forbearance to sue, to waive the defense of the statute of limitations, such defense can or cannot be interposed. Missouri has a statute requiring a new promise of acknowledgment, in order to remove the statutory bar, to be in writing. Three of the Missouri judges hold that the statute of limitations was not a valid defense under the circumstances, and a fourth member of the court concurred in the result on the ground that the particular period of limitation relied on could not apply to the case at bar. opinion of the judges holding that the defendant was not entitled to the benefit of the statute is in direct conflict with the decision of the New York Court of Appeals in Shapley v. Abbott, 42 N. Y. 443. Three members of the Missouri court approve of Vol. 42—No. 19.

and rely on Shapley v. Abbott. New York Law Journal contends with that the view of the much earnestness New York Court Appeals the of sounder one, and that the members of the Missouri court who dissent from Shapley v. Abbott, point out a technical distinction, in saying that an agreement to waive the defense of the statute is not in express terms an acknowledgment of the indebtedness or a promise to pay the same. "This, of course," remarks the New York Law Journal, "is true, but we think the substanposition taken by the New York court is correct, that, except in so far as the agreement to waive the statute operates as an acknowledgment or a promise to pay, it is nugatory. In Shapley v. Abbott it is held that a verbal agreement to waive the defense of the statute would be sufficient as an acknowledgment of the debt, were it not for the provision requiring such acknowledgment to be in writing. Judge Earl, in Shapley v. Abbott, says, 'That if he (plaintiff) relied upon what the defendant then said as an agreement not to plead the statute, he would fail, if for no other reason, because there was no consideration for the agreement.' What seems more really to be lacking is a valid obligation moving from the debtor. As three of the Missouri judges point out, an agreement for forbearance by a creditor is usually an adequate valuable consideration. But in the new transaction the alleged consideration moving from the debtor is one that the policy of the law cannot recognize or countenance. Such policy is a broad one that something in writing shall be necessary to forestall or remove the bar of the statute of limitations. As remarked by Judge Earl in Shapley v. Abbott: 'A party may, undoubtedly, without trenching upon public policy, waive the defense of usury or of the statute of frauds or of the statute of limitations by omitting to set up the defense when sued. And he may waive his statute exemption by turning out exempt property when the officer comes with the execution; but no case has occurred to me in which a party can, in advance, make a valid promise that a statute founded in public policy shall be inoperative.' "

NOTES OF RECENT DECISIONS.

LIBEL - BOOK REVIEW - ORITICISM. - In Dowling v. Livingston, 66 N. W. Rep. 225. the Supreme Court of Michigan had before it an interesting question of libel in the writing of a book review, the holdings of the court being that where there is no misstatement of facts or of the propositions set forth in a book under review by a newspaper critic, it is not libelous for him to attack with sarcasm and ridicule the theories of the author; that in an action for an alleged libelous review of plaintiff's book, it is error to charge that defendant had the right to ridicule the book if, in the candid judgment of any fair man, the book deserved ridicule, since the critic himself is the judge of the language of criticism. Where an author quoted from another paragraph inclosed in quotation marks. but not credited by name, a statement by a reviewer that the author has quoted another without giving him credit does not charge him with plagiarism. For a critic to write, "of course, like all quack remedies, it would intensify the trouble," does not characterize the author under review as a quack. In a book review it is not libelous to write one of the author's views that Horace Greeley advocated the same doctrine, though it should appear that such was not the case. Where an author, in discussing Mr. George's proposition to take the land from the present owners without compensation, denounces it as "a gigantic piece of robbery," it is not libelous for a critic to write that the author "denounces the single tax scheme as robbery."

CONSTITUTIONAL LAW — LEGISLATIVE APPORTIONMENT—POWER OF COURT.—The Supreme Court of Indiana in Denny v. State, 42 N. E. Rep. 929, has recently gone fully over the question of the validity of the legislative apportionment act of that State, and has laid down a number of valuable rules in relation to the general principles involved. It holds (1) That the question as to the validity of such a law is not a political one, subject only to the discretion of the legislature; but that the courts of law have jurisdiction to determine its constitutionality; (2) That article 4 of the constitution of that State, which in section 4 requires a sexen-

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nial enumeration of the male inhabitants of the State over the age of twenty-one, and in section 5 provides that at the next session after each period of enumeration, the number of senators and representatives shall be apportioned among the several counties, prohibits the legislature, after it has made a valid apportionment of the State after such an enumeration, to reapportion the State during the six years period; and that the legislature is, also, precluded from repealing a valid apportionment law during the enumeration period in which it was passed; (3) That if the first apportionment law is unconstitutional, the legislature may at any time during the same enumeration period pass a second apportionment law, even before the first one has been declared unconstitutional by a judicial tribunal; (4) That under constitutional provisions that the number of senators and representatives shall be apportioned among the several counties according to the male inhabitants over the age of twenty-one in each (Const. Ind. Art. 4, § 5), and that a senatorial or representative district, when more than one county shall constitute a district, shall be composed of contiguous counties, and that no county, for senatorial apportionment, shall ever be divided (section 6), an apportionment act which groups together two or more counties, none of which has a voting population equal to the ratio for a senator or a representative, and gives to the district so formed more than one senator or representative, is unconstitutional, as an abuse of the legislative discretion of approximation, and derogatory to the right of local representation; especially when voters of other counties having the necessary ratio of voters are entitled under the act to vote for but one senator or representative; (5) That, unless it is absolutely necessary, a county which has slightly over the ratio for a representative should not be given one representative and also a voice in the election of another representative, in connection with other counties, while counties with a greater population are given only one representative; (6) That a judgment of the lower court, an appeal from which is dismissed, in an action between two citizens to test the constitutionality of an apportionment law, is not res judicata, as to the constitutionality of the act, in a subsequent action by the State; nor

will the doctrine of stare decisis require that that judgment be followed; and (7) That the fact that an election of members of the legislature has been had under an unconstitutional apportionment act does not estop the State from contesting its constitutionality before the election of the next legislature.

Assignment—Order on Fund in Bank.—In Central Nat. Bank v. Spratlen, 43 Pac. Rep. 1048, it is decided by the Court of Appeals of Colorado that an order to a bank to pay, to persons named, a specified sum, out of a special fund, belonging to the drawer, in the hands of such bank, constitutes an assignment of such fund, to the persons named in the order, to the amount specified, whether the bank accepts the order or not. The following is from the opinion:

Appellant was a bank, engaged in business. Lane, being indebted to it, assigned his entire claim against the city to it-First, to secure the indebtedness; second, as his agent, to collect for him the entire claim, pay itself, and hold the balance to be disposed of as directed by him. The assignment was only for the amount of the indebtedness; the balance, for collection. The amount of the claim against the city is said to have been \$2,800; appellant's claim against Lane, \$1,198.57; balance belonging to Lane, \$1,101.43; the Doyle attachment, \$496.93; balance after Doyle attachment, \$604.50. This was the condition of affairs on July 19th, when the order of Lane in favor of appellees for \$500 was presented. The attachments of Beatty and McClelland were later in the day, and after the transfer of the \$500 by Lane to appellees. The sworn answer of appellant, as garnishee in the different proceedings, set up this condition, and admitted the transfer of \$500 to appellees from Lane, which it was to pay over. There was a full recognition of the transfer, its validity, and the legal liability of the bank to pay the amount, which it could not subsequently change and invalidate. It is clear that, so far as the excess over the indebtedness was concerned, appellant was only the agent or trustee, to apply the money as ordered by Lane. The trust was accepted, and it was its duty to apply the money as ordered by Lane. It was not invested with any discretion or power of adjudicating between the different claimants, and if in doubt it could only await the decree of a competent court. The question of the legality of the transfer of \$500 from Lane to appellees was entirely between them, and, if challenged, it could only be by rival claimants for the same fund. The residue, after payment of the indebtedness to the bank, was a specific trust fund. Of that fund \$500 was assigned to appellees. That such a transfer was a legal and equitable assignment of so much of the fund, whether the fund was in hand or to be received, is well settled by authority. It was an assignment, of the date of the order, and, if the money was not in hand, became operative when the money was received. In Christmas v. Russell, 14 Wall. 84, it is said: "A bill of exchange or a check is not an equitable assignment pro tanto of the funds of the drawer in the hands of the drawee. But an order to pay out of a special

fund has always been held to be a valid assignment in equity, and to fulfill all the requirements of the law," and that such an assignment is good at law. See, Pom. Rem. & Rem. Rights, §§ 77, 85; Drake, Attachm. §§ 527, 528; 2 Wade, Attachm. § 587; McDaniel v. Maxwell (Or.), 27 Pac. Rep. 952, where the almost identical question involved in this case received careful attention. See, also, Trist v. Child, 21 Wall. 441; Christmas v. Russell, supra; Lapping v. Duffy, 47 Ind. 51; Brill v. Tuttle, 81 N. Y. 454; Peugh v. Porter, 112 U. S. 737, 5 Sup. Ct. Rep. 361; Wright v. Ellison, 1 Wall. 16; Fordyce v. Nelson, 91 Ind. 447; Legro v. Staples, 16 Me. 252. Consequently, if appellant attempted to exercise any discretion, or adjudicate the rights of rival claimants, and made a mistake, it must suffer the consequences. Its answer in this suit was at variance with its answer in the attachments, and it was bound by its answer in those. Neither of the matters set up in the answer was available to it as a disinterested custodian or agent, and could only be made available by some rival claimant to the same

HOMESTEAD—WHAT CONSTITUTES—DECLARATION.—In Power v. Burd, 43 Pac. Rep. 1094, the Supreme Court of Montana decides that, under Code Civ. Proc. § 322, providing that a homestead consisting of a certain quantity of land owned and occupied by any resident of the territory shall be exempt from forced sale, the mere declaration of an intention to claim land as a homestead, without improvement or occupancy thereof, is insufficient to constitute the land a homestead. The court says in part:

Our statute is exactly the same as that of Minnesota. The courts of that State hold that actual occupancy is necessary to constitute a homestead in land. Quehl v. Peterson, 47 Minn. 13, 49 N. W. Rep. 390; Tillotson v. Millard, 6 Minn. 513 (Gil. 419); Sumner v. Sawtelle, 8 Minn. 809 (Gil. 272); Kelly v. Baker, 10 Minn. 124 (Gil. 154); Kresin v. Mau, 15 Minn. 87 (Gil. 116); Kelly v. Dill, 23 Minn. 485. Under a similar tatute to ours the Supreme Court of California, ins many decisions, holds that actual occupancy is necessary to acquire a homestead in land. Gregg v. Bostwick, 32 Cal. 220; Villa v. Pico, 41 Cal. 469; Babcock v. Gibbs, 52 Cal. 629; Lubbock v. McMann, 82 Cal. 228, 22 Pac. Rep. 1145; Tromans v. Mahlman (Cal.), 27 Pac. Rep. 1094. See, also, Tillar v. Bass (Ark.), 21 S. W. Rep. 34; Hotchkiss v. Brooks, 93 Ill. 386; Thomp. Homest. & Ex., §§ 100-105; Wap. Homest. & Ex., pp. 176-186. In Bonner v. Minnier, 13 Mont. 269, 34 Pac. Rep. 30, the authorities are collated on this subject. While in this case there was a dissenting opinion, there was no difference of opinion that under our statute occupancy was necessary to acquiring a homestead in land. The authorities are too numerous to cite which hold that an intention to claim and occupy land as a homestead is not sufficient to constitute a homestead. Counsel for appellant rely upon Reske v. Reske, 51 Mich. 541, 16 N. W. Rep. 895, in which case actual occupancy was not required. But in Reske v. Reske the claimants had fenced the lot which was procured for a home. They were proceeding to improve and occupy it to the extent of their means; they had their domestic animals on it; they came to

live in the immediate vicinity of the lot; they dug a well; they put up outbuildings. Everything but building the dwelling was done before the levy. Here something more had been done and was being done by the claimants than merely declaring their intention to claim and occupy the land in question as a homestead. So in the other cases cited by appellant. In the case at bar appellant had done, at the time of levy, nothing, except to declare his intention to claim and occupy the land in controversy as a homestead, nor does it appear that he has done anything since towards improving or occupy the land as a homestead. We think it may be said that, according to the great weight of authority under statutes like ours the mere declaration of an intention to claim land as a homestead is insufficient to constitute the land a homestead.

EVIDENCE ILLEGALLY OBTAINED.

"Cases do not make law, but law cases." While the above is true of adjudicated cases not founded on principle, yet such decisions make the law of that particular case. I hope, therefore, in this article, to show the errors of several State courts in the admission of evidence illegally obtained in a criminal cause. It is a fact, the subject of most profound regret, that upon a matter of such vital importance the courts seem to have lost sight of the constitution, the principles of the common law, and the great object and purpose to be derived therefrom. The writers of the opinions hereinafter noted seem to have had but one purpose in view, and that was to sustain the admissibility of the evidence because, to their minds, it pointed directly to the guilt of the accused, and to support them harp upon the one string: "That the object of the law is to get at the truth." While it is true that the object of the law is to get at the truth, yet the law is more concerned in the means adopted to procure the evidence of that truth than in the admission of evidence improperly obtained, although the evidence, so obtained, is clear and convincing. Experience has taught, and the law recognizes, that courts should consider in the admission of evidence, that no pernicious precedent be established by which a wrong may be done in the future. Courts are not established for the detection of crime, but for the correction of crime. Among the first cases to which I refer is the case of Graham.1 In that case the officer who had the prisoner in custody compelled him to place his foot in the tracks found in

1 State v. Graham, 74 N. C. 646.

the prosecutor's field, and the officer was allowed to testify, over objection, that the foot of the prisoner fitted the tracks exactly. Counsel for the prisoner insisted that the evidence was procured by duress; the court said: "The object of all evidence is to elicit the truth," * * * "no hopes or fears of the prisoner could produce the resemblance of his tracks," also that "the evidence was real evidence." The footprint was real, but that it was the footprint of the prisoner was a point to be established and was not real evidence. The fact was that the officer compelled the prisoner to make evidence against himself by placing his foot in the footprint found, yet the court said that this compulsion was not duress. Duress is defined: 2 1st. "Constraint, confinement, imprisonment. The state of compulsion or necessity in which a person is induced by the restraint of his liberty or menace of bodily harm to execute a deed or do any illegal act." In a broader sense it means, all evidence not freely and voluntarily given by the accused, but extorted by torture, force, coercion or duress of imprisonment. In the case now under discussion the defendant was compelled to furnish evidence against himself in violation of the constitution and the maxim of the common law: "Nemo tenetur seipsum prodere." The court in its opinion cites Mr. Best to support its theory that the evidence was real evidence. Mr. Best was but giving illustrations of what was real evidence; but no place in his book does Mr. Best say that such evidence is competent evidence, but on the contrary says: "In the next place the proposition that it is the duty of the courts of justice to use all available means to get at the truth of the matters in question before them must be understood with these limitations: 1st. "That those means be such as are likely to extract the truth in the majority of cases; and secondly, that they be not such as would give birth to collateral evils, outweighing the benefit of any truth they might extract." Had the court reflected but for a moment it would have considered that it was not the footprint but the similarity that the prosecution was after. With the constitution as a shield to protect the defendant in a criminal case, from being compelled to produce evi-

³ Best Principals, Ev. Sec. 558.



² Burrill.

dence against himself by word, act or deed, secured by the reason of compulsion, if any force may be used to compel him so to do, we are back to the thumb-screw period. law does not recognize force divided into parts; so if any force or compulsion is used in obtaining evidence, either confession or fact, it is inadmissible. There are some cases that hold that a confession obtained, not freely and voluntarily made, and so excluded, a fact obtained by reason of confession will be admitted with sufficient of the confession to make it clear as to its connection with the crime. Such cases are those "that palter with us in a double sense." A fact is always the pivotal point in a criminal case. though the case of Graham seems to be the stepping-stone for the courts of Texas. Nevada, and Indiana, which by sly approaches have, in their State, overturned the maxim, "Nemo tenetur seipsum accusare," and the constitution, the courts of Illinois and Alabama, do so by virtue of an example set by the court of Massachusetts. When Mr. Redfield in his edition of Greenleaf falls into the same error as the court of Massachusetts there is some excuse, probably, for the thoughtless decisions of the above courts. Greenleaf says: "The courts will not take notice of how the evidence is obtained out of court."4 While I do not consider for one moment that the decision of any court can overturn the constitution it is well to examine into and "behold how great a matter a little fire kindleth." In the case of Com. v. Danna,⁵ the question was, whether a search or seizure of the defendant's papers or property, directed by a warrant in the case, was an unreasonable search or seizure. The defendants' counsel insist, that such searches and seizures are entirely inconsistent with the plainest principles of common law and natural rights of mankind. That the right to search for and seize private papers is unknown to the common law is most conclusively shown by the able opinion of Lord Camden.6 The Massachusests court, after discussing Entick v. Carrington, while apparently agreeing with Lord Camden, the court said: "When papers are offered in evidence, the court can take no notice how they were ob-

tained, whether lawfully or unlawfully, nor would they frame a collateral issue to determine that question."7 The decision of the court of Massachusetts is distinguished in several ways: 1st. It is the first time a court ever so stated the law in a criminal case. 2d. It has been followed by a text-writer and several State courts. 3d. It renders the provisions of the constitution inoperative. case of Leggat v. Tollervey, which the court of Massachusetts cited, was an action on the case for malicious prosecution; and the plaintiff called an officer of the court who produced the indictment, but it did not appear that either the court or attorney-general had authorized a copy to be given to the plaintiff, according to the rule of the Old Bailey, and the court nonsuited the plaintiff. A motion was made for the setting aside the nonsuit, on the grounds that the want of an order from the court for a copy of the indictment was not necessary to found the plaintiff's right of action, whatever difficulty he might be under in obtaining the necessary proof. Best, Serjt., opposed the rule, and insisted that the officer who produced the records from the session had no authority from the court nor flat from the attorney-general, therefore the evidence was properly rejected. They réferred to the general orders made by the judges of the Old Bailev in 16 Car. 2: That no copies of an indictment for felony be given without special order, upon motion made in open court, at general goal delivery, for the late frequency of actions against prosecutors. Shepherd, Serjt., in support of the rule, insisted upon the admissibility of the records when ready to be produced; though the officer, without an order for the purpose, might not have been compelled to produce on subpæna duces tecum. The order can never be necessary to make the record or an examined copy evidence which is evidence per se and only evidence of the allegation of prior indictment. Lord Ellenborough, C. J.: "It is very clear that it is the duty of the officer, charged with the custody of the records of the court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the court, pursuant to the order which has long prevailed there; and with respect to the records of the realm upon application to the

⁷ Leggat v. Tollerrey, 14 East, 302.



⁴ Sec. 254a, Gr. Ev; Com. v. Danna, 2 Met. 829; Leggat v. Tollerrey, 14 East, 302.

⁵ ² Met. 329.

⁶ Entick v. Carrington, 19 Howells St. Trials, 1029.

But if an officer shall, attorney-general. even without authority, have given a copy of the record, or produce the original, and that is properly proved in the evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the court, and he may be warned at the time of his peril in so doing; and a discreet officer placed in such a position would, doubtless, before he produced a record, or gave a copy of it, apply to the court, and state the circumstances of the case; and it cannot be doubted that he would be saved harmless in doing what, after such a disclosure, the court should order him to do. But still I cannot help thinking that the rule laid down by Lord C. J. Lee, in the case of Jordan v. Lewis, is a correct one. The order made at the Old Bailey was then read by way of objection to the evidence offered, but the chief justice said that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without an order of the court for the purpose. If the production of such an order were essential to the validity of the evidence of the record of acquittal on the former prosecution, or a true copy of it were found a fact in special verdict, it would be immaterial, unless the order of the judge or court before whom it was tried, allowing it, were also proved and found. But can this be stated? Even if it were found negatively that the judge or court had refused to allow the party acquitted a copy of the indictment, yet if, in the subsequent action for a malicious prosecution, the plaintiff gave in evidence that which he was able to prove to be in fact a true copy of the indictment, can it be said it would not be available? With deference, then, to the opinion expressed by Mr. Baron Adams in the case cited, by which alone the opinion of the learned judge appears to have been governed on the trial of this cause, I do not see how the circumstance of the copy of the record having been, as he says, surreptitiously taken, can affect the validity of the proof, though the officer's conductin lending himself as a voluntary instrument to the plaintiff's purpose might with propriety be animadverted upon by the court. The order of the Old Bailey does not state that actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be

maintained without copies. The other judges assenting, the order made setting aside the nonsuit may be made absolute. case is the foundation for the decision in Com. v. Danna, upon which is built Sec. 254a, Greenleaf Ev. If a witness for the prosecution is placed upon the stand to detail a confession, or to produce a paper, weapon or money, or other fruits of crime, the relevancy must first be shown; and if in connecting the confession or other evidence with the alleged crime, any act which would show compulsion or unlawful seizure in procuring the evidence goes to its competency, I fail to see what issue would have to be framed to try the issue alluded to by the Massachusetts court which the plea of not guilty does not.

If it were a civil case it is hardly necessary to say that the law would be different. But it is as Justice Bradley observed, 8 that, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal procedure." Upon the supposed faith of section 254a, Gr. Ev., was decided, Seibert v. People,9 in which the court said: "The papers may have been illegally taken from the defendant on a criminal charge, the papers being pertinent to issue; the court will not take notice of how they were obtained." This case was followed by the Alabama court.10 The jailer searched the person of the prisoner and discovered a pistol subsequently offered and received in evidence over objection that the search was illegal. Held, objections properly overruled. given by the court are: 1. "That the search was unauthorized and illegal we cannot doubt. The sheriff is the jailer, having the legal custody and charge of, the county jail and of the prisoners therein confined, he may commit the custody and charge to a jailer for whose acts he is civilly liable. Cr. Code Sec. While it is true that the search of the defendant was without legal justification, a trespass, and an indictable misdemeanor, we know of no theory or principle upon which the State may be deprived of the right to employ the evidence of a criminal offense thus obtained. As is observed by the Supreme Court of Illinois (citing 138 Ill. 111): "The

⁸ Boyd v. U. S., 116 U. S. 616.

^{9 138} III. 111.

¹⁰ Shields v. State, 39 Cent. L. J. 396.

¹¹ Duffy v. People, 26 N. Y. 590, and cases cited.

State had no connection with, and no agency in, the wrong committed by the sheriff: "The law appoints the remedy for the redress of the wrong, but the exclusion of the evidence criminating the defendant is not within the scope of the remedy." 2. "That the court cannot take notice of how the evidence is obtained." What a saving grace there is in the fact that the law provides a remedy for civil action—with what satisfaction and comfort could a convicted person, in a capital case, upon such evidence, contemplate a civil action for damages. Another verity of caselaw is "The rule which excludes evidence of the confessions of persons charged with crime, where such confessions have been made under the influence of threats or promises, has never been held to exclude evidence of any facts which were ascertained in consequence of such confessions." But the court of that State has decided the law in the case of People v. McCoy12 as follows: A woman indicted for the murder of an illegitimate child at birth, the coroner had directed two physicians to go the jail and examine her private parts to determine whether she had been recently delivered of a child. She objected to the examination but being threatened with force, yielded, and examination was had. Their evidence was offered at the trial and ruled out. The court said the proceeding was in violation of the spirit and meaning of the constitution. "They might as well have sworn the prisoner and compelled her by threats to testify that she had been pregnant and had been delivered of a child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and had been recently delivered of a child." In Boyd v. U. S., supra, an information was filed by the district attorney for the southern district of New York against 35 cases of plate glass. The charge was that the goods were imported into the United States without payment of duty. On the trial the district attorney offered in evidence, for the purpose of showing value, an order of the district judge, requiring the defendant to produce the invoice. The claimant in obedience to the notice but objecting to its validity and the constitutionality of the law, produced the invoice. The

court held: "The clauses of the constitution, to which it is contended the laws are repugnant, are the fourth and fifth." It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution in all cases in which a search and seizure would be; because it is a material ingredient, and affects the sole object and purpose of search and seizure." The Supreme Court of the United States, in the case last cited, quote at length from Lord Camden in Entick v. Carrington as follows: "The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than Lord Coke denied its legality (4 Inst. 176); and, therefore, if the two cases resembled each other more than they do we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge, upon oath, of theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description." "If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy; my answer is, that all these precautions would have been long since established by law if the power itself had been legal, and that the want of them is an undeniable argument against the legality of the thing." Then, after showing that these general warrants for search and seizure of the papers originated

¹³ 45 How. Pr. 216.

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with the Star Chamber, and never had any advocates in Westminster Hall except Justice Scroggs, Lord Camden proceeds: "Lastly it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence." "I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. In a criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our laws provide no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." The Supreme Court of the United States concludes: "Can we doubt that when the fourth and fifth amendments were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and the 'unreasonable' seizures. It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than twenty years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." "We have already noticed the intimate relation between the two amendments. They throw great light upon each other. For the 'unreasonable searches and seizures' condemned in the fifth, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth. amendment. And we have been unable to perceive that the seizure of a man's

private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is clearly within the intent and meaning of those terms." In the case of Ah Chuey,18 the court held that it was not error for the court to compel the defendant to unbare his arm to the jury. This case stands alone except for the favorable comment made upon it by the Indiana court.14 But as the case of Ah Chuev has been heretofore commented upon in the CENTRAL LAW JOURNAL, it is necessary only to add two additional cases to those cited in the article referred to. Lord Mansfield observed,15 "that in civil causes the court will force the parties to produce evidence which may prove against themselves, or leave the refusal to do it (after proper notice) as a strong presumption to the jury. The court will do it in many cases, under particular circumstances, by rule before trial; especially if the party from whom the production is wanted applies for a favor. But in a criminal or penal cause the defendant is never forced to produce any evidence, though he should hold it in his hands in court." Justice Grey, of United States Supreme Court,16 said: "No right is held more sacred than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "the right to one's person may be said to be a right of complete immunity; to be let alone." Cooley Torts, 29. "The inviolability of the person is as much invaded by a compulsory stripping as a blow." The courts of North Carolina, Texas, Indiana and Nevada, with one case in New York, based their opinions upon what they termed fact or real evidence, while Illinois and Alabama followed the false premise of the Massachusetts court. However laboriously the courts may file away, with judicial subtleties at the ancient mere-stones, they will stand forever as a protection to personal rights and personal security.

Tacoma, Wash. J. F. RAMAGE.

¹⁸ State v. Ah Chuey, 14 Nev. 79.

¹⁴ O'Brien v. State, 125 Ind. 38.

Roe v. Harvey, 4 Burrows, 2489.
 U. P. R. R. Co. v. Botsford, 141 U. S. 250.

VENUE IN CIVIL CASES—JURISDICTION BY SERVICE OF SUMMONS—PRIVILEGE OF LITIGANT.

POWERS V. ARKADELPHIA LUMBER CO.

Supreme Court of Arkansas, January 18, 1896.

Under Sand. & H. Dig. § 5696, permitting certain actions to be "brought in any county in which the defendant, or one of several defendants, resides or is summoned," jurisdiction cannot be obtained of a defendant, in a county other than that of his residence, by service of summons on him while in such county in attendance on the taking of depositions in a pending action to which he is a party.

Bunn, C. J.: A suit in chancery was pending in the Clark circuit court, wherein the appellant, Powers, was plaintiff, and the Arkadelphia College was defendant, for a balance of \$700 or \$800 claimed by Powers to be still due him on his contract for erecting the college buildings. agreement of counsel representing the respective parties, they met at Arkadelphia, and took depositions in the case on the 17th day of August, On the same day the complaint in this cause was filed by counsel for plaintiff herein, who were also counsel for defendant in the chancery cause in which the depositions were being taken, as stated; and summons at once issued, and was served upon appellant, to be and appear in the Clark circuit court to defend herein. At the following term of said circuit court defendant, Powers, appeared for the sole purpose of moving the court to quash the summons served upon him, as aforesaid, showing by affidavit that he was, at the time of the service of said summons, and continued to be, a resident of the city of Little Rock, in Pulaski county, as he had been for a long time previously, and that he was present in Arkadelphia on the 17th day of August, 1893, for the sole purpose of attending the taking of the depositions aforesaid, and that the same was necessary, and that advantage of attendance was taken to compel him to defend his said suit in another jurisdiction than that of his residence. He therefore prayed that the summons be quashed. His motion to that effect, however, was overruled, he saved exceptions, judgment was rendered against him, and he appealed.

There is really no controversy as to the facts—at least none that could affect the issue. We think the judgment ought to be reversed. After several sections immediately preceding, designating where civil actions are to be brought, according to the nature of the subject-matter and the relative situation of the parties, Section 5696. Sand. & H. Dig., reads thus: "Every other action may be brought in any county in which the defendant, or one of several defendants, resides or is summoned." Similar statutes are found in all, or nearly all, the States. The appellee contends that the privilege of defendant should be restricted to the rule held by some of the courts, as in Illinois, for example—that is, to cases of arrest on

civil process—and that the exemption does not extend to a non-resident suitor in ordinary cases, temporarily present in the State and county, or in the county, for the mere purpose of attending a suit to which he is a party, unless his presence has been procured by some artifice, trick or fraud of plaintiff or of his counsel; citing Greer v. Young, 120 Ill. 184, 11 N. E. Rep. 167. We think, however, that the weight of authority is against that view of the subject. See Works, Jur. pp. 258-260. One line of authorities rests the privilege solely on the familiar constitutional ground of freedom from arrest on civil process, but we prefer to rest it also on the ground of a sound public policy, so aptly expressed by the Supreme Court of Ohio in the case of Andrews v. Lembeck, 46 Ohio St. 41, 18 N. E. Rep. 483, thus: "The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered," citing many authorities. And, continuing, say that court: "The contention that the application of this principle should be or is confined to cases where the suitor is served with process while attending upon judicial proceedings without his State is not supported by sufficient force of reason to justify the distinction." The statute of that State is similar to ours. In Lamkin v. Starkey, 7 Hun, 479, the Supreme Court of New York said: "The court has power, independently of the statute, to protect its suitors, officers, and witnesses." And the same is substantially said by the same court in Matthews v. Tufts, 87 N. Y. 568. And it further appears, from the great weight of authorities, that the privilege is not only assured while one is attending upon strictly judicial proceedings but upon any tribunal whose business has reference to or is intended to affect judicial proceedings. In Larned v. Griffin, 12 Fed. Rep. 590, the court said: "It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during attendance, and for a reasonable time in going and coming," and further, "that this protection extends to attendance of parties and witnesses before arbitrators, commissioners, and examiners." That was a case of arrest, it is true, but it is cited to show the nature of the tribunal an attendance upon which will come under the rule. In the case of Mulhearn v. Publishing Co., 21 Atl. Rep. 186, the Supreme Court of New Jersey said that the vice-president of a fereign corporation, attending as a witness before a commissioner of that court, which testimony is to be used in a



cause therein pending, is privileged from service of summons to appear in another action against said corporation. The weight of authority is decidedly with the appellant, and the judgment is reversed, and the case is dismissed, without prejudice.

NOTE .- Immunity from Process .- The privilege of exemption from service of process which a suitor or witness has while necessarily without the jurisdiction of his residence, either for the purpose of attending any trial of a cause wherein he is a party, or in which he is a witness, is a very ancient one. Vin. Abr. "Privilege." It is uniformly sustained by the modern authorities: Massey v. Colville, 45 N. J. L. 119; May v. Shumway, 16 Gray (Mass.), 86; Henegar v. Spangler, 29 Ga. 217; In re Healey, 53 Vt. 694; Mitchel v. Huron, Ct. Judge, 53 Mich. 541, 19 N. W. Rep. 176; In re Cannon, 47 Mich. 481, 11 N. W. Rep. 280; Bridges v. Sheldon, 7 Fed. Rep. 36, 42-45; Larned v. Griffin, 12 Fed. Rep. 590; Person v. Grier, 66 N. Y. 124; Kinne v. Lant. 68 Fed. Rep. 436; Brooks v. Farwell, 4 Fed. Rep. 166; 1 Greenl. Ev., sec. 316; Fisk v. Westover, 4 S. D. 283, 55 N. W. Rep. 961; People v. Judge, 40 Mich. 729; Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210. And the better reason and the decided trend of the authorities is to the effect that the rule governing the immunity is the same where the parties are nonresidents of the State where the process is served, and where they simply live in a county of the same State other than where served. Person v. Grier, 66 N. Y. 124; People v. Inman, 74 Hun, 130; Miles v. McCullough, 1 Bin. (Pa.) 77; Mitchell v. Huron, 53 Mich. 541, 19 N. W. Rep. 176; Shaver v. Letherby, 78 Mich. 500, 41 N. W. Rep. 677; Sherman v. Grendloch, 87 Minn. 118; Kinne v. Lant, 68 Fed. Rep. 436; Brooks v. Farwell, 4 Fed. Rep. 166; Atchinson v. Morris, 11 Fed. Rep. 582; Fisk v. Westover, 4 S. D. 233, 55 N. W. Rep. 961; Small v. Montgomery, 23 Fed. Rep. 706; First Natl. Bank v. Ames, 39 Minn. 179, 39 N. W. Rep. 308; Walpole v. Alexander, 3 Doug. (Mich.) 45; Mallory v. Brewer (S. D.), 64 N. W. Rep. 1120; Wilson v. Donaldson, 117 Ind. 356, 20 N. E. Rep. 250; Bolgiano v. Gilbert Lock Co., 73 Md. 132, 20 Atl. Rep. 788; Kaufman v. Kennedy, 25 Fed. Rep. 785; Parker v. Marco, 136 N. Y. 585, 32 N. E. Rep. 989. Nor is it simply a present privilege of the party or witness, but it is that of the court itself, as well, and one deemed necessary from the experience of the ages for the upholding of the dignity and authority of the court, and to promote the due and unhampered administration of justice. Person v. Grier, 66 N. Y. 124. And at common law a writ of protection would issue to the party or witness by the court in which the action was pending, which would be respected by the other tribunals. And this power doubtless exists to this day in courts of common law jurisdiction. though the occasion for the exercise of it does not often present itself. But the granting of the writ of privilege, which, while proper, is not at all necessary to the security of the person from process, it only furnishes a convenient and authoritative notice to those who disregard it. Bridges v. Sheldon, 7 Fed. Rep. 44; Parker v. Marco, 136 N. Y. 585, 32 N. E. Rep.

The immunity extends to every case where the attandance is a duty or is necessary in conducting any proceeding of a judicial nature. Bac. Abr. "Privilege" B. 2; People v. Judge, 40 Mich. 729; Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210. It applies to plaintiffs and defendants in a cause without distinc-

tion (Fisk v. Westover, 4 S. D. 233, 55 N. W. Rep. 961), nor is there any difference in the application of the rule between parties and witnesses. Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210. And it is not necessary that the party be served with process. He may waive this and attend out of his jurisdiction, either as a suitor or witness, if he do so in good faith, and the immunity will still attend him. Ballinger v. Elliott, 72 N. C. 596; Arding v. Flower, 8 Tr. 534; Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210; 1 Greenl. Ev. sec. 316; Dungan v. Miller, 36 N. J. L. 182; May v. Shumway, 16 Gray (Mass.), 86. And the privilege extends to cases civil as well as criminal proceedings. Atchinson v. Morris, 11 Fed. Rep. 582; Cameron v. Roberts, 87 Wis. 291, 58 N. W. Rep. 376; Person v. Grier, 66 N. Y. 124; Miles v. McCullough, 1 Bin. (Pa.) 77. "The privilege of parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary, and returning wholly free from the restraint of process in other civil proceedings, has always been well settled and favorably enforced. It is mentioned in the Year Book, 20 Henry VI, 10, and enforced to protect not only the body of the suitor from arrest, but his horse and other things necessary for his journey which would otherwise be attachable." Brodie v. Sheldon, 7 Fed. Rep. 34, 43. Nor have the courts ever been inclined to restrict this privilege; on the contrary, it has always been the rule to allow every reasonable indulgence to persons claiming it. 1 Sell. Pr. 123. The privilege extends to every case where attendance is a duty in conducting any proceeding of a judicial nature. 1 Greenl. Ev., sec. 317; Bridges v. Sheldon, 7 Fed. Rep. 34, 48.

In Bours v. Tuckerman, 7 Johns. 538, one Williams was under recognizance to appear at the General Sessions of the Peace, and, appearing in obedience thereto, and before his discharge, was arrested upon a capias ad respondendum. He claimed his privilege in due form, and the Supreme Court of New York ordered his discharge on filing bail. But such a condition of the granting of the privilege is practically withholding it, as the party would, after all, have to respond to the bail bond or suffer the consequences, which, it is reasonable to presume, ordinarily, are tantamount to answering the proceedings in response to a summons or an indictment. The manifest error of this ruling was so palpable as to impress the court, in a later case, the necessity of repudiating it entirely and holding as was held in Norris v. Beach, 2 Johns. 294, that the immunity was absolute and unconditional, and could not be hampered by requiring the party concerned to give bail. Sanford v. Chase, 3 Cow. (N. Y.) 381. The reason for, and nature of, the privilege is thus clearly stated in Person v. Grier, 66 N. Y. 124. "It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle, as well as upon authority, their immunity from the service of process for the commencement of civil actions is absolute eundo morando et redeundo. · · · This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. Witnesses might be deterred and parties prevented from attending, and delays might ensue or injustice be done." Some instances in which the privilege has been upheld will be mentioned. Where one attends an arbitration to be examined under a rule of court, the privilege attaches.

Spence v. Stuart, 3 East, 89; Sanford v. Chase, 3 Cow. (N. Y.) 381. Likewise in case of a party necessarily attending proceedings in bankruptcy. Mathews v. Tufts, 86 N. Y. 568; King, ex parte, 7 Ves. Jr. 312; Arding v. Flower, 8 Tr. 534, So is a witness who attends to give his deposition before an officer in an action pending in court exempt. U.S. v. Edme, 9 S. & R. (Pa.) 147; Parker v. Marco, 136 N. Y. 535, 32 N. E. Rep. 989. Where a suitor came from a foreign jurisdiction at the request of his counsel for the purpose of consultation during the progress of a demurrer in his case and argument thereon, he was held to be privileged from process during his attendance upon the court, as well as during temporary recess taken for the convenience of the court. Kinne v. Lant, 68 Fed. Rep. 436. And in a case where a party to an action pending in Massachusetts was attending the taking of evidence in his cause in the city of New York before a special examiner was served with a summons in an action in New York during a temporary adjournment, it was held that he was privileged. Judge Blatchford in disposing of the issue well said: "The defendant attended as a party before the examiner. The regularity of the examination was recognized. It was thus made a regular proceeding in the suit in Massachusetts. The defendant had a right to attend upon it in person, whether he was to be himself examined as a witness or not. He attended in good faith, the examination was pending and unfinished, and he was served during the interval of an adjournment. The privilege violated was a privilege of the Massachusetts court, and one to be liberally construed for the administration of justice." Plimpton v. Winslow, 9 Fed. Rep. 365. For a like reason, one attending an examination, either as party or witness, before a master in chancery is privileged. Dungan v. Miller, 36 N. J. L. 182. In the case of Atchinson v. Morris, 11 Fed. Rep. 582, the defendant was a resident of Wisconsin, and was attending court in Chicago in obedience to process, when he was summoned in that city to appear in a civil action. He petitioned for a removal of the cause to the federal court which, being granted, he moved in that tribunal to quash the return of the summons. It was held that he was privileged from process in the State court, and that his petition and removal of the case to the federal court had not deprived him of his right to insist on his immunity. And this rule obtains though the motion to quash be filed in the State court before the removal is effected or even petitioned for. Kaufman v. Kennedy, 25 Fed. Rep. 785.

The time in which a suitor or witness may remain after his case is disposed of, or his testimony given, is such time as is reasonably necessary. And where a party to a suit, attending court out of the jurisdiction of his residence, was served the next day after the trial had ended, it was properly held that he was still privileged, as he might well be detained a day in rounding up his business in court, such as settling up costs, giving directions about execution and kindred matters. "Courts will not nicely scan the time of the return." Hayes v. Shields, 2 Yeates (Pa.), 222; Larned v. Griffin, 12 Fed. Rep. 590; Atchinson v. Morris, 11 Fed. Rep. 582; Cameron v. Roberts, 87 Wis. 291, 58 N. W. Rep. 376.

Generally, it is necessary, in order to protract the protection of privilege, that the suitor or witness attending a judicial proceeding of any kind return to his jurisdiction without unnecessary delay. If he should voluntarily and unnecessarily prolong his stay beyond the time reasonably necessary for his going

and return, he would lose the protection the instant that he remained over a reasonable time, and would, of course, then become subject to process the same as though he had come into the distant jurisdiction voluntarily and with no business purpose in view. But where a suitor who had been in attendance upon an arbitration was arrested on criminal process early the next morning before a proper time to leave, Lord Ellenborough held that he was clearly privileged. Spence v. Stuart, 3 East. 89.

There are a very few cases, mostly early ones, which seem to lean to the idea that the privilege can extend only to immunity from arrest in a civil action. This is held to be the law in a comparatively late case in Illinois, where two citizens of Missouri were engaged in a suit in that State, and it became necessary to take depositions in Chicago on behalf of the defendant. who accompanied his attorneys at the taking of the testimony, and, while so attending, was served with process in Illinois upon the same action. Upon motion to quash the return of the summons, it was held that the defendant was not exempt from service (Greer v. Young, 120 Ill. 184, 11 S. E. Rep. 167); and some of the earlier decisions in this State appear to be in harmony with this contention. The case, however, receives the criticism of the court in the principal case, where a contrary view. announced in a late Ohio case, is reviewed at length and unqualifiedly approved. This is evidently the true doctrine as existing at this day, and is sustained by overwhelming authority.

The immunity is of no less service or less protection in a criminal case, or an arrest under civil proceedings, than is the privilege of attending unmolested upon every stage of a legal proceeding, wherein the most sacred personal and property rights may be at stake. There is no greater difficulty, necessarily, in meeting a civil than a criminal charge; at least the necessity of the suitor's presence is as great and as indispensable in the one class of cases as in the other. All one might have could be involved in a civil case, while a criminal prosecution might involve only a nominal fine. It might, therefore, be much more important for the party to be affected to be present at his civil suit than at a criminal trial. True, he should be privileged to be at either, and, as we have seen and contend, he is privileged alike in both cases, and in the one just as fully and comprehensively as in the other. The leverage obtained by a litigant over his adversary, by getting service in a local jurisdiction to one and foreign as to the other, is very great, and, doubtless, might be such as to impel one to forego the privilege of attending the testimony in a case of no vast importance to avoid the possibility of service if he should invade the foreign jurisdiction. But the law knows no difference in the magnitude of cases, but offers a fair and impartial trial, with all necessary privileges and immunities in a case involving small amounts, as well as in cases where the most gigantic property or other rights are involved. Justice knows no degrees, but holds the most trivial right as inviolably sacred as the most important, and guarantees the privilege without distinction in all cases, whether criminal, quasi criminal or civil.

W. C. RODGERS,

Nashville, Ark.

JETSAM AND FLOTSAM.

THE TORRENS' SYSTEM OF LAND TRANSFERS IN OHIO.

The Torrens' system of land transfers is now a law in Ohio. The law as originally drawn, and as it passed the senate, made the registration of land by owners, while living, permissive merely, but provided that whenever any person died seized of a feesimple title to unregistered land, the executor of the estate of such deceased owner, should make application to have the same registered. By compelling representatives of decedents to have their lands registered, it was expected, that within a generation or so the whole of the land in the State would become registered. The lower house, however, did not take well to this mandatory provision, and by changing the word "shall" to "may," made it simply permissive. It was a small change, but one of very great effect. Instead of registration going forward in every county, it will be but here and there an isolated case. The law provides that upon first bringing land under the act, the owner must pay into an assurance fund, one-tenth of the value of the land as appraised for taxation. This will stand in the way of voluntary registration. The present law will, however, be an educator, and undoubtedly efforts will be made at the next general assembly to restore the mandatory provisions. In the meantime the people will have a chance to acquaint themselves with the practical value of the system .- Ohio Legal News.

BOOK REVIEWS.

AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, Vol. 29.

This volume is the last one of the series and comprehends subjects from "water companies" to "youth." It includes a very exhaustive article on the first mentioned topic, a paper on wills of nearly four hundred pages in length, one on witnesses nearly as long and a useful article on working contracts. This series of books is now well known to the profession and is of great value to the active practitioner. It possesses an especial value to those who have not access to libraries and text books inasmuch as, in a compact form, the substance of the law together with the adjudications of court may be readily found. It is published by Edward Thompson Co., Northport, Long Island, N.Y.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Pull or Commented upon in our Notes of Recent Decisions.

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- 1. ADMINISTRATION—Sale of Decedent's Land.—The purchase of the land of an estate by one of several heirs, at a sale under order of court for the payment of decedent's debts, does not inure to the benefit of the other heirs.—AUBUCHON v. AUBUCHON, Mo., 34 S. W. Rep. 569.
- 2. ADMINISTRATION—Trust Funds.—Where an intestate in his lifetime so commingled trust funds with his own that they cannot be identified in the hands of his administrator, the claims of the beneficiaries were those of ordinary creditors against decedent's estate.—PRIOR V. DAVIS, Ala., 19 South. Rep. 440.
- 8. ADMINISTRATION—Validity.—Administration upon the estate of one who is alive, and the sale of a land certificate thereunder are void.—SCHLEICHER V. GUT-BROD, Tex., 24 S. W. Rep. 657.
- 4. ADVERSE POSSESSION.—The occasional cutting of firewood on, or the taking of rock from, land, and permitting others to do so, and the payment of taxes thereon, all without the owner's knowledge, and without inclosing the land, will not constitute adverse possession thereof.—HERBST v. MERRIFIELD, Mo., 34 8. W. Rep. 571.
- 5. Assignment for Benefit of Creditors.—A general exception of exempt property from an assignment for the benefit of creditors does not, ipso facto, make the assignment deed void for uncertainty, or fraudulent and void as against creditors, and does not authorize an attachment against the assignee on account of its having been executed.—PARKER V. CLEAVELAND, Fla., 19 South. Rep. 344.
- 6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.

 —Where an assignment for benefit of creditors is a partial one only, its validity is not impaired by the fact that before its execution the assignors were engaged in fraudulently converting a part of their assets into money to prevent the same from being subjected by their creditors.—Thompson v. Preston, Miss., 19 South. Rep. 347.
- 7. ATTACHMENT Exemptions Express Wagon.—
 Under a tatute exempting from attachment one "express wagon," held that a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce and other light articles, and one that may conveniently be used for such purpose, is within the exemption.—WALKER V. CARKIN, Me., 34 Atl. Rep. 29.
- 8. Banks—Usury.—Code 1886, § 4140, making it a misdemeanor for any banker to discount commercial paper at a higher rate than 8 per cent. per annum, does not apply to national banks.—SLAUGHTER V. FIRST NAT. BANK OF MONTGOMERY, Ala., 19 South. Rep. 480
- 9. Bastardy Proceedings.—In bastardy proceedings, that the bond given by defendant for his appearance before the circuit court was defective does not affect the jurisdiction of the circuit court to try the case.—Walker v. State, Ala., 19 South. Rep. 358.
- 10. Carriers of Passengers—Negligence—Evidence.

 —Testimony of a mother that the death of her child was caused by a cold contracted by exposure to cold in defendant's railway coach, was competent as tending to establish the cause of such death, where it was shown that such witness was 46 years old, and the mother of eleven children; that the child in question

was robust and healthy; that its feet and hands became cold, and it became sick, and affected with sneezing and coughing, and contracted a severe cold, in the coach in question; that though it had the best of care, and was subjected to no other exposure, it grew worse, until it died; and that she had attended it constantly during such illness.—Fr. Worth & D. C. Ry. Co. v. Hyatt, Tex., 34 S. W. Rep. 677.

11. CARRIERS—Regulations—Enforcement.—The regulation of a railroad company that a monthly commutation ticket shall be surrendered by the passenger to the conductor on the last trip taken during the period for which it is issued, is a reasonable regulation of the railroad company in the conduct of its business as a common carrier of passengers; and if this regulation be indorsed on the ticket, and the passenger holding said ticket fails or refuses to surrender it on his last trip, or pay his fare to the conductor according to the legally established rates of the company, he can be ejected from the car.—Rogers v. Atlantic City R. Co., N. J., 34 Atl. Rep. 11.

12. CHATTEL MORTGAGE—Validity—Fraudulent Conveyance.—A mortgage given by a purchaser to secure the purchase price of a stock of goods—covering only the goods purchased, and given as a part of the transaction of purchase—is not fraudulent as to creditors of the purchaser, though he is allowed to sell from the mortgaged property in the course of trade; the transaction not having withdrawn from creditors any property which was subject to their claims, and not involving any fraudulent intent on the part of the debtor.—ADEINS V. BYNUM, Ala., 19 South. Rep. 400.

13. CONSTITUTIONAL LAW—Abandonment by Husband.—Code, § 1832, providing that "every woman whose husband shall abandon her shall be deemed a free trader, and she shall have power to convey her personal estate and her real estate without assent of her husband," is not in violation of Const. art. 10, § 6, providing that a married woman may convey her lands with her husband's written consent.—HALL v. WALKER, N. Car., 24 S. E. Rep. 6.

14. CONTEMPT—Verbal Order of Imprisonment.—Persons cannot be legally imprisoned for contempt by the district court simply on an oral order to an officer to confine such persons in jail, and without the issuance of a writ of commitment.—Ex PARTE KEARBY, Tex., 34 8. W. Rep. 635.

15. CONTRACT—Bailment.—Under an agreement to pay one dollar per day for the use of oxen, and to feed and care for them till returned, the pecuniary compensation of the bailor is limited to the number of days the oxen are actually used, though they are kept for a longer period.—LEARNED-LETCHER LUMBER CO. V. FOWLER, Ala., 19 South. Rep. 396.

16. Contract—Damages.—The rule that one who has been damaged by a breach of a contract should do all that reasonably lies within his power to protect himself from loss by seeking another contract of like character, the profits of which should be applied in mitigation of such damages, is correct as applied to some classes of cases, and has especial reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services.—Sullivan v. McMillan, Fla., 19 South. Rep. 340.

17. CONTRACT—Damages.—A refusal to allow one to perform a stipulated service does not entitle him to recover the agreed price for full performance, but only such damages as he actually sustained by the refusal.—WILLIAM TARR CO. V. KIMBROUGH, Ky., 84 S. W. Rep. 582

18. CONTRACT—Physicians and Surgeons.—A contract by a physician to permanently retire from the practice of medicine in a particular city and vicinity, in consideration of \$250, is reasonable and valid.—WEB-STER V. WILLIAMS, Ark., 34 S. W. Rep. 537.

19. CONTRACT TO PAY ANOTHER'S DEBT-Novation.—Where a third person contracts in writing to pay the

debt of another, and the creditor, with his consent and relying on the contract, credits the debtor, and charges such person with the debt, he, by novation, becomes directly liable to the creditor.—PUGH V. BARNES, Ala., 19 South. Rep. 370.

20. CONTRACT — Validity.—A contract under which plaintiff agreed to establish and maintain a shooting gallery in a house furnished by defendant, the net profits of which business were to be divided between them, and the business to continue so long as it was profitable or paid expenses, does not, on account of its uncertainty, furnish a cause of action which will support a judgment for damages in case of a breach thereof by defendant, by terminating such business.—Pulliam v. Schimpf, Ala., 19 South. Rep. 428.

21. CONTRACTS—Indefiniteness.—In a suit to enforce a vendor's lien, evidenced by a note which provided that the note is to be traded out by the payee by buying live stock from the maker if the prices can be agreed upon, otherwise it is to be paid in cash when due, that the payee examined some stock, and expressed himself satisfied with the prices, no particular stock, though, being selected by the payee, is no defense.—BUFORD v. WARD, Ala., 19 South. Rep. 358.

22. Conversion by Carriere—Evidence.—In conversion it appeared that defendant carrier received a horse consigned to "T & W," and transported it to the point of destination; that plaintiff claimed the shipment was to himself, and demanded possession of the horse; that defendant refused to deliver it till it had some evidence of plaintiff's right to receive the horse, and used all reasonable efforts to ascertain who was the proper consignee; that plaintiff never furnished any evidence; and (that, when it was finally determined to whom the horse should be delivered, he refused to accept the horse, and pay the charges, whereupon defendant sold it at public auction: Held, that there was no conversion by defendant.—GULF, C. & S. F. RY. CO. V. FOWLER, Tex., 34 S. W. Rep. 661.

23. CONVERSION—Damages.—In trover for the conversion of logs cut from plaintiff's land by an inadvertent trespasser, and purchased by defendants in good faith, the measure of damages is the value of the logs after severance, and before their removal from the land, and not their increased value at the place of delivery.—White v. Yawkey, Ala., 19 South. Rep. 360.

24. CORPORATION—Quasi Public Corporations—Charter.—The charter of a private corporation, which is in its nature essentially public, is not protected from legislative interference, unless, in unmistakably clear language, the State has indicated a deliberate purpose not to interfere in all time to come, with the rights and privileges granted.—Winchester & L. Turnpike Road Co. v. Croxton, Ky., 34 S. W. Rep. 518.

25. CORPORATION — Service of Process.—Service of summons, in an action against a foreign corporation on an officer thereof who was also plaintiff's attorney in fact for the commencement and prosecution of such action, was invalid.—GEORGE v. AMERICAN GINNING Co., S. Car., 24 S. E. Rep. 41.

26. CORPORATIONS—Preferred Stock — Lien.—A corporation cannot, in the absence of statutory authority, make its preferred stock a lien upon its property; nor can an agreement between the subscribers to the stock of the corporation make such stock a lien on its property, as against bondholders or general creditors without notice of such agreement.—CONTINENTAL TRUST CO. OF NEW YORK V. TOLEDO, ST. L. & K. C. R. CO., U. S. C. C. (Ohio), 72 Fed. Rep. 98.

27. CREDITORS' BILL—Parties.—A bill by creditors of a decedent against his heirs, alleging that the decedent in his lifetime, without consideration, conveyed certain land to said heirs, which conveyance rendered the decedent insolvent, and was void as against the demands of complainant, need not make the decedent's administrator a party, or show, further, why he was not made a party.—MERCHANTS' NAT. BANK OF TUSCALOOSA V. MCGEE, Ala., 19 South. Rep. 356.



- 28. CRIMINAL EVIDENCE—Homicide.—Dying Declarations cannot be objected to on the ground that deceased at the time of making them, had hope of recovery, because immediately on receiving the wound he remarked to a person that he would get even with him; he having a short time afterwards stated that the wound was mortal, and having continued to make this statement till his death.—Pole v. State, Tex., \$4 S. W. Rep. 633.
- · 29. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—A complete foundation has been laid for the introduction of dying declarations in evidence by making proof that the attending physician had told the deceased that his wounds were dangerous, that the deceased had stated that he was going to die, and at the time of making his statement his extremities were cold, and shortly afterwards he died.—STATE v. SMITH, La., 19 South. Rep. 458.
- 30. CRIMINAL EVIDENCE—Indecent Assault—Declarations of Prosecutrix.—On trial for indecedent assault, statements made soon afterwards by prosecutrix to her mother are inadmissible unless shown to be so closely connected with the assault in point of time as to be res gestæ.—PRICE V. STATE, Tex., 34 S. W. Rep. 622.
- 31. CRIMINAL EVIDENCE—Photograph.—On a trial for assault with intent to kill, it was not error to permit a photographer, who was present at the time of the assault, to introduce in evidence, to be used as a diagram, a photo representing the window through which the person assaulted was shot, with said person occupying the position he was in at the time of the shooting, the said photograph having been made by said photographer the morning after the shooting.—STATE V. KELLEY, S. Car., 24 S. E. Rep. 60.
- 52. CRIMINAL EVIDENCE—Robbery.—On a prosecution for robbery at H, it being in evidence that defendant gambled, it was error to admit evidence that H was infested with a gang of gamblers, who were reported to be the persons who had committed robberies there for several years past.—Brown v. State, Ark., 34 S. W. Rep. 541.
- 83. CRIMINAL LAW—Arson—Burning One's Own House.
 —In the absence of statute, a person cannot be convicted of arson for burning his own house, of which he has possession, though done with intent to defraud an insurance company.—STATE v. SARVIS, S. Car., 24 S. E. Rep. 55.
- 34. ORIMINAL LAW-Embezzlement-Evidence.—One intrusted as attorney to collect money, who, concealing from his principal the fact of collection, appropriates to his own use part of the money collected, without any authority, is guilty of embezzlement, though he intended to replace it out of money of his own.—FARMER V. STATE, Tex., 34 S. W. Rep. 620.
- 85. CRIMINAL LAW-Flight of Accused.—In a prosecution for homicide it is not error to exclude evidence that defendant did not attempt to run away after the homicide, where the State did not attempt to show flight by defendant, and a voluntary surrender had already been shown.—HARVEY V. STATE, Tex., 34 S. W. Ren. 623.
- 36. CRIMINAL LAW—Instructions—Accomplice.—When the testimony of a witness for the State tends strongly to show that he was an accomplice in the crime for which the defendant is being tried, the instructions should state the law governing the testimony of an accomplice, and leave it to the jury to determine whether or not the witness was one.—Ballew v. State, Tex., 34 8. W. Rep. 616.
- 37. CRIMINAL LAW—Larceny—Possession.—On a trial for larceny, where there was evidence that defendant was keeping the property at prosecutor's request, it was error to instruct that the possessor of recently stolen property is the thief, unless his possession is satisfactorily explained, without predicating it on a finding that larceny had been committed.—Thomas v. STATE, Ala., 19 South. Rep. 408.

- 38. CRIMINAL LAW!— Theft Intent. On trial for theft of a chicken it was error to exclude testimony that on the night of the alleged theft witness and defendant agreed, for sport merely, and without intent to steal, to catch a chicken in prosecutor's henroost, make it squall, and then let it go.—Colwell v. State, Tex., 84 S. W. Rep. 615.
- 89. DEDICATION—Street—Married Woman.—It having been provided by statute that a married woman can only convey her separate real estate by the joint deed of herself and her husband, she can dedicate land for use' by the public as a street only by such a deed, or by a statutory dedication; and a dedication cannot be established against her by equitable estoppel.—Var.SANDT v. WIER, Ala., 19 South. Rep. 424.
- 40. DEED—Delivery.—Evidence that a vendor, by direction of the vendee, who was indebted in another state, conveyed the land by deed absolute in form to the vendee's wife, and delivered it to a person designated by the vendee, is prima facie evidence of delivery to the wife, though the deed was afterwards found in possession of the husband, and he claimed the land.—RUMSEY v. OTIS, Mo., 34 S. W. Rep. 551.
- 41. DEED OF TRUST.—A deed of trust purporting to have been executed by a husband and wife in which the name of the wife who was owner of the property, does not appear in the body of the instrument is invalid.—DAVIDSON V. ALABAMA IRON & STEEL CO., Ala., 19 South. Rep. 390.
- 42. DEED OF TRUST-Description.-A deed of trust on the lands and railway of a mining and railway corporation provided that the mortgage should cover all the "personal property of every kind, now owned, or hereafter to be acquired and owned and used, whether by purchase or otherwise, in connection with, and for use in developing and operating, its said coal mines and other works of improvements now on, or hereafter to be opened upon, said lands or any part thereof." The deed authorized the grantor to enjoy the real and personal property conveyed until default, and to take and use the rents and income therefrom: Held, that the mortgage did not cover the profits or proceeds of the business of mining, such as coal, coke, and iron mined and manufactured, and accounts from the sale thereof.—ALABAMA NAT. BANK V. MARY LEE COAL & RAILWAY CO., Ala., 19 South. Rep. 404.
- 48. DEED TO HOMESTEAD—Mistake in Description-Reformation.—A deed to the homestead, which is properly signed and acknowledged by both husband and wife, but which, by mistake, misdescribes the land by giving a wrong section number, may be reformed in equity.—Tillis v. Smith, Ala., 19 South. Rep. 374.
- 44. DEED Warranty—After-acquired Title.—Where land subject to a duly recorded mortgage was conveyed by the mortgagor, with warranty, and a third person subsequently purchased at the foreclosure sale for the mortgagor, the title he acquired inured to the benefit of the grantee in the warranty deed, as against a purchaser from such third person with notice that he held the land for the mortgagor.—Morris v. Housley, Tex., 34 S. W. Rep. 659.
- 45. DESCENT—Partition.—Under Rev. St. 1889, § 4469, providing that when several lineal descendants are all of equal degree of consanguinity to the intestate of his father, mother, brothers, etc., or any ancestor living, and their children come into partition, they shall take per capita, and where a part of them are dead and a part living, and the issue of those dead have a right to partition, such issue shall take per stirpes if nephews and nieces of an intestate come into partition together with the children of deceased nephews and nieces of the intestate, the first shall take per capita, and the latter per stirpes.—AULL v. Day, Mo., 34 S. W. Rep, 578.
- 46. ELECTION OF REMEDIES Estoppel.—The seller, after recovery of judgment for the purchase price of the property, and levy of attachment thereon, cannot, on a claim being interposed in such action, by the

buyer, that the property is exempt, sue in detinue for its recovery, on the ground that the title to the property was not to pass until the purchase price was paid.

—FULLER V. EAMES, Ala., 19 South. Rep. 866.

47. EQUITY — Jurisdiction.—A suit in equity, to remove a cloud upon complainant's title to land and exclude defendant from such land, cannot be maintained, in a federal court, when the defendant is in possession of the land and the complainant is not, the remedy at law being adequate and complete; and a local statute, permitting the bringing of such suits in the State courts, does not enlarge the power of the federal courts to entertain the same.—GORDAN v. JACKSON, U. S. C. C. (Ark.), 72 Fed. Rep. 86.

48. ESTOPPEL — Sale of Land.—Where, in the division of a decedent's estate, a note due the estate is given one of the distributees as her share of the estate, that she subsequently takes from the maker a mortgage on land as security for the note, and purchases on foreclosure of the mortgage, does not estop another distributee to claim an interest in the land adverse to the mortgagee.—COOPER v. LINDSAY, Ala., 19 South. Rep. 379.

49. EVIDENCE — Proof of Handwriting.—An unrecorded instrument, purporting to be a deed, signed by one person as maker, and attested by two other persons as witnesses, is admissible in evidence, upon proof showing that all three of these persons are dead, and that the signatures of the two latter upon the instrument are in their genuine bandwriting.—MCVICKER V. CONKLE, Ga., 24 S. E. Rep. 23.

50. EXECUTION SALE — Purchase by Judgment Creditor.—A creditor who buys in land at execution sale under his judgment, by merely crediting the amount of his bid on such judgment, is not a bona fide purchaser.—AULTMAN, MILLER & CO. v. GEORGE, Tex., 34 S. W. Rep. 652.

51. FALSE IMPRISONMENT — Arrest —Code Cr. Proc. art. 229, authorizing an officer to arrest an accused without a warrant, where it is shown, on satisfactory proof, that a felony has been committed, and the accused is about to escape, a sheriff arresting a person without a warrant at the request of a third person, on mere suspicion that he is guilty of a felony, without any proof thereof, is liable for false imprisonment.—KARNER V. STUMF, Tex., 34 S. W. Rep. 656.

52. FEDERAL COURTS — Following State Practice.—Rev. St. § 914, providing that the practice, pleading, etc., in the circuit and district courts in civil causes shall conform as nearly as may be to the practice, pleading, etc., in the State courts, does not authorize the federal courts to disregard the established distinctions between law and equity nor to permit equitable defense in actions at law, although the State statutes permit such defenses to be made in the State courts.—Davis v. Davis, U. S. C. C. of App., 72 Fed. Rep. 81.

52. FEDERAL COURTS—Mortgage Foreclosure.—A deed absolute in form, given as security for a loan of money, and executed contemporaneously with the debtor's notes and with a bond to reconvey, given by the grantee, all in accordance with the provisions of the Georgia Code (sections 1969-1971), may be foreclosed as a mortgage, by a suit in equity in a federal court, not withstanding that the above Code provisions give a special remedy at law; for the equity jurisdiction of the federal courts cannot be limited by State legislation.—RAY V. TATUM, U. S. C. C. of App., 72 Fed. Rep. 112.

54. FEDERAL OFFENSE — Conspiracy under Federal Statutes.—The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is. The statutes, however, impose one limitation upon the common law crime, namely, that there must be some overtact.—USITED STATES V. MCCORD, U. S. D. C. (Wis.), 72 Fed. Rep. 159.

55. FEDERAL OFFENSE-Improper Use of Mails — Obscene Matter.—Rev. St. § 8893, making it a criminal offense to place in the mails any "obscene, lewd, or laseivious publication," refers only to publications which are immoral by reason of their relation to sexual impurity, the words having the same meaning as is given them at common law in prosecutions for obscene libel.—Swearingen v. United States, U. S. S. C., 16 S. O. Rep. 562.

56. FRAUDULENT CONVEYANCE — Present Debtor.—A voluntary conveyance is not per se void, except as against present debts.—SEVERS v. DODSON, N. J., 84 Atl. Rep. 7.

57. FRAUDULENT CONVEYANCES — Preferring Creditors.—The fact that a creditor accepts a mortgage from a failing or insolvent debtor, knowing that the debtor's purpose is to hinder and delay other creditors, and that such will be the result, does not invalidate the instrument, if it betaken in good faith to secure a valid debt.—WOOD v. CASTLEBURY, Tex., 34 S. W. Rep. 655.

58. HOMESTEAD.—During coverture, and while the husband and wife are living together, there can be no such thing as a separate homestead of the wife, distinct from that of the husband.—ROSENBERG V. JETT, U. S. C. C. (Ark.), 72 Fed. Rep. 90.

59. Homestead—Dower Lands.—Under laws effectuating Const. 1888, art. 2, \$ 32, which directed an enactment to exempt from process to the head of any family residing in this State a homestead in lands, whether held in fee or any lesser estate, a widow cannot claim a homestead exemption in her dower lands in addition to a homestead exemption previously claimed and allowed in her deceased husband's estate.—Landam v. Glover, S. Car., 24 S. E. Rep. 49.

60. HUSBAND AND WIFE — Mortgage—Death.—Where a husband and wife mortgage her separate property, their minor children are not proper parties to an action by the wife, after his death, against the mortgagee, for possession, in which the mortgagee asks foreclosure of his mortgage.—KELLER V. BEATTIE, Tex., 34 S. W. Rep. 667.

61. HUSBAND AND WIFE—Contracts between—Equity.

—A husband purchased land for his wife, under an agreement with her that a mortgage should be given by her to a third person to secure the husband in the repayment of the bond given by him for the price, and thereby avoid the common law rule prohibiting contracts between the husband and wife. The husband and wife were subsequently divorced: Held, that equity would give effect to the transaction, so as to enforce the equitable lien of the husband on the land for repayment of the purchase price paid by him.—
ECKERMETER V. HOFFMEIER, Ky., 34 S. W. Rep. 521.

62. INSURANCE — Action on Policy Pleading.—As a policy, as a written instrument, imports a consideration in an action thereon, in the absence of a plea of want or failure of consideration, evidence of non-payment of premiums is inadmissible.—PHENIX INS. CO. v. HAGUE, Tex., 84 S. W. Rep. 654.

63. INSURANCE—Total Loss.—The total loss of a building under Rev. 8t. art. 2971, does not mean the entire destruction of its materials, but that the building has lost its specific character and identity as a house; and, in an action to recover from an insurance company for a total loss, evidence that, by the use of the materials remaining, the building could be reconstructed for less than the amount of the policy, to authorize the company to rebuild, is inadmissible.—ROYAL INS. CO. V. MCINTYRE, Tex., 24 S. W. Rep. 661.

64. INSURANCE—Warranties—Waiver.—A covenant in a fire policy by which the insured agrees to keep a set of books showing all business transactions and the last inventory of the business locked in a fireproof safe at night and when the store is not open for business, and that the policy shall be void if, in case of loss, they are not produced, constitutes a warranty which must be strictly, and not substantially complied

with.—NORTHWESTERN NAT. INS. Co. v. MIZE, Tex., 34 S. W. Rep. 670.

65. Joint Wrongdorms—Action Over for Indemnity.

—In an action against the District of Columbia for injuries caused by the want of a cover on a gas box placed by a gas company in the sidewalk, there was no evidence of actual notice to the District of the absence of a cover, though there was evidence that the box had been uncovered for some time: Held, that a verdict against the District determined that the defect had existed so long as to impute negligence to those whose duty it was to keep the box in repair, and hence a judgment on such verdict established negligence on the part of the company, which was conclusive in a subsequent suit over against it by the District.—Washington Gaslight Co. v. DISTRICT OF COLUMBIA, U. S. S. C., 16 S. C. Rep. 564.

66. JUDGMENT OF SISTER STATE—Impeachment.—The only grounds upon which the judgment of a court of general jurisdiction can be disregarded in another state are—First, where the adjudging tribunal had no jurisdiction over the person against whom judgment was pronounced, or over the subject-matter of the litigation; and, second, where the adjudication of the foreign tribunal has been obtained by fraud.—FAIR-CHILD v. FAIRCHILD, N. J., 84 Atl. Rep. 10.

67. JUDGMENT—Res Judicata.—A judgment in an action for damages for the construction by a railroad company of a permanent drain, whereby water is thrown across the land of another, is a bar to an action for damages subsequently accruing (no material change being made in the drain) by the washing away of the soil.—INTERNATIONAL & G. N. RY. CO. V. GIESELMAN, Tex., 34 S. W. Rep. 658.

68. JUDGMENT—Vacation.—The court cannot, after the term at which a default judgment was rendered in an action where service was by attachment of property, vacate the judgment on a showing that the property attached was not the property of the defendant.—SOULARD V...VACUUM OIL CO., Ala., 19 South. Rep. 414.

69. JUDICIAL SALE—Money in Hands of Officer.—A purchaser at a judicial sale, who allows a cash payment made by him on the property to remain in the hands of the officer selling after the sale has been set aside, does so at his own risk, and he is not entitled to be credited with the amount on a subsequent purchase of the property when resold by another officer.—HEAD V. MORE, Tenn., 34 S. W. Rep. 518.

70. LIMITATIONS—Libel—Statements in Judicial Proceedings.—A cause of action for libel, founded upon publications made in the course of judicial proceedings, does not accrue until the final determination, in favor of the party libeled, of the proceedings in which the publication is made, and the statute of limitations accordingly does not begin until then to run against such cause of action.—MASTERSON v. BROWN, U. S. C. C. of App., 72 Fed. Rep. 136.

71. LIFE INSURANCE—Notice of Forfeiture.—In an action on a life policy on the joint lives of plaintiff and his wife, containing a provision that no forfeiture should be declared for non-payment of premium, unless a notice in writing should have been mailed by defendant to plaintiff, it was error to admit, over objection, evidence of such notice and forfeiture, where they had not been affirmatively alleged by defendant, though plaintiff had alleged, and defendant, by both general and special denials, denied that the policy was in force at the date of the death of plaintiff's wife, and that plaintiff and his wife had complied with the terms of the policy as to the payment of premiums.—MULLEN v. MUTUAL LIFE INS. Co., Tex., 34 S. W. Rep. 805.

72. MARRIED WOMEN—Mortgage of Separate Estate.—Under the Act of 1887, providing that a mortgage by a married woman of her separate estate shall be a charge thereon whenever an intention to that effect is declared in the mortgage, no such intention need appear in the instrument, if it was in fact executed for the benefit of her separate estate.—RIGBY v. LOGAN, S. Car., 24 S. E. Rep. 56.

78. MASTER AND SERVANT—Injuries—Defective Machinery.—In an action by a servant for personal injuries caused by defective machinery, a complaint alleging that the defect had existed for a long time, and that the master had negligently failed to remedy the same, and negligently permitted the machinery to be operated in the defective condition, sufficiently alleges negligence on the part of the master.—COMRAD V. GRAY, Ala., 19 South. Rep. 898.

74. MASTER AND SERVANT—Injury—Contributory Negligence.—A railroad brakeman who, in his contract of employment, stated that he had had three years' experience in that capacity, and knew it was dangerous to climb up the side of a box car by the ladder while the train was moving, was killed while attempting, without any urgent necessity therefor, to climb up a ladder whose grab iron he knew was defective, and which it was part of his special duty to examine: Held, that he was guilty of contributory negligence, and there could be no recovery.—CLYDE v. RICHMOND & D. B. CO., U. S. C. C. of App., 72 Fed. Rep. 123.

75. MASTER AND SERVANT—Vice-principal.—Negligence.—A railroad engineer, with authority to direct a brakeman to put on the brake, is, as to such brakeman, a vice-principal, within Act March 10, 1891, providing that "ail persons engaged in the service of any railway corporation who are intrusted by such corporation with the authority to direct any other employee are vice-principals of such corporation, and not fellow-servants with such employee."—Texas Cent. Rt. Co. v. Frazier, Tex., 34 S. W. Red. 664.

76. MECHANIC'S LIEN—Failure to Register Contract.—Failure of a contractor to register the contract as required by statute to fix his mechanic's lien will not defeat the lien, where the owner had the original contract (of which no copy existed) in his possession, and refused on demand to surrender it for registry.—PARKS V. TIPPIE, Tex., 34 S. W. Rep. 676.

77. MECHANIC'S LIEN-Homestead.—A claim of homestead cannot be asserted against a mechanic's or material-man's lien.—MCANALLY v. HAWKINS LUMBER Co., Ala., 19 South. Rep. 417.

78. MORTGAGE—Defective Title—Mistake of Law.—In an action to foreclose a mortgage securing the price of land other than that mortgaged, defendants may be granted relief on the ground that the vendor, though her deed recited that she owned, and it professed to convey a fee-simple title, and both parties acted under the erroneous legal conclusion that she had such title, had in fact only a life estate in the property.—Wilsos v. Off, Penn., 34 Atl. Rep. 28.

79. MORTGAGE OF CORPORATION PROPERTY—Lien.—Under Code, § 1225 (Acts 1879), disabling corporations from conveying their property, by mortgage, freed from liability on a judgment obtained against such corporations "for labor performed, for material funished, or torts committed by such corporations, their agents or employees," liens for labor performed or material furnished after making the mortgage are superior thereto.—POCAHONTAS COAL CO. v. HENDERSON ELECTRIC LIGHT & POWER CO., N. Car., 24 S. E. Red. 22.

90. MUNICIPAL CORPORATIONS—Liquor License—Ordinance.—A conviction for the violation of an ordinance against the sale of intoxicating liquor by a retail liquor dealer on Sunday, which operates as a revocation of the license of the liquor dealer, is void, and the ordinance which confers upon the conviction such an operation is also void, as not being within the chartered powers of the common council to enact.—STATE V. MAYOR OF CITY OF RAHWAY, N. J., 84 Atl. Rep. 5.

81. MUNICIPAL CORPORATIONS — Privilege Tax on Trades.—An ordinance imposing a license tax on all dealing in second-hand clothing does not violate Const. art. 5, § 8, requiring such taxes to be uniform between those belonging to the same class.—ROSENBAUM T. CITY OF NEWBERN, N. Car., 24 S. E. Rep. 1.

52. NEGLIGENCE—Defective Manhole.—Where plaintiff was injured by the tilting of the cover of a manhole



maintained by defendant in the sidewalk in front of his premises, the fact that an independent contractor, who delivered coal to defendant, negligently failed to replace the cover properly, will not relieve defendant from liability, if the negligent construction of the cover directly contributed to plaintiff's injury.—BENJAMIN V. [METROPOLITAN ST. RY. Co., Mo., 34 S. W. Rep. 590.

- 88. NEGLIGENCE—Examiner of Title.—A right of action for negligence in the examination of a title accrues at the time the examination is made and reported, and not when damages result therefrom.—SCHADE V. GEHNER, Mo., 34 S. W. Rep. 576.
- 84. NEGLIGENCE—Gas Companies.—A gas company is bound to use reasonable care in the inspection of its pipes, and in repairing leaks therein, after notice, whether caused by its own negligence or not.—Pine Bluff Water & Light Co. v. Schneider, Ark., 84 S. W. Rep. 547.
- 85. NEGLIGENCE OF SERVANT—Injuries to Third Persons—Evidence.—In an action for injuries from being run into by a horse and buggy negligently driven by defendant's servant, a refusal to allow the servant to testify whether he wilifully ran into plaintiff was proper, where the only allegation in the petition on that issue was an argumentative one that the injuries could not have been inflicted save through "the gross-mismanagement and carelessness, amounting to criminal neglect," of the servant; especially where plaintiff, in open court, disclaimed that the petition claimed that the servant acted willfully.—TAYLOR V. SCHERPE & KOREN ARCHITECTURAL IRON CO., MO., 24 S. W. Rep. 591.
- 86. NEGOTIABLE INSTRUMENT—Extension of Note.—The payment and acceptance of interest on a past due note for a specified period beyond the date of its maturity, and the indorsement thereof on the note by the payee, are only prima facts evidence of a contract to extend payment, and will not discharge the surety, if it appears that no such extension was in fact agreed to by the payee.—MADDOX V. LEWIS, Tex., 24 S. W. Rep. 647.
- 87. NEGOTIABLE INSTRUMENT—Liability of Indorser.—Where defendant, payee of a note, indorses it for a certain amount, he cannot be held liable for attorney's fees, provided for in the note, in addition to the amount indorsed.—COLE v. TUCK, Ala., 19 South. Rep. 377
- 88. NEGOTIABLE INSTRUMENT—Note—Alteration.—To add a name to a note as a joint maker thereof, without the knowledge and consent of the original maker of the note, after it has been transferred, is a material alteration thereof, and discharges the original maker from liability thereon.—FORD V. FIRST NAT. BANK OF CAMERON, Tex., 34 S. W. Rep. 684.
- 89. NEGOTIABLE INSTRUMENT—Sealed Note.—Though a note under seal is executed in blank as to the payee's name, if the maker, after such name is inserted, acknewledges the note as his, he will be liable thereon.—Wester v. Baller, N. Car., 24 S. E. Rep. 9.
- 90. Partition.—The right of a tenant in common to partition is a matter of right, and is unaffected by the fact that a sale, the land being incapable of equitable partition otherwise, would not be to the best interest of all the owners.—Cates v. Johnson, Ala., 19 South. Rep. 416.
- 91. PAYMENT Notice of Assignment.—The maker of a bond payable to F is charged with notice that it had become the property of N, where, on making a payment, he is given a receipt signed "F," per an agent, reciting receipt of the money "for N."—NATIONAL FERTILIZER CO. V. THOMASON, Ala., 19 South. Rep. 415.
- 92. PRINCIPAL AND AGENT Purchase of Lands.—One purchasing lands through an agent is affected by the previously acquired knowledge of the agent in respect to matters affecting the title, if the agent had that knowledge in his mind when he made the purchase. Where it is sought, therefore, to bind the principal by

- his agent's knowledge, it is competent to adduce evidence tending to show previous knowledge by the agent, but the party is bound to follow this up by evidence tending to show that the agent had it in mind at the time.—BROWN V. CRANBERRY IRON & COAL CO., U. S. C. C. of App., 72 Fed. Rep. 76.
- 98. PRINCIPAL AND AGENT Unauthorized Act of Agent.—In an action on a note, where defendant pleaded that, while the note was in the hands of plaintiff's agent, he turned over to the agent a smaller note of a third person, which was accepted by the agent as part payment of the one in suit, and it was shown that plaintiff had the smaller note, which was at the time of trial in the hands of her attorney for collection, it was error to exclude evidence thereof on proof alone that the agent had no authority to accept the note as payment; the action of plaintiff in retaining the note after the filing of the answer tending to show a ratification of its acceptance by the agent, if received by him as alleged.—CAMPBELL v. JENKINS, Tex., 34 S. W. Rep. 673.
- 94. PROCESS Summons Service on Corporation.—Under Sand. & H. Dig. § 5669, providing that service of summons on a domestic corporation may be on one of the chief officers, and, in case of their absence, on one of the other officers or an agent, the return on a summons showing service on an agent of the corporation does not show good service on the corporation, it not being stated therein that none of its chief officers were to be found in the county.—Arkansas Coal, Gas, Fire-Clay & Manufacturing Co. v. Haley, Ark., 34 S. W. Red. 545.
- 95. RAILROAD COMPANIES Accident on Track—Negligence.—In an action for personal injuries it appeared that defendant's train was standing on a switch track, and blocked a public crossing; that plaintiff went to the head of the train, crossed over, and was walking back between the main and switch track to the crossing; that he did not look back to see whether a train was approaching on the main track, and that, as he stepped upon it, he was struck by a train; that the track was clear, and that the train might have been seen by plaintiff had he looked back: Held, that plaintiff was chargeable with negligence.—MARTIN V. LITTLE ROCK & FT. S. RY. CO., ARK., 34 S. W. Rep. 545.
- 96. RAILROAD COMPANY—Street-railway Companies—Negligence.—Recovery for injury to one who tries, by hurrying, to cross a street-car track ahead of an approaching car, and is struck by it before he can get across, is barred by reason of his contributory negligence, though the motorman may be negligent in not stopping the car after he is seen.—Watson v. Mound St. Ry. Co., Mo., 34 S. W. Rep. 578.
- 97. REPLEVIN Undivided Interest in Crops.—Replevin will not lie by a mortgagee to recover, from a cotenant of the mortgagor in possession of a crop raised on shares, the undivided interest of the mortgagor therein, subject to the mortgage.—MOSELY V. CHEATHAM, Ark., 34 S. W. Rep. 543.
- 98. SALE Breach of Warranty.—Where an executed contract of sale of corporate stock contained a warranty on the part of the seller, and also a clause in the nature of a defeasance, of the benefit of which the buyer might avail himself at his option, his waiver of such privilege did not deprive the buyer of his right to recover on such warranty.—BLACKNALL v. Rowland, N. Car., 24 8. E. Rep. 1.
- 99. SALE-Right to Rescind Waiver.—Where goods were sold under an agreement that one-half of the price was to be paid on delivery and the balance at four months, the vendors, by accepting the first installment two months after delivery, waived their right to reclaim the goods, and the title thereto thereupon vested in the vendee.—CRAWFORD V. SPRAGGINS, Ala., 19 South. Rep. 372.
- 100. Sales—Bona Fide Purchaser.—A bona fide purchaser of attached property from the attachment plaintiff, who secured possession thereof after the at-

tachment, under an agreement with other attaching creditors of the owner, cannot hold the same as against the officer levying the attachment.—JETTOR v. TOBEY, Ark., 24 S. W. Rep. 531.

101. STATUTE — Time of Taking Effect.—Const. 1876, art. 8, § 89, provides that no law shall take effect or go into force "until 90 days after the adjournment" of the session at which it was enacted, etc.: Held, that the words "until 90 days after the adjournment" mean until a period of 90 days shall have elapsed after the adjournment.—HALBERT V. SAN SABA SPRINGS LAND & LIVE-STOCK ASS'M, Tex., 34 S. W. Rep. 689.

102. TAX TITLES.—A tax title is good though Laws 1895, ch. 119, § 51, declaring that no land shall be sold for taxes unless the taxpayer has not sufficient personal property to pay the same, situated in the county where the tax is due, was not complied with.—STANLY V. BAIRD, N. Oar., 24 S. E. Rep. 12.

108. TELEGRAPH COMPANIES—Failure to Deliver Telegram.—A telegraph company through whose failure to deliver a message plaintiff was prevented from visiting his dying stepfather, between whom and himself the relations were tender and affectionate, is not responsible in damages for the injury occasioned by such failure, unless shown to have had notice of the tender and affectionate relations existing between such parties.—Western Union Tel. Co. v. Garrett, Tex., 24 S. W. Rep. 849.

104. TRUST FOR MARRIED WOMAN—Power of Disposition.—The words "for the separate and sole use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created.—Kirby v. Boyette, N. Car., 24 S. E. Rep. 18.

105. UNLAWFUL DETAINER—Defenses.—A tenant cannot defend an action by his landlord, before a justice of the peace, for unlawful detainer, by setting up the foreclosure of a mortgage executed by the landlord prior to the date of the lease, and an attornment by the tenant to the purchaser at the sale; since Code, § 8889, forbids the merits of the title to be inquired into in such suits.—Davis v. Pou, Ala., 19 South. Rep. 863.

106. USURY—Note Bearing Illegal Interest.—A provision in a note for the purchase of property, that after maturity it shall bear interest at 10 per cent., renders it usurious, such interest being for the forbearance of the debt after its maturity, and no action can be maintained thereon.—BANG V. PHELPS & BIGELOW WISDMILL CO., Tenn., 84 S. W. Rep. 516.

107. Usury — Note — Verbal Agreement. — A verbal agreement, entered into at the time a note was executed, that a usurious rate of interest shall be paid thereon, renders the note usurious.—ROE v. KISER, Ark., 34 S. W. Rep. 534.

108. VENDOR AND PURCHASER—Interpretation of Contract.—Where one purchases land at an agreed price, and assumes the payment of \$4,000 subscribed by the grantor in aid of the extension of a railroad, but because of the abandonment of such extension before completion he is rendered liable only for a part of the subscription, he is not liable for the balance to the grantor.—MILLER v. BARLER, Tex., \$4.8. W. Rep. 601.

109. VENDOR AND PURCHASER—Specific Performance.

—Where a vendor asks the specific performance of an executory contract to buy land, and an issue is made as to title, the burden rests upon him to show that the title offered is a marketable one, and he cannot recover without such proof, unless the only defects are incumbrances that can be satisfied from the purchase money due, in which case the decree may protect the interests of the purchaser by such requirement.—Upton v. Maurice, Tex., 34 S. W. Rep. 642.

110. VENDOR AND VENDRE—Subrogation to Vendor's Lien.—Where it was agreed between a vendor, the vendee, and intervener that the debt for the price should be satisfied by a cash payment, a reconveyance

of one-third of the land, and a further payment within a fixed time of a stated sum by the vendee, and that intervener should advance the cash payment for the vendee, and have a lien therefor on the remaining two-thirds, intervener, after the cash payment had been made, and a deed to one-third and payment of the additional sum had been tendered by the vendee within the time fixed, was subrogated to the lien of the vender on the remainder.—JOHMSON V. PORTWOOD, Tex., 34 S. W. Rep. 596.

111. VENDOR AND VENDES—Land Certificate—Presumption of Delivery.—Whether the presumption of delivery of a transfer of a land certificate, arising from the fact that the transfer is an ancient instrument, and was witnessed by two witnesses, is overcome by the fact that after its date the certificate on which it was indorsed was in the possession of another than the transferee, who claimed ownership, located and sold the land, his vendee taking possession and paying taxes thereon, is for the jury.—HUFF v. CRAWFORD, Tex., 84 8. W. Rep. 607.

112. WILL—Exercise of Power.—A devise to the testator's wife of all his property, to be disposed of by her among his children as she may think best, vested a life estate in her, with power to divide the land between his children as she thought best.—Degman v. Degman, Ky., 84 S. W. Rep. 528.

113. WILL—Holographic Will—Requisites.—Under a statute requiring, in regard to a holographic will, that it shall be found among the valuable papers or effects of testator, or shall have been lodged in the hands of any person for safe-keeping, a letter from a decedent stating his desire, in case of his death, that certain land shall go to the person to whom the letter is addressed, who was authorized to collect debts due testator and retain the money until testator's return, may be valid as a holographic will, though the addressee was not directed in the letter to preserve it as the testator's will.—ALSTON V. DAVIS, N. Car., 24 S. E. Rep. 15.

114. WILL—"Living Children."—Where a testator devised a life estate to his son, with remainder to the son's "living children," without specifically restricting it to children living at the date of the will or of the testator's death, all the children living when the son died, took equally.—IMGE V. JONES, Ala., 19 South. Rep. 436.

110. WILLS — Ambiguous Provisions.—Testator devised to his son the residue of his estate, "and to his care the protection and support of my daughter C during her natural life." Such residue was the larger part of testator's estate, and his will showed that it was not his intention to disinherit any one of his children. Such daughter was frail both in body and mind, and unfit to manage property: Held, that the support of such daughter was made a charge on such residue, and that it was not testator's intention simply to enjoin or such son a moral obligation to support the daughter.—Bank of Florence v. Greeg, S. Car., 24 S. E. Rep. 64.

116. WILLS—Devise to Wife.—Under the devise, "I give to my beloved wife all my property of every description, to keep and hold together, for her use and the use of my children, after my just debts are paid," the devisee holds the estate as trustee for her own use and the use of the children, without power to sell or convey any estate.—CRUDUP v. HOLDING, N. Car., 24 8. E. Rep. 7.

117. Wrongful Garnishment—Evidence.—In an action for wrongfully suing out a writ of garnishment it was improper to permit defendant to testify that at the time the garnishment action was commenced he believed that process of garnishment was necessary to obtain satisfaction of his debt, that he was not influenced either by malice or vexatious spirit in having the garnishment issued, and that he could not see how he damaged plaintiff to the extent claimed or to any extent.—Mobile Furniture Commission Co v. Little, Ala., 19 South. Rep. 443.

Central Law Journal.

ST. LOUIS, MO., MAY 15, 1896.

The novel question of a wife's right to recover damages for the unlawful dissection of her husband's body before burial arose for the first time in Larson v. Chase decided by the Supreme Court of Minnesota, and commented on in 34 Cent. L. J. 43. The same question has recently come before the Supreme Court of New York in Foley v. Phelps, 37 N. Y. Supp. 471. In both cases it was very properly held that the wife could recover. The only difficulty in such cases is in determining the nature of the right that has been infringed. In an old Indiana case there is a dictum by one of the judges, that corpses are property in the strict sense of the common law. Bogert v. City of Indianapolis, 14 Ind. 134. In Pierce v. Proprietors, etc., 10 R. I. 227, it was denominated a quasi property right. In Foley v. Phelps, supra, the court following substantially the doctrine of Larson v. Chase declared that a surviving wife is entitled to the possession of the body of her deceased husband in the same condition as when death occurred for the purposes of giving it proper care and burial. As the Harvard Law Review in commending the decision well says that "even if so clearly defined a legal right did not exist, the courts would probably have no trouble in supporting an action of this sort on some broader ground. It is one of those instances where failure of justice would involve such a shock to every feeling of decency and propriety that the law positively must disclose a principle to cover it. The development in recent times of such rights as the right to privacy shows that the common law is ever ready to expand in response to demands of that nature." A seemingly contra rule has been laid down in a case where the deceased died suddenly and an autopsy was performed by a physician at the establishment of undertakers to which the remains had been conveyed, in order to enable the physician to give the certificate as to cause of death required by law. Cook v. Walley (Col.), 27 Pac. Rep. 950.

In 1894 the legislature of Indiana passed an act which is a copy of the Civil Rights Bill,

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enacted by congress, entitling all persons equally to the enjoyment of the "accommodation, advantages, facilities of inns," etc., and making any person denying them liable in damages. This act has recently been applied by the appellate court of that State in the case of Fruchey v. Eagleson, 43 N. E. Rep. 146. It appeared from the facts in that case that the students of the Wabash College Football team had made arrangements to entertain the Indiana University Football team, of which the plaintiff, a college student, was a member, and the members of the Indiana Football team assented to the arrangement. A representative of the entertaining team applied at the hotel for accommodations, and the manager, taking exception to the color of the student, said that he would only permit him to lodge there on condition that he would take his meals in the "ordinary," away from the other guests. We infer that the team stood by its colored brother, and the entire body refused to lodge at the hotel. The plaintiff then brought his action, under the statute, against the proprietor of the hotel, and recovered before a jury, which verdict was sustained by the Appellate Court of Indiana. Besides the application of the statute to the facts in the case there were some questions of pleading of minor importance.

The case of Glidden v. Mechanics' Nat. Bank recently decided by the Supreme Court of Ohio should serve as a warning to banks and holders of collateral notes. In that case it was held that a bank selling collateral pledged with it as security for a loan cannot buy in the same at the sale, unless this is authorized by the agreement under which the pledge was made. The principle upon which the decision is founded has long been established, but the question has seldom arisen upon a collateral note. It has always been the law that a pledgee of property cannot, directly or indirectly become a purchaser at his own sale for the satisfactory reason that he holds the property in a fiduciary capacity which forbids the disposition of it for his personal benefit and requires good faith and fidelity to the interests of the pledgor in making a sale of it. His duty as a seller is inconsistent with his interest as a purchaser and the principle that a trustee

cannot be a purchaser at his own sale is applicable.

The court held the sale, for the reasons stated, void. Had there been embodied in the collateral note an express agreement that the pledgee might become the purchaser at any sale which should be made, the difficulty would have been obviated.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW -- INTERSTATE COM-MERCE-KILLING OF GAME-SALE OUTSIDE OF STATE.—The case of Geer v. State of Connecticut, 16 S. C. Rep. 600, decided by the Supreme Court of the United States, involved important questions of constitutional law as to sale of prohibited game in another State, the holdings of the court being that the interstate commerce clause of the constitution does not affect the right of a State to prohibit the transportation outside its limits of game killed in the State; that the ownership of the wild game within the limits of a State, so far as it is capable of ownership, is in the State for the benefit of all its people in common, and that the police power residing in a State authorizes it to forbid the killing of game within the State with intention to procure its transportation beyond the State limits. Mr. Justice White delivered an exhaustive opinion for the court, and Mr. Justices Field and Harlan dissented.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE.
—In People v. Conkling, 44 Pac. Rep. 314, decided by the Supreme Court of California, the nature and extent of the right of self-defense were discussed. The court takes radical ground in favor of such right, and the discussion is of interest in view of the position that has been asserted in some cases and by some text-writers, that a person who has reason to suspect that he may be attacked is under a duty to avoid going where his enemy may be expected to be.

TELEPHONE COMPANY—PUBLIC STATION—DUTY TO FURNISH MESSENGERS—NEGLIGENCE—DAMAGES.—The Appellate Court of Indiana holds in Central Union Tel. Co. v. Swoveland, 42 N. E. Rep. 1035, that it is the duty of a telephone company which main-

tains a line between different cities and towns, with stations in such towns for the use of the public on payment of tolls, to furnish a suitable messenger service for the purpose of notifying persons, within a reasonable distance, when its patrons at other stations desires to communicate with them; and for the neglect or omission of such messengers, it is responsible within proper limits; that while a telephone company has the right to adopt reasonable rules, a regulation that it will not be responsible for the negligence of messengers sent from its stations, who must of necessity be of its selection and under its control, but that they shall be deemed the agents of the patron at whose instance they are sent, is void, and that where by reason of the delay of a telephone company in calling a veterinary surgeon to its station, as it undertook to do, he lost several hours in reaching a horse to attend which he was called, and meantime the animal died, the value of the horse cannot be considered as an element of damages in an action by its owner against the telephone company for negligence in failing to sooner place him in communication with the surgeon; the question as to whether the horse would have been saved had the messenger taken the call at once being entirely a matter of speculation.

GARNISHMENT OF RECEIVER.—That a receiver appointed in an action brought by one partner to wind up and administer the affairs of an insolvent firm, cannot be garnished by a firm creditor without leave of the court which appointed him, is made clear by the decision of the Supreme Court of Wisconsin in Blum v. Van Vechten, 66 N. W. Rep. 507. The court has this to say on the subject:

It is said that the landlord's liability to his tenant is more restricted than it is to third persons, and this is unquestionably so, in so far as it rests upon the contract between the parties, and want of care in the tenant; but, in this and similar cases, there is a separate and distinct ground of liability, depending, not upon contract or want of contract, but upon the obligation the landlord or landowner is under to his tenant, as well as third persons, not to expose them to danger which he knows or could know by the exercise of reasonable diligence. The rule laid down does not place upon the landlord the obligation of an insurer or warrantor by contract, nor does it impose the extreme duty of constant care and inspection, but it does impose upon him the duty of reasonable care and diligence to inform himself of the condition of the property which he proposes to let; and if, when he leases, he knows, or by the exercise of reasonable

care and diligence should know, that the premises are dangerous, it is his duty to make them safe before he leases, or inform the tenant of their condition; and if he does not, he must respond, to any person not in fault, for damages caused by such condition of the premises, whether tenant or third person. Nor does this holding imply, as counsel suggests, that the tenant is thereby entirely relieved from the duty of proper diligence on his part, and that the landlord is virtually made guardian for the tenant. The obligation of the tenant to exercise proper diligence was properly stated by the trial judge, and there is nothing in the ruling of this court that can legitimately bear the construction given to it by counsel to relieve the tenant of such care.

The contention in the Sternberg case is, mainly, that, being a boarder, she was the guest of the tenant, and not a third person in the eye of the law. It suffices to say, upon this point, without noting other considerations, that the evidence shows that the house was let to be used as a boarding house, and recommended by the landlord for that purpose. If it was unsafe for that purpose, which is a quasi public purpose, and defendant knew it, or could by reasonable care and diligence have known it, he should respond in damages to any person injured on the premises. The boarder is there as much by invitation of the landlord as of the tenant. She is there, not strictly as a guest, but as a third person, legitimately on the premises on business, for the purpose for which they were let. The rule is that, if the landlord is guilty of delictum or negligence, he is liable; otherwise, not. And in this view of the case, the tenant and his boarder stand upon the same footing, the contract being out of the way. The tenant may have more extensive rights if she expressly contracts for safe premises, and is assured of their safety; and, on the other hand, her rights may be restricted if she is guilty of negligence in ascertaining for herself the condition of the premises when she rented them, or took them knowing them to be unsafe. The rule, as laid down by this court, imposes reasonable care and good faith on both landlord and tenant, in the absence of a contract to make the premises safe, or a warranty of their condition; and keeping this rule in view, the tenant and his boarder are entitled to as much protection against the landlord as is the stranger passing along the street, or occupying adjoining premises. It cannot be the law that the owner of an hotel which is in an unsafe condition, known to him to be so, or by reasonable care and diligence he could know, can lease it to a tenant, who exercises reasonable care and diligence, and does not discover the danger, and then escape liability to either the keeper of the hotel, or his family or servants, or the persons who enter the hotel for its accommodation. What the hotel keeper's liability may be at the same time is not a question now before us. While many of the cases cited in the opinion are cases where the liability was held to exist as to third persons, there is no difference between third persons and the tenant and his servants, the matter of contract and negligence of tenant being out of the way, as is said in Cowen v. Sunderland (Mass.). 14 N. E. Rep. 117. There is an exception to the general rule of caveat emptor, as between lessor and lessee, "arising from the duty which the lessor owes the lessee. This duty does not originate directly from the contract, but from the relation of the parties, and is imposed by law." We quote from Wood on Landlord and Tenant (page 855): "Where there are defects in the premises, not open to ordinary observation, of the existence of which the landlord knows, or

ought to know, which are dangerous to the person of the tenant, it is his duty to disclose them to the tenant; and if he fails to do so, and the tenant is injured thereby, the landlord is responsible for all the damages that ensue to the tenant therefrom." Again (page 869), the same author says: "But, when the premises at the time when they are leased, are in so defective a condition as to be per se a nuisance, especially when they are leased for a quasi public use, the landlord is responsible for injuries resulting either to the tenant or third persons lawfully upon the premises therefrom."

The rule laid down by this court, and (as we think) sustained by authority and reason, is that, in the absence of a contract to repair, or warranty of condition, both the landlord and tenant must use reasonable care and diligence. If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or knowing their condition, assumed the risk, then he cannot recover against the landlord. On the other hand, if the landlord neglect to use reasonable care and diligence in ascertaining whether his premises are safe, or if he actually know they are unsafe, and conceals or misrepresents their condition, then he is liable, the tenant being in no fault. It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law not to expose the tenant or the public to danger which he knows, or in good faith should know, and which the tenant does not know, and cannot ascertain by the exercise of . reasonable care and diligence. The cases are numerous which use the expressions, laid down in the opinion in this case, that the landlord is liable, not only for actual knowledge, but also for reasonable care and diligence in obtaining such knowledge-not only when he knows, but when he ought to know, of the defects by using ordinary care and diligence. As using this expression, we cite, among others, Martin v. Richards, 155 Mass. 381, 29 N. E. Rep. 591; State v. Boyce, 73 Md. 469, 21 Atl. Rep. 322; Carson v. Godley, 26 Pa. St. 111; Coke v. Gutkese, 44 Am. Rep. 499. In the late case of Lindsey v. Leighton, 150 Mass. 288, 22 N. E. Rep. 901, it was held that it was not necessary to show that the owner had actual knowledge of the defects. His duty was that of due care, and ignorance of the defect was no defense, in the absence of such care. In Moynihan v. Allyn, 162 Mass. 272, 38 N. E. Rep. 497, it was held that it was the duty of the landlord to inform the tenant of any hidden defects, which could not be discovered by reasonable diligence on his part, and of which the defendant ought, for his proper protection, to be informed; citing quite a number of other Massachusetts cases. Mr. Pingrey says, in section 592 of his work on Real Estate: "Of course, if there is a conceded defect which renders the premises dangerous, which the tenant cannot dis cover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for an injury which results from his concealment of it." In section 594 the same author says: "It is held that the obligation and liability is the same to the temant's guest and to his servants, and the landlord is liable unless it appears that he did not know, or by reasonable care and diligence could not have known, of the unsafe condition of the premises when he leased them."

Under the principle we have attempted to lay down, the landlord's liability, leaving the contract of lease out of view, is the same to the tenant as to his servant, or his guest, or his customer, or his wife or

child, or to the stranger passing along the streets or on the premises for any legitimate purpose. The only case cited by counsel apparently holding a doctrine contrary to that laid down by this court is that of Burdick v. Cheadle, 26 Ohio St. 393. This case is also reported in 50 Am. Dec. 782, and referred to as a peculiar case, and, as we think, very justly criticised, as placing the party injured in a very anomalous position. The case is clearly out of line with the current of authority. It may be remarked, however, that in that case the court said: "Whether the noxious structures existed at the time the lessees entered into possession of the storeroom does not appear." As illustrative of the application of the rule we have laid down, we cite the following, among other cases, showing when the rule is applied, and as to what persons held applicable: In Swords v. Edgar, 59 N. Y. 28, a longshoreman in the service of the tenant sued the owner, and recovered. In Godley v. Hagerty, 20 Pa. St. 387, a servant of the tenant sued the owner, and recovered. In Carson v. Godley, supra, a customer of the tenant sued the owner, and recovered. In Ceser v. Karutz, 60 N. Y. 229, the owner was held liable to the child of the tenant. In Coke v. Gutkese, supra, the owner was held liable for injuries sustained by a child of the tenant. In Martin v. Richards, 155 Mass. 381, 29 N. E. Rep. 591, three cases were tried together, and the owner was held liable for an injury to the child and wife of the tenant. In Minor v. Sharon, 112 Mass. 477, three cases were tried together, and the owner was held liable for injuries to the tenant's children. In State v. Boyce, 78 Md. 469, 21 Atl. Rep. 322, the owner was held liable for injuries to the servant of the tenant. In Gill v. Middleton, 105 Mass. 477, the owner was held liable for an injury to the wife of the tenant. In Nugent v. Railroad Co., 80 Me. 62, 12 Atl. Rep. 797, the owner was held liable to persons rightfully on the premises. In Nelson v. Brewing Co., 2 C. P. Div. 311, the right of the servant of the tenant to sue was recognized. In Moynihan v. Allyn, 162 Mass. 272, 38 N. E. Rep. 497, the right of the child of the tenant to sue was recognized. And Mr. Pingrey, in his work on Real Property, expressly states that there is no distinction in the rule as to the liability of the owner to the tenant or to the tenant's guest, or to the tenant's servant. In each instance he says the rule is the same.

NEGOTIABLE INSTRUMENT — PROMISSORY NOTE—ALTERATION BY PAYEE.—It is held by the Supreme Court of Ohio, in Newman v. King, that the date borne by a promissory note is a material part thereof; and if the payee, without the knowledge or consent of the maker, alter its date after the note has been delivered to him, such act renders the instrument void even in the hands of an innocent indorsee for value. After stating the general propositions as to the effect of alteration of a note, the court says:

The defendant in error contends that, although the date which a promissory note bears may be a material matter, yet that as the note in controversy, according to the intention of all the parties to it, should have been dated June 23d instead of June 22d, 1890, an alteration made by the pavee honestly and in good faith after its delivery to him, that merely caused the instrument to express the date intended, even if done

without the knowledge or consent of the makers, would not render the note void. This contention finds support from reputable authorities. In Decker v. Franz, 7 Bush (Ky.), 273, a promissory note had been dated in 1868, and the payee altered the date to 1869 by changing the figure "8" to "9" without the knowledge or consent of the maker. The court maintained the validity of the note on the ground that in its altered condition it conformed to the intention of The same doctrine is maintained in the parties. Mississippi. McRoven v. Crisler, Admr., 53 Miss. 542; in Maine, Hervey v. Hervey, 15 Me. 857. In the latter case, however, great weight was given to the fact that the maker knew of the mistake, while the other parties did not, and the court seemed to be of opinion that his attempt to avail himself of the alteration as a defense constituted a fraud upon the plaintiff. Ib. 359; Clute v. Small, 17 Wend. 238; Brown v. Jewell, 2 N. H. 543.

Other cases, cited as sustaining this doctrine, do not support it to the extent claimed for them. Thus, in Johnson v. Johnson's Estate, 66 Mich. 525, which was an action to charge the estate of the principal maker of a promissory note for the debt evidenced thereby. a note had been given on October 23, 1876, for the balance due on an account stated between the parties, but by mistake was dated October 23, 1875. The trial court found that the payee honestly, and with no fraudulent intent, changed the "5" to a "6." This was done without the knowledge or consent of the makers. Afterwards the principal made two payments on the note, upon which circumstance some stress was placed by the court, although it does not appear that he knew of the alteration when the payments were made. The wife of Johnson had signed the note as surety. The court seemed to be of opinion that the alteration changed the contract and discharged the wife, for the court said "the fact that Mrs. Johnson was not bound by the note would not discharge her husband for whom she signed as surety." The claim was allowed against the estate of the principal. The reasoning of the court is not very clearly set forth, but sufficient appears to show that the decision was quite as much due to the theory that the original consideration, the account stated, would support the claim as to any other principle; the court saying: "And furthermore the account stated, which was the foundation of the note, would form a new basis of indebtedness."

In some cases the alteration was sustained on the ground that it was made by an agent of the maker, or drawer, before delivery. Brett v. Pecard, Ryan & Moody, N. P. 37; Van Brant and Slaight v. Eoff, 35 Barb. (N. Y.) 51. In other cases the note or bill of exchange was held valid, notwithstanding the insertion of a word without the knowledge of the maker or drawer, upon the ground that the word inserted was implied by the contents of the instrument.

The question raised by the instructions given and refused, relate solely to the effect to be given to a promissory note, after its date has been altered by the payee without the knowledge or consent of the maker.

maker

The question is one of public policy. Doubtless, all minds will concur in the proposition that after a written instrument has been altered in a material matter, it no longer retains its identity; it is in fact a new contract, and imposes obligations and secures right different from those it imposed or secured at its origin. Nor will any reasonable mind contend that one of the parties to a written instrument may alter it without the consent of the others so that it will ex-

press anything not intended by the parties. The contention is, however, that it may be altered by one party alone without the knowledge or consent of the others, if, in its altered condition, it conforms to the intention of the parties, and the alteration was honestly made; and that, that being true, it may be enforced in its altered condition. The reasoning is that, as, in its changed condition, it expresses the intention of the parties, no injury has been done by the alteration. That, no doubt, is true in every case of an alteration in so far as it concerns the parties affected by it. If, in its altered state, it requires the obligor to do the particular thing he agreed to do, no personal wrong has been inflicted on him. In this view of the matter the number and extent of the alterations are immaterial, for however great and numerous they may happen to be, the instrument in its changed condition requires the obligor to do just what he promised, and therefore, in good conscience, ought to do. The question, however, does not rest solely upon this aspect of the matter. Regard should be had to the policy of maintaining the integrity of written instruments; particularly those whose character or nature is such that their possession and custody belong to one party only. Promissory notes are of this class. This policy, we think, denies to the custodian of a written instrument, to whose possession its nature necessarily confides it, the power to alter its terms in any material matter whatever, in order that it may conform to his notion of what the parties intended when it was executed.

Landlord and Tenant—Dangerous Premises.—The Supreme Court of Tennessee, on rehearing in the case of Hines v. Wilcox, 34 S. W. Rep. 420, affirming the original opinion 33 S. W. Rep. 914, hold that a landlord is liable to his tenant, and also to a boarder of his tenant, for injuries resulting from a defect in the premises, which were leased for a boarding house, of which the landlord, by the exercise of reasonable care, might have known at the time the premises were leased, and which was unknown to both the tenant and the boarder, and could not have been known by the exercise of reasonable care. The following is from the opinion of the court:

The appellants' counsel concedes that it would be a contempt of the court appointing him to interfere with a receiver's possession of property pertaining to his trust, and received by him in that capacity, and that an actual levy on property, or attachment of the same, could not be made without leave of the court which appointed him. This concession is fatal to the plaintiff's contention in support of the garnishment of the receiver; for, if the process of garnishment should be effectively prosecuted, it would necessarily result in depriving the receiver of the property rightfully in his possession, without the leave of the court appointing him, in order to satisfy the plaintiffs' demand. The claim that the garnishee action is not against the receiver in his official, but in his personal capacity, though affecting the title and right of possession of such property, is an evasion of the difficulty, and cannot be maintained. Whether the action affects him in his official capacity, and not the mere manner or style in which he is named in the process, is the true test. The question is not one of mere form, but of substance, and whether the receiver, in his official capacity and rights, is to be affected by the action. High, Rec. §§ 256, 257. The rule is otherwise where the receiver takes possession or holds property which does not pertain to his office, and where he is a mere trespasser (Beach, Rec. § 660); or where he is sued to recover damages as for a tort, and there is no attempt to interfere with the actual possession of the property which he holds under the order of the court appointing him. Kinney v. Crocker, 18 Wis. 74; Wood v. Crocker, Id. 345. The better opinion seems to be that the privilege of the receiver is not personal, but pertains to his trust, and exists for the protection of the rights of those whom he represents, and that, where the prosecution of the action would affect or interfere with the control of the property rightfully in his custody, he cannot waive it without the consent of the court. Otherwise, the protection which the court interposes against unwarranted interference with its own officers, and depredations upon the estate in its charge and custody, would be broken down, and confusing and embarrassing questions in its administration would ensue. Beach, Rec. § 653. There are, however, authorities which hold that the receiver may waive the objection.

The possession of the receiver is the possession of the court appointing him, and the property in his hands as such is not subject to attachment, nor is he subject to garnishment on account of it, or funds in his hands or subject to his control in that capacity. Where a receiver has been properly appointed of the property and effects of a partnership, he cannot be garnished in an action brought by a creditor of the firm or upon a judgment recovered therein; as a judgment upon the garnishment, if recognized and enforced, would divest and defeat the previously acquired jurisdiction of the court in the equitable action to administer and apply to proper purposes the property and effects of the partnership. The authorities to this effect are too numerous and decisive to admit of question or doubt. High, Rec. §§ 151, 164; Beach, Rec. § 228, and cases cited; 8 Am. & Eng. Enc. Law, 1145, and cases in note; Jackson v. Lahee, 114 Ill. 287, 2 N. E. Rep. 172; Book Co. v. De Golyer, 115 Mass. 67; Com. v. Hide & Leather Ips. Co., 119 Mass. 155; Holmes v. McDowell, 15 Hun, 585. In the case last cited, the action was to administer and distribute the assets of an insolvent partnership equally among its creditors, and to adjust its affairs, and a receiver was appointed by stipulation. Subsequently, and during the pendency of the action, certain creditors of the partnership recovered judgments against the firm upon which supplemental proceedings were instituted, in which the same person was appointed re ceiver as in the partnership action, and such creditors applied in the latter action to have the receiver directed to pay their debts in full; but it was held that the judgments they had recovered, and the proceedings under them, gave them no priority over the other creditors of the firm, and their application was denied. In that case the court held that the owners of the partnership property had, by their voluntary act, placed it in the hands of the court for equal distribution, and that the court had assumed jurisdiction over it for that purpose; that it had not yet made its order of distribution, but, by the appointment of its receiver, it had assured all persons interested that it would make that order in due time, and, until it settled the terms thereof, it would hold it for that purpose; and that the property, or fund from its sale, was in the hands of the court, and any one interested might quicken its action by proper application, and that the court held the property in trust for the benefit of those who might be entitled to it, and that all might be properly protected; that the property, when once in the hands of the court, was pledged and dedicated to the objects of the proceeding, and in it others became interested, who had a right to invoke the action of the court that had thus assumed control over it; and that the creditors of the firm were the cestuis que trustent of the court, and could not be defrauded, unless the court should lend itself to the fraud. This decision was affirmed in 76 N. Y. 596, on the ground stated in the prevailing opinion. This view is supported by Van Alstyne v. Cook, 25 N. Y. 489; Law v. Ford, 2 Paige, 310; Maynard v. Bond, 67 Mo. 315.

CRIMINAL LAW - LARCENY - BRINGING STOLEN PROPERTY FROM A FOREIGN COUNTRY. -In State v. Morrill, 33 Atl. Rep. 1070, decided by the Supreme Court of Vermont, it was held that one who steals property in another country and brings it into Vermont is guilty of larceny in Vermont, on the principle that the legal possession of the property remains in the true owner, the taking having been felonious and that every aspiration is a The court said in part: fresh taking.

For a hundred years our courts have held the common law to be that one who steals property in another country, and brings it into this State, is guilty of larceny here. The same is true of one who steals in another of the United States and brings the property here. The first reported case in respect of stealing in Canada is State v. Bartlett, 11 Vt. 650, decided in 1839. It was there said that the rule had been too long settled, and recognized by too long and uniform a course of practice and decision, to be changed except by legislative action. That was 57 years ago. The rule has not been changed by legislative action, although the attention of the legislature was then specifically directed to the matter, and hence it is fair to infer that the legislature has been satisfied with the rule. If it was too late then for the court to change the rule, it is certainly too late now. Nor can it be changed except for reasons that would equally call for its abrogation in cases of property stolen in another State of the Union and brought here, for the States are as independent of one another in respect of their jurisdiction as they are of foreign countries. Two States-Massachusetts and Ohio-have attempted to distinguish between the thief who brings therein property stolen by him in another State and the thief who does the like with property stolen by him in another country; convicting the one and acquitting the other. Com. v. Uprichard, 3 Gray, 434; Stanley v. State, 24 Ohio St. 166. But we think that no such distinction can be made, and that both cases stand on precisely the same ground. We could not, therefore, abrogate the rule as to one without abrogating it as to both, which we are by no means prepared to do. We are satisfied with the rule as matter of policy, as was the court in State v. Bartlett; for our law should not be such as to induce thieves to come here with their plunder. We are satisfied with it on principle, for every asportation is a fresh trespass and a fresh taking, and so, as matter of law, you have a felonious taking and carrying away in this State, since the possession as well as the title of the property is deemed

to continue in the owner, notwithstanding the original taking, as that was felonious. It is upon the precise ground that in England one who steals goods in one country and carries them into another may be indicted for larceny in the latter, though he can be indicted for robbery only in the country where the force or putting in fear was. It is true, they do not extend the rule to cases where the property was stolen abroad; and the principle of the rule is logically capable of such extension, and it, in effect, receives such extension in this country when a thief is convicted of larceny in one State for bringing in goods that he stole in another State, which the States very generally do, though some do not. On this ground it is that one who steals my goods from one who had stolen them may be indicted as having stolen them from me. Ohio denies the principle altogether, and says that a mere change of place by the thief while he continues in the uninterrupted and exclusive possession of the stolen property does not constitute a new taking, either in law or in fact, and yet she convicts of larceny the thief who brings goods into the State that he stole in another State, but upon what ground is not obvious. Larceny of the same goods by the same person may be committed any number of times; and this offense, like every other, is punishable in the jurisdiction in which it is committed. We cannot punish for offenses against a foreign law, but only for offenses against our law. But a man cannot bar prosecution for a criminal act here on the ground that he committed a like act elsewhere. A man can neither be punished nor escape punishment here because he stole the same goods in another State or country. 1 Bish. Cr. Law, 7th ed., sec. 187. This question is so fully discussed in the cases, and the reason for the different holdings so fully stated, that further discussion here is unnecessary. We may say, however, that Maine holds with us in the question here involved. State v. Underwood, 49 Me. 181.

COVENANTS IN LEASE.

Sec. 1. Definition-How Created.

Sec. 2. Kinds of Covenants.

Sec. 3. Same—Express and Implied Covenants.

Sec. 4. Same—Implied Covenants of Lessor.

Sec. 5. Same—Same—Effect cf.

Sec. 6. Same-Implied Covenant of Lessee.

Sec. 7. Same-Distinction Between Express and Implied Covenants.

Sec. 8. Same-Real and Personal Covenants.

Sec. 9. Covenants Running with the Land-When Covenants Run with Land.

Sec. 10. Same-Covenants Running with Part of Land.

Sec. 11. Same—What Covenants Run with the Land. Sec. 12. Same—Rights of Assignee Under.

Sec. 18. Same-When Assignee Bound.

Sec. 1. Definition - How Created. - Strictly speaking, a covenant is an agreement between two or more persons, entered into in writing, executed under the solemnities of a seal; but as used in this connection covenant signifies the agreement which appears in a lease, binding the parties to perform or give certain things, whether

¹ Anderson's L. Dict. 287; 1 Bouv. L. Dict. (15th ed.) 447.

the lease is undersealed or not.² No particular form of words is necessary to create a covenant. Whatever shows the intention of the parties to bind themselves to the performance of a stipulation may be deemed a covenant, without regard to the form of expression.³

Sec. 2. Kinds of Covenants.—The only kind of covenants in which we are interested in this connection are express and implied, personal and real. Covenants are inserted in leases for the purpose of limiting or otherwise defining the rights and duties of the parties; but if no express agreement in this respect is contained in the lease, the rights and obligations of the parties are regulated by law. As thus distinguished, covenants are either express or implied, that is, are either covenants in deed or in law.

Sec. 3. Same—Express and Implied Covenants.—
The covenants of a lease of lands are either to be found fully set forth in the instrument of lease, or to be implied from the terms used therein, and for that reason such covenants are known as express and implied covenants. As with conditions, any covenants agreed upon between the parties, which do not contravene the law, may be inserted in a lease, entirely changing the common law rights and liabilities of the parties.

Sec. 4. Same—Implied Covenants of Lessor.— There are certain covenants in a lease incident to the relation of lessor and lessee, and for that reason are implied in law, 4 and may be exacted in-

² In Hayne v. Commings, 16 C. B. N. S. 421, 111 Eng. C. L. 420, it is said that the words "covenant" and "condition," when used in an agreement, do not necessarily mean an agreement under seal or a coudition, in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean "contract" or "stipulation." This, of course, has no reference to the common law form of the action to be used in the enforcement of the covenant in a lease. The action of covenant would lay only in the case of an agreement under seal signed and sealed by the covenantor. See Hinsdale v. Humphrey, 15 Conn. 431; Pike v. Brown, 61 Mass. (7 Cush.) 183; Goodwin v. Gilbert, 9 Mass. 510; Gale v. Nixon, 6 Cow. (N. Y.) 445; Maule v. Weaver, 7 Pa. St. 329; Johnson v. Mussey, 45 Vt. 419. See article by author: Essay on "Action of Covenant" in 4 Am. & Eog. Ency. of L. 463, 570.

³ Masury v. Southworth, 9 Ohio St. 341, 352. See Savage v. Mason, 57 Mass. (3 Cush.) 500, 505; Trill v. Eastman, 44 Mass. (3 Met.) 121, 124; Gardiner v. Horson, 15 Mass. 504; Jackson ex d. Wood v. Swart, 20 Johns. (N. Y.) 85; Trutt v. Spotts, 87 Pa. St. 339; Taylor v. Preston, 79 Pa. St. 436; Great Northern R. Co. v. Harrison, 12 C. B. (3 J. Scott) 576, 609, 74 Eng. C. L. 575, 607; Williams v. Burrell, 1 C. B. (1 Man. G. & S.) 402, 429, 50 Eng. C. L. 401, 427; Courtney v. Taylor, 6 Man. & G. 851, 46 Eng. C. L. 850; Wolveridge v. Steward, 3 Moo. & S. 561, 30 Eng. C. L. 521.

4 See Hamilton v. Wright, 28 Mo. 199; Mayor of New York v. Mable, 13 N. Y. 151, 64 Am. Dec. 538; Tone v. Brace, 8 Pa ge Ch. (N. Y.) 597; Ross v. Dysart, 35 Pa. St. Bishop St. Albans v. Battersley, L. R. 3 Q. B. D v. 539, 28 Moak Eng. Rep. 314; Williams v. Burrell, 1 C. B. (1 Man. G. & S.) 402, 409, 50 Eng. C. L. 401, 429; Surplice v. Fansworth, 7 Man. & Gr. 576, 49 Eng. C. L. 574.

dependently of express stipulation.5 covenants are such as arise by construction from the use of certain words or form of expression. The covenants usually implied on the part of the grantor are that he has a title and therefore a right to make the lease, and that, in consideration of the rent to be paid him, the lessee shall not be disturbed in the possession by the lessor or those claiming under him, during the term of the lease. The American doctrine differs materially from that held in England on this point, which is, that "he who lets agrees to give possession, and if he fails to do so the lessee may recover damages against him and is not driven to bring ejectment."6 This doctrine, however, is followed in Alabama. In King v. Reynolds,7 the court says: "We hold that where there is a contract of lease and no stipulations to the contrary, there is an implied covenant on the part of the lessor that when the time comes for the lessee to take possession under the lease according to the terms of the contract, the premises shall be open to his entry. In other words, there shall be no impediment to his taking possession. But this implied covenant or agreement does not extend beyond that time. If, after the time the lessee is entitled to have the possession according to the terms of the contract, a strange person take possession and holds, that is a wrong done to the lessee, for which the lessor is in no way responsible. And this is the rule whether the trespass is committed before or after the lessee obtains actual possession. The lessor's covenant extends no farther than to guaranty he had authority to make the lease, and that the premises will be open for occupancy when the contract gives the lessee the right to enter."8 There is no implied covenant on the part of the lessor as to the condition of the premises demised, or that they are fit for any particular purpose,9 or that they shall remain in the condition in which they are when taken throughout the term for which they are demised; 10 and if the premises are leased for a particular purpose there is no implied covenant that they are suitable for that purpose.11 In the letting of a fur-

⁵ Clark v. Clark, 49 Cal. 586; Bennet v. Womack, 7 Barn. & C. 627, 14 Eug. C. L. 283; Hodgkinson v. Crowe, L. R. 10 Chan. App. 622, 14 Moak Eug. Rep. 823; Wilkins v. Fry, 2 Swant. 249.

6 Coe v. Clay, 5 Bing. 440, 15 Eng. C. L. 660.

⁷ 67 Ala. 229.

8 The courts cite, as following the English rule, L'Hussier v. Zallee, 24 Mo. 13; Hughes v. Wood, 50 Mo. ; Field v. Herrick, 14 Ill. App. 181.

⁹ Libbey v. Tolford, 48 Me. 316; Foster v. Peyser, 63 Mass. (9 Cush.) 243; Dutton v. Gerrich, 63 Mass. (9 Cush.) 89; O'Brien v. Cappell, 59 Barb. (N. Y.) 497; McGlashan v. Tallmadge, 37 Barb. (N. Y.) 313; Cleves v. Willoughby, 7 Hilt. (N. Y.) 83; Mayer v. Moller, 1 Hilt. (N. Y.) 491; Hazlett v. Powell, 30 Pa. St. 293; Carson v. Godley, 26 Pa. St. 111; Scheppi v. Gindele (Pa.), 14 W. N. C. 31.

10 Branger v. Maclet, 30 Cal. 624; Welles v. Casiles, 69 Mass. (3 Gray) 223; Robbins v. Mount, 4 Robt. (N. Y.) 553, 33 How. (N. Y.) Pr. 241; Moore v. Webber, 71 Pa. St. 429; Hazlett v. Powell, 30 Pa. St. 293.

¹¹ Libbey. Tolford, 48 Me. 36; Jaffe v. Harteau, 56

nished house for a year there is no implied covenant against noxious odors which render the house uninhabitable during a part of the year, where those noxious odors originate outside of the demised premises and were unknown to the lessor when the lease was executed.¹² Where the lease is drawn technically in form, with obvious attention to details, a covenant cannot be implied in the absence of language tending to the conclusion that the covenant sought to be set up was intended.¹³

Sec. 5. Same—Same—Effect of.—The lease need not be in writing to give rights to an implied covenant.¹⁴ There is an implied undertaking on the part of the lessor that a lessee shall not be dispossessed or disturbed in his quiet enjoyment of the premises by the lessor, or by any persons claiming under him, or by any one having the legal title or right of entry to the land; but there is no implied contract to indemnify the lessee against the wrongful acts of a trespasser or other person, so ragainst an action in ejectment brought by a third person not having legal title or right of entry; or against the exercise of right of eminent domain by the State. 18

Sec. 6. Same - Implied Covenant of Lessee .-There are covenants also implied on the part of the lessee. Thus there is an implied covenant to pay a stipulated or a reasonable rent on the part of the lessee as long as he occupies the premises without obstruction or molestation on the part of the landlord.19 There is also an implied covenant on the part of the lessee that he will treat the premises in a proper and husbandlike manner,20 and also in such a manner that no substantial injury shall be done to them by willful and negligent conduct on his part.21 This implied obligation is as much a part of the contract as though it were incorporated in it by express language; it results from the relation of landlord and tenant, which the lease creates.22 A lessee may enter

N. Y. 398, 15 Am. Rep. 438; Clarke v. Babcock, 23 Mich. 164.

¹² Franklin v. Brown, 118 N. Y. 110, 6 L. R. A. 770, 30 Cent. L. J. 300.

13 See Bruce v. Fulton National Bank, 79 N. Y. 154, 35 Am. Rep. 505.

14 Maule v. Ashmead, 20 Pa. 482.

¹⁵ Wade v. Halligan, 16 Ill. 507; Foster v. Peyser, 68 Mass. (9 Cush.) 243.

16 Gazzolo v. Chambers, 73 III. 75; Sigmund v. Wilkens, 16 Md. 35.

17 Schuylkill v. Dauphan R. Co., 57 Pa. St. 271.

¹⁸ Dyer v. Whitman, 66 Pa. St. 425; Frost v. Earnest, 4 Wart. (Pa) 86.

19 Van Rensselaer v. Smith, 27 Barb. (N. Y.) 104, 140; Royer v. Ake, 3 Pa. St. 406; Kimpton v. Walker, 9 Vt. 191.

20 Nave v. Berry, 22 Ala. 582; Miller v. Shields, 55 Ind. 71; Aughinlaugh v. Coppenheffer, 55 Pa. St. 347; United States v. Bostwick, 94 U. S. 53; bk. 24, L. ed.

²¹ United States v. Bostwick, 94 U. S. 53; bk. 24, L. ed. 65.

22 Holford v. Dunnett, 7 Mees. & W. 352. See Auworth v. Johnson, 5 Car. & P. 239, 24 Eng. C. L. 545;

into express covenant for the repair of the premises, and an unqualified covenant of this kind will compel him to repair, whatever may have been the cause of the damages,25 but the implied covenant of the lessee extends only to repairs made necessary by his negligence. He is not liable to repair any damages done by the elements or strangers without his fault, where he used the land in a husbandlike manner.24 Thus it has been said that a tenant for years, or from year to year, of a house, is bound to keep it wind and water tight,25 and is bound to make reasonable and tenantable repairs; such as keeping the fences in order, replacing windows and doors broken during his occupation, and the like." But in the absence of an express covenant a lessee is not bound to do painting, whitewashing, or other work of ornamentation; 27 and if the premises are accidentally destroyed by fire or otherwise, he will not be required to rebuild.28

Sec. 7. Same—Distinction Between Express and Implied Covenants.—There is a marked distinction to be observed between the express and the implied covenants in a lease, because one who enters into an express covenant will be bound by it although the lease be assigned over; but he will

Cheetham v. Hampson, 4 Durnf. & E. (4 T. R.) 318, 2 Rev. Rep. 397.

23 See Gibbon v. Eller, 13 Ind. 128; Leavitt v. Fletcher, 92 Mass. (10 Allen) 121; Phillips v. Stevens, 16 Mass. 238; Abby v. Billups, 35 Miss. 618; Warner v. Hitchins, 5 Barb. (N. Y.) 666; Hoy v. Holt, 91 Pa. St. 88, 36 Am. Rep. 559; Walton v. Waterhouse, 2 Saund. 422.

²⁴ Gibson v. Eiler, 13 Ind. 128; Leavitt v. Fietcher,
 92 Mass. (10 Ailen) 121; Elliott v. Aikin, 45 N. H. 36;
 Warner v. Hitchins, 5 Barb. (N. Y.) 666; Post v. Vetter,
 2 E. D. Smith (N. Y.), 248.

25 Auworth v. Johnson, 5 Car. & P. 239, 24 Eng. C. L. 545. In the case of Ferguson v. ———, 2 Esp. 590, Lord Kenyon said that a tenant from year to year is bound to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premiers

26 Cheetham v. Hampson, 4 Durnf. & E. (4 T. R.) 318, 2 Rev. Rep. 397; Ferguson v. ———, 2 Esp. 590. In speaking, respecting Espinasse's Reports, on an occasion when the case of Wheeler v. Atkins, 5 Esp. N. P. C. 246, was relied upon by counsel, Lord Denman said: "I am tempted to remark, for the benefit of the profession, that Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke's Reports." Small v. Nairne, 13 Q. B. 840, 844, 66 Eng. C. L. 839, 844.

27 Wise v. Metcalf, 10 Barn. & C. 299, 21 Eng. C. L.

²⁸ Levey v. Dyess, 51 Miss. 501; JUnited States v. Bostwick, 94 U. S. 53; bk. 24, L. ed. 65; Auworth v. Johnson, 5 Car. & P. 239, 24 Eng. C. L. 545; Bullock v. Dommett, 6 Durnf. & E. (6 T. R.) 650, 3 Rev. Rep. 300.

29 Greenleaf v. Allen, 127 Mass. 248; Deane v. Cald-

not be personally liable under an implied covenant for rent after assignment of the premises and acceptance of the rent from the assignee.³⁰ In those cases where the lessor refuses to accept the assignee he may still hold the lessee for the rent, and will have an action in debt to recover the same;³¹ but it has been said that a lessee remains personally liable on an express covenant, although the lease has been assigned in writing and rent actually received from the assignee, in those cases where the lessor has not accepted the surrender of the lessee and released the original lessor.³²

Sec. 8. Same—Real and Personal Covenants.—We have already seen^{SS} that covenant in a lease are further distinguished as real and personal covenants; that is, as between such as run with the land to assignees, and are binding upon the assignees by privity of estate, and those which are purely personal obligations. We shall hereafter see^{SI} that in order to run with the land the performance or non-performance of the covenant must affect the nature, quality or value of the demised premises, independent of collateral circumstances, or must affect the mode of enjoyment of the premises; and there must always be a privity of estate between the parties. Thus a cove-

well, 127 Mass. 242. In Greenleaf v. Allen, supra, the court say that "an assignment of the lease by the lessee cannot affect the liability of the lessee or his executor upon the covenant assigned." Citing Davitt v. Mudge, 78 Mass. (12 Gray) 23.

²⁶ Wave v. Leed, 88 Mass. (6 Allen) 369; Patten v. Deshon, 67 Mass. (1 Gray) 330; Walker v. Physick, 5 Pa. St. 193; Kimpton v. Walker, 9 Vt. 191; Auriol v. Mills, 4 Durnf. & E. (4 T. R.) 94, 2 Rev. Rep. 341.

³¹ Auriol v. Mills, 4 Durnf. & E. (4 T. R.) 94, 2 Rev. Rep. 342.

5 Franklin v. Maguire, 42 Pa. St. 82.

33 See ante, § 2.

4 See post, § 9.

Somman v. Welles, 17 Wend. (N. Y.) 136. See Schwoerer v. Boylston Market Assn., 99 Mass. 285, 297; Hurd v. Curtis, 36 Mass. (19 Pick.) 459. It is said in Schwoerer v. Boylston Market Association, supra, that there can be no covenant running with the land where no land but only an incorporcal hereditament is granted. Citing Hurd v. Curtis, 36 Mass. (19 Pick.) 459.

38 Bronson v. Coffin, 108 Mass. 175, 180; Hurd v. Curtis, 36 Mass. (19 Pick.) 459, 48 Mass. (9 Met.) 94; Webb v. Russell, 3 Dunf. & E. (3 T. R.) 393, 402, 1 Rev. Rep. 725, 730; Balley v. Welles, 3 Wils. 29. In the case of Hurd v. Curtis, supra, several owners of mills drawing water from the same stream by means of the same dam entered into an indenture in which, for themselves, their heirs, administrators and assigns respectively, they covenanted with each other, and their respective heirs, administrators and assigns, that they would erect and use wheels of a certain construction and limited power in their respective mills. It was held that there was no privity of estate between the parties to the indenture, and consequently that the covenant did not run with the land and bind the grantee of one of the mills. A covenant to build a house on the land of a third person is a mere personal covenant; but a covenant to build a house or a new wall on the land demised will run with the land and bind the assignee on account of the

nant in the lease that the lessor will not carry on the business for which the premises were leased within a radius of six miles, is a personal covenant and does not affect the right of a person to whom he may subsequently sell a portion of the premises; 37 and if the lessor covenant with a stranger to pay a certain rent, in consideration of the benefit to be derived under a third person, the covenant not being made with the person having the legal estate, cannot run with the land. 30 •

Sec. 9. Covenants Running With the Land-When Covenants Run With Land .- Of the covenants in a lease some run with the land while others are binding only upon the person.39 When the covenant is of a collateral nature to the land, it is a personal obligation and does not run with the land; if it is incapable in law of attaching to the estate, it will not bind or pass to assignees, even where they are expressly named. 40 All covenants relating to a subject-matter not in esse, such as for the erection of buildings upon the premises demised, are personal covenants and do not run with the land so as to bind the assignees, unless they are expressly named therein.41 A covenant runs with the land when either the liability for its performance or the right to enforce it passes to the assignee of the land itself. In order that it may run with the land its performance or nonperformance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.49 It was said in Dorsey v. St. Louis, A. & T. H. R. Co.,48

privity of estate between the covenanting parties. Spencer's Case, 5 Co. 16.

87 Herbert v. Dupaty, 42 La. An. 343, 7 South. Rep.

³⁸ See Allen v. Wooley, 1 Blackf. (Ind.) 148; Gleen v. Canby, 24 Md. 127; Hurd v. Curtis, 36 Mass. (19 Pick.) 459.

39 See 1 Sch. Pers. Prop. (2d ed.) § 29.

40 See Aiken v. Albany R. Co., 26 Barb. (N. Y.) 289; Masury v. Southworth, 9 Ohio St. 340; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175; Spencer's Case, 5 Co. 16; Keppell v. Bailey, 2 Myl. & R. 517.

41 Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Tallman v. Coffin, 4 N. Y. 134; Masury v. Southworth, 9 Ohio St. 340; Bean v. Dickerson, 2 Humph. (Tenn.) 126; Sampson v. Easterly, 9 Barn. & C. 505, 17 Eng. C. L. 230; Grey v. Cuthbertson, 2 Chit. 482, 18 Eng. C. L. 747; Spencer's Case, 5 Co. 16; Congleton v. Pattison, 10 East. 138.

42 Wiggin's Ferry Co. v. Ohio & M. R. Co., 89 Ill., 10 Cent. L. J. 166; See Baldwin v. Walker, 21 Conn. 168; Plumleigh v. Cook, 13 Ill. 669; Patten v. Deshon, 67 Mass. (1 Gray) 325; Howland v. Coffin, 29 Mass. (12 Pick.) 125; Van Rensselaer v. Hays, 19 N. Y. S1; Nicholl v. New York & E. R. Co., 2 N. Y. 131; Van Rensselaer v. Smith, 27 Barb (N. Y.) 151; Crawford v. Chapman, 17 Ohio, 449; Cook v. Brightley, 46 Pa. St. 445; Streaper v. Fisher, 1 Rawle (Pa.), 161; Scott v. Lunt's Admr., 32 U. S. (7 Pet.) 596, 606; bk. 8, L. ed. 797, 800; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175; Spencer's Case, 5 Co. 16.

43 5/8 Ill. 67.

that a "covenant is said to run with the land when either the liability for its performance or the right to enforce it, passes to the land itself. A covenant is said to run with the reversion when the liability to perform it or the right to enforce it passes to the assignee of the reversion." It has been said that whether a covenant will or will not run with the land, does not, however, so much depend on whether it is to be performed on the land itself, as whether it tends directly or necessarily to enhance its value, or render it more beneficial and convenient to those by whom it is owned or occupied."

Sec. 10. Same-Covenants Running with Part of Land.—The common law doctrine that an entire contract could not be apportioned was limited to personal contracts and covenants and did not extend to such contracts and covenants as run with the land; 45 consequently, wherever a covenant running with the land is divisible in its nature, if the entire interest to the part or parcel of the premises is demised to distinct individuals, the covenant attaches pro tanto to the parcels assigned and to the part remaining,46 the holder of each part being answerable for his proportion of any charge which is a common burden upon the land, and exclusively liable for any breach of the covenant which relates to his part alone, covenant laying both by and against each.47 In the case of Patten v. Deshon, the court say that the assignee of all a lessee's interest in and to the lease may recover rent subsequently accruing, of one to whom such lessee has previously leased a a portion of the demised premises for the whole of the term, and who occupies such portion accordingly, in an action of contract, without setting forth in his declaration the assignment from the original lessee to the plaintiff. And the defendant in such action is estopped to deny the estate of the original lessor in the premises. The reason for this is because the assignee of the lease becomes privity in estate with the original lessor, and is bound by the covenants of the original lessee so that an action will lie against him by the

44 Masury v. Southworth, 9 Ohio St. 340.

45 Van Rensselaer v. Bradley, 3 Den. (N. Y.) 135, 141, 45 Am. Dec. 451, 453. See Taylor v. Heideron, 46 Barb. (N. Y.) 452; Van Rensselaer v. Smith, 27 Barb. (N. Y.) 154; Astor v. Miller, 2 Paige Ch. (N. Y.) 68, 78; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Pollard v. Shaaffer, 1 U. S. (1 Dal.) 210; bk. 1, L. ed. 104; Merceron v. Dowson, 5 Barn. & C. 479, 11 Eng. C. L. 549; Stevenson v. Lombard, 2 East, 575; 6 Rev. Rep. 511; Wollaston v. Hakewill, 3 Man. & Gr. 297, 42 Eng. C. L. 161; Hodglins v. Robson, 1 Vent. 276.

46 Van Rensselaer v. Bradley, 3 Den. (N. Y.) 135, 45 Am. Dec. 451. See Harris v. Frank, 52 Miss. 158; Deaminville v. Mann, 32 N. Y. 204; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Astor v. Miller, 2 Paige Ch. (N. Y.) 68; Van Horne v. Crain, 1 Paige Ch. (N. Y.) 455; St. Clair v. Williams, 7 Ohio, pt. II. 110; Gammon v. Vernon, 2 Lev. 231.

47 Patten v. Deshon, 67 Mass. (1 Gray) 325; Twynman v. Pickard, 2 Barn. & Ald. 105.

48 67 Mass. (1 Gray) 325.

original lessor.49 Consequently covenant lies against the assignee of part of the land demised, and the damages are to be proportioned, on the ground that the assignee is chargeable, by reason of privity of estate.50 But to render one liable in covenant as assignee he must take an assignment of the whole or a part of the premises for the entire term.51 The court say in the case of Patten v. Deshon,52 that this is one of the cases in which the exception proves the rule. The assignee, being liable only in privity of estate, is liable only for breaches accruing whilst he holds the estate as assignee; not for breaches, which occurred before he became assignee;58 nor after he has transferred his whole interest by assignment,54 even though the assignee of the assignee be a woman and a prisoner or a beggar or a pauper.55

Sec. 11. Same — What Covenants run with the Land.—The usual covenants running with the land are for quiet enjoyment, whether expressed or implied; to convey; to cultivate the land in a particular manner; to deliver up the premises in good condition; to do act elsewhere does not run against the land; to insure premises devised where the money realized in case of loss is to be spent in rebuilding or repairing; to maintain a

49 Patten v. Deshon, 67 Mass. (1 Gray) 325, 329. See Palmer v. Edwards, 1 Doug. 187; Taylor v. Needham, 2 Taunt. 278, 11 Rev. Rep. 572.

80 Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; Stevenson v. Lombard, 2 East. 755, 6 Rev. Rep. 511.

51 Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; Bedford v. Terhune, 30 N. Y. 453, 460; Kain v. Hoxle, 2 Hilt. (N. Y.) 311, 316; Bagley v. Freeman, 1 Hilt. (N. Y.) 196; Holford v. Hatch, 1 Doug. 183.

52 67 Mass. (1 Gray), 325, 327.

53 St. Saviours v. Smith, 3 Burr. 1271.

54 Eaton v. Jacques, 2 Doug. 461 and note.

55 Torry v. Wallis, 57 Mass. (3 Cush.) 442; Daniels v. Richardson, 39 Mass. (22 Pick.) 565; Howland v. Coffin, 26 Mass. (9 Pick.) 52, 29 Mass. (12 Pick.) 126; Taylor v. Shum, 1 Bos. & P. 21, 4 Rev. Rep. 759; Pitcher v. Tovey, 1 Salk. 81; Lekeux v. Nash, 2 Stra. 1221.

56 Shelton v. Codman, 57 Mass. (3 Cush.) 318; Hunt v. Amidon, 4 Hill (N. Y.), 345; Suydam v. Jones, 10 Wend. (N. Y.) 180; Markland v. Crump, 1 Dev. & B. (N. C.) L. 945; Campbell v. Lewis, 3 Barn. & Ald. 392, 8 Taunt. 715, 5 Eng. C. L. 230; William v. Burrell, 1 C. B. (Man. S. & S.) 402, 433, 50 Eng. C. L. 401, 432.

57 Van Horne v. Crain, 1 Paige Ch. (N. Y.) 455. See. Hagar v. Buck, 44 Vt. 289, 8 Am. Rep. 368, 370; Jackson ex d. Weidman v. Hubble, 1 Cow. (N. Y.) 613; Jackson ex d. Stevens v. Stevens, 13 John. (N. Y.) 316.

58 Gordon v. George, 12 Ind. 408; Cockson v. Cock, Cro. Jac. 125.

38 See Myers v. Burns, 38 Barb. (N. Y.) 401; Demarest v. Willard, 8 Cow. (N. Y.) 206; Shelby v. Hearne, 6 Yerg. (Tenn.) 512; Pollard v. Shaafer, 1 U. S. (1 Dal.) 210, bk. 1, L. ed. 104; Deane of Windsor's Case, 5 Co. 54; Spencer's Case, 5 Co. 16; Sargent v. Smith, 78 Mass. (12 Gray), 426, and denied in a dictum of Baron Parke in Doe v. Seaton, 5 Cromp. M. & R. 730.

60 Spencer's Case, 5 Co. 16; Mayho v. Buckhurst, Cro. Jac. 483; Keppell v. Bailey, 2 Myl. & K. 517.

61 Masury v. Southworth, 9 Ohio St. 340. See, Thomas v. Von Kapff, 6 Gill. & J. (Md.) 372; Dee



partition fence; 62 to pay for buildings erected is a covenant that passes to the assignee of the lessee, but does not bind the assignee of the reversion; 63 to pay rent; 64 to renew lease; 65 to repair; 68 to pay taxes; 67 to rebuild; 68 to reside on

d. Fowler v. Peck, 1 Barn. & Adol. 428, 20 Eng. C. L. 546; Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 18.

⁶⁸ Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550. See, Spencer's Case, 5 Co. 16; Bally v. Wells, 3 Wils.

⁶³ Hunt v. Danforth, 2 Curt. C. C. 592. See, Aikin v. Albany R. Co., 26 Barb. (N. Y.) 289; Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175. The general principle applicable to cases of this class is laid down by Best, J., in Vyvyan v. Arthur, supra, which was a case where the lessee of part of an estate covenanted with the lessor to do a service at a mill belonging to the lessor upon another part of the estate, in which the lessee bound his assigns, as follows: "If the performance of the covenant be beneficial to the reversioner in respect of the lessor's demand, and to no other person, his assignee may sue upon it: but if it be beneficial to the lessor without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue."

44 Howland v. Coffin, 29 Mass. (12 Pick.) 125; See Maine v. Feathers, 21 Barb. (N. Y.) 646; Jacques v. Short, 20 Barb. (N. Y.) 269; Graves v. Porter, 11 Barb. (N. Y.) 592; Demarest v. Willard, 8 Cow. (N. Y.) 206; Noonan v. Orton, 4 Wis. 342; Hunt v. Danforth, 2 Curt. C. C. 392; Hurst v. Rodney, 1 Wash. C.

C. 375.

8 Renond v. Daskam, 34 Conn. 512; Blackmore v. Broadman, 28 Mo. 420; Piggot v. Mason, 1 Paige Ch. (N. Y.) 412. Where the lease provided for the lessee enjoying the estate for a certain term, with a right to hold it as much longer as he should choose after the expiration of the term, at the same rate, no definite time being prescribed, it was held not to be a covenant running with reversion so as to bind the assignee of the lessor; and the lessor having died during the term, the lessee having chosen to hold beyond the term, his tenancy became one from year to year, determinable by notice from the lessee or the owner of the reversion. West Transportation Co. v. Lansing, 49 N. Y. 499.

Gordon v. George, 12 Ind. 408; Taffe v. Harteau,
 N. Y. 398, 15 Am. Rep. 328; Demarest v. Willard,
 Cow. (N. Y.) 206; Pollard v. Shaaffer, 1 U. S. (1
 Dal.) 210, bk. 1, L. ed. 104; Deane of Windsor's Case,

5 Co. 24; Spencer's Case, 5 Co. 16.

Martin v. Baker, 2 Blackf. (Ind.) 232; Astor v. Miller, 2 Paige Ch. (N. Y.) 68; Host v. Kerney, 1 Sandf. (N. Y.) 105, 2 N. Y. 394. It is said in Astor v. Miller, supra, that where the covenant is contained in a lease on the part of the lessee, to pay all taxes and assessments which be imposed on the premises by authority derived from the United States, the State of New York, or from the corporation of the city of New York, and an improvement was made by the corporation of New York in the opening of Lafayette Place, which took part of the leasehold premises, it was held that the lessee was chargeable with the amount of the assessment upon the interest of the lessor in the Premises.

⁶ Doe d. Fowler v. Peck, 1 Barn. & Adol. 428, 20 Eng. C. L. 546; Vernon v. Smith, 5 Barn. & Ald. 1, 7

Eng. C. L. 13.

the premises; ⁶⁰ to warrant; ⁷⁰ not to carry on a particular trade on the premises; ⁷¹ not to employ any other place or site in the same stream for a mill of the specified kind, in a mill lessee; ⁷² not to sell wood or timber from the demised premises; ⁷³ and all the implied covenants run with the land. ⁷⁴

Sec. 12. Same-Rights of Assignee Under .- A covenant is said to run with the land, so as to bind an assignee to its performance, where it relates to the management or conduct of the land, is beneficial to the estate, or its performance is a part of the original consideration on which the lease was granted;75 but a covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him.76 Thus a covenant to insure in a lease is one that is beneficial and runs with the land,77 and on the assignment of the reversion pass to the assignee. The original covenantee could not avail himself of this covenant after assignment; does not sustain any loss by the destruction of the buildings and therefore has no interest to have them insured.78 The covenant of the lessee to pay rent is one that runs with the The assignee of the lessor may have debt against such lessee or his assignee, where the letting has been by an indenture of lease,80

69 Van Ransselaer v. Read, 26 (N. Y.) 558, 576; Doe d. Lockwood v. Clarke, 8 East, 185, 9 Rev. Rep. 402; Tatem v. Chaplan, 2 H. Bl. 133, 3 Rev. Rep. 360; See Williams v. Earle, L. R. 3 Q. B. 739, 750, 37 L. J. Q. B. 231; Fleetwood v. Hull, 23 Q. B. Div. 35, 37, 58 L. J. Q. B. 341.

70 Van Horne v. Crain, 1 Paige Ch. (N. Y.) 455.

71 St. Andrew's Church's Appeal, 67 Pa. St. 512; Tatem v. Chaplin, 2 H. Bl. 133, 3 Rev. Rep. 360. A covenant not to exercise a particular trade on other premises of the lessor, however, does not bind a grantee of the latter for want of privity to estate. Taylor v. Owen, 2 Blacks. (Ind.) 301.

Norman v. Wells, 17 Wend. (N. Y.) 136.
 Verplanck v. Wright, 23 Wend. (N. Y.) 506.

74 See Fletcher v. McFarlane, 12 Mass. 48; Harvey v. McGraw, 44 Tex. 412; Smith v. North, L. R. 7 Ex. 242.

75 Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678: Gordan v. George, 12 Ind. 408; Morse v. Aldrich, 36 Mass. (18 Pick.) 749; Blackmore v. Broadman, 28 Mo. 420; Van Rensselaer v. Smith, 27 Barb. (N. Y.) 104, 106; De Forrest v. Byene, 1 Hilt. (N. Y.) 43; Jackson ex d. Benton v. Vlaughhead, 2 Johnn. (N. Y.) 75; Piggot v. Mason, 1 Paige Ch. (N. Y.) 412; Norman v. Wells, 17 Wend. (N. Y.) 136; Wolliscroft v. Norton, 15 Wis. 204; Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13.

76 Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 18, 17.

77 See, ante, Sec. 11.

78 Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13. See Saddler's Co. v. Badcock, 2 Atk. 577.

79 See ante, § 11.

80 Patten v. Deshon, 67 Mass. (1 Gray) 325, 327;

where the assignment is of the whole or a portion of the premises for the entire term; but if the assignment is not for the entire term it will be regarded as simply a subleasing and such sublessee or his assignee, will not be liable to the original lessor.81 This is said to be one of the cases in which the exception proves the rule. The assignee, being liable only in privity of estate, is liable only for breach occurring whilst he holds the estate as assignee, not for breach which occurred before he became assignee,82 nor after he has transferred his whole interest by assignment,83 even though the assignee of the assignee be a woman and a prisoner, or even a beggar, or a pauper.84 The lessor is also liable to the assignee of the lease on his covenants running with the land, among which are covenant for quiet enjoyment,85 for further assurances,86 to renew lease,87 to repair the premises,88 to allow the lessee liberty to purchase the estate and the like.

Sec. 13. Same-When Assignee Bound .- We have already seen⁸⁹ that covenants collateral to the land, and incapable in the law of attaching to the estate demised, will not pass to or bind assignee, even where they are expressly named in the lease.90 An important distinction in respect to covenants running with the land is to be observed between those covenants which bind assignees, as well as operate in their favor, without their being named, and such as require assignees to be named in order to be binding upon them. This distinction is based upon the fact that the subject-matter of the covenant is or is not in esse, at the time of the demise. If the covenant relates to a thing in esse, such as to repair a building or maintain fences, it will bind the assignee, whether named or not; but where the subjectmatter of the covenant is not in esse, such as to build a new house or a new fence upon the demised premises, it is personal covenant not running with the land, and the assignee is not

Howland v. Coffin, 29 Mass. (12 Pick.) 125; Demarest v. Willard, 8 Cow. (N. Y.) 206.

81 Patten v. Deshon, 67 Mass. (1 Gray) 329; Bedford v. Terhune, 30 (N. Y.) 460; Norman v. Wells, 17 Wend. (N. Y.) 136.

82 Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; St. Saviours v. Smith, 2 Burr. 1271.

83 Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; Eaton v. Jacques, 2 Doug. 461.

84 Patten v. Deshon, 67 Mass. (1 Gray), 325, 339. See Torry v. Wallis, 57 Mass. (8 Cush.) 442; Daniels v. Richardson, 39 Mass. (22 Pick.) 565; Howland v. Coffin, 26 Mass. (9 Pick.) 52, 29 Mass. (12 Pick.) 126.

85 Waldo v. Hall, 14 Mass. 486.

86 King v. Jones, 5 Taunt. 418, 1 Eng. C. L. 219.

87 Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13; Spencer's Case, 1 Moo. 159.

88 Laffan v. Neglee, 9 Cal. 662, 70 Am. Dec. 678; Napier v. Darlington, 70 Pa. St. 64; Kerr v. Day, 14 Pa. St. 112.

89 See ante, Sec. 9.

³⁰ See Aiken v. Albany R. Co., 26 Barb. (N. Y.) 289; Masury v. Southworth, b Ohio St. 340; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175; Spencer's Case, 5 Co. 16; Keppell v. Bailey, 2 Myl. & R. 517. bound, 91 unless expressly named in the lease. M. This distinction gives rise to questions bordering closely on the line between real and personal covenants, which does not seem to be very clearly defined, and the questions raised, for that reason, rest largely in the discretion of the court, and the intention of the parties as gathered from the lease.

James M. Kerr.

New York.

91 See Hansen v. Myer, 81 Ill. 321, 25 Am. Rep. 282; Tallman v. Coffin, 4 N. Y. 134, 136; Thompson v. Rose, 8 Cow. (N. Y.) 266, 269; Masury v. Southworth, 9 Ohio St. 340; Bean v. Dickerson, 2 Humph. (Tenn.) 126; Sampson v. Easterly, 9 Barn. & C. 505, 17 Eng. C. L. 230; Grey v. Cuthbertson, 2 Chit. 482, 18 Eng. C. L. 747; Spencer's Case, 5 Co. 16; Congleton v. Pattison, 10 East. 138. In Hanson v. Meyer, supra, the lessor covenanted to put in certain fixtures consisting of counters and shelving, and the court held that where a written lease does not in terms bind the lessor's assigns, the lessee cannot maintain an action against a grantee of the premises from the lessor, for breach of a covenant on the part of the lessor to put in fixtures.

92 Spencer's Case, 5 Co. 16.

93 Congleton v. Pattison, 10 East. 138.

COUNTY TREASURER-LIABILITY FOR MONEY DEPOSITED IN BANK.

FAIRCHILD V. HEDGES.

Supreme Court of Washington, February 27, 1896.

A county treasurer is liable for money deposited by him in a bank which afterwards becomes insolvent, though no negligence is charged against him, and though the county has not provided a safe place in which to deposit said money.

GORDON, J.: The appellant was, for four years prior to January, 1895, the qualified and acting treasurer of Pierce county, and the respondent Hedges succeeded him as such treasurer. The respondents, Holmes, Rogers and Bartholomew constitute the board of commissioners, and the respondent Gloyd is county auditor of said county. From the record it appears that, during his terms of office as such treasurer, the appellant deposited sums of money coming into his hands as such treasurer in various banks, some of which banks thereafter failed, and this proceeding was instituted by the appellant to compel the respondents to accept, in settlement of appellant's account as treasurer, certain receivers' certificates of insolvent banks. The petition asserts that the deposits were made with the knowledge of the respondents, and in accordance with his business custom; that neither the county of Pierce nor the board of county commissioners of said county provided him with any safe place for keeping the funds; that the safest and surest manner of keeping them was to make a deposit of them in reliable banks of good standing in the community; that the several banks selected by him as places of deposit were of high standing and repute, etc. The lower court sustained respondent's motion to quash the affidavit upon which the application



for a writ of mandate was based, and, the relator electing to stand thereon, judgment of dismissal was rendered, from which he appeals. For a better understanding of the nature of the controversy, we quote the following from the opening statement contained in appellant's brief, viz: "The question at issue in this action is narrowed, by agreement of parties, to the consideration of the one question to-wit: 'Is the county treasurer of Pierce county, Wash., liable personally or upon his bond for money deposited in a bank which afterwards becomes insolvent, in a case where there is no charge of negligence or want of care in any degree against the treasurer, and where it is further admitted that the county has not provided a suitable and safe place in which to deposit the amount of money which may come into the treasurer's hands?' "

Appellant's contentions are: (1) That the treasurer is not the debtor or insurer of the money that comes into his hands, but only the bailee for hire, or trustee of an express trust, who was only responsible for the exercise of good faith and reasonable skill and diligence in the discharge of his trust; and (2) that there is no statutory or constitutional inhibition against depositing such funds in the banks for safe-keeping; that, under the circumstances, it was his duty to so deposit said funds; and that he would be liable for negligence only in selecting such depositories. Section 5, art. 11, of the constitution of the State requires that "the legislature shall provide for the strict accountability of the said officers (referring to the county officers) for the fees which may be collected, and for all public moneys which may be paid to them or officially come into their possession." The statute makes it the duty of the county treasurer to receive all moneys due and accruing to the county, and disburse the same in the manner provided by law. and requires him, before entering upon the duties of his office, to give a bond to the county, conditioned, among other things, that "all moneys received by him for the use of the county shall be paid as the commissioners shall from time to time direct, except where special provision is made by law for the payment of such moneys, by order of any court, or otherwise, and for the faithful discharge of his duties." 1 Hill's Code, § 211. An examination of all the authorities has satisfied us that, while such officers are bailees, "they are special bailees, subject to special obligations," and that "it is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility." U.S. v. Thomas, 15 Wall. 337. "His liability is to be measured by his bond, and that binds him to pay the money." Boyden v. U. S., 13 Wall. 17.

On this branch of the case, this court, in Marx v. Parker, 9 Wash. 473, 37 Pac. Rep. 675, after reviewing the authorities bearing upon the proposition, said: "It seems to us that every one of the earlier cases cited, where the expression was used that such and such an officer was not a

bailee, or a mere bailee, or was a debtor, must be regarded from the standpoint of the court and the particular case. They were, one and all, cases where suit had been brought upon the bond of the officer, and he was attempting to excuse his default because he had lost the money by robbery, or from some other cause over which he claimed to have no control. But in every such case it was held that his liability was absolute, and the true reason, under U. S. v. Thomas, supra, must be, not that he was any the less a bailee, but that the statute imposed upon him a measure of duty larger than that found in the common law." We take it that it is fundamental in the law of bailments that the amount of care which the bailee is required to take of the goods or property intrusted to him may be expressly fixed by the contract, and that it is only in the absence of an express agreement that the law presumes it to have been the intention of the parties that a bailee for hire (other than common carriers and the like) is required to exercise only ordinary care, prudence, and caution in the custody and control of the property with which he is intrusted. In the wellconsidered case of Board v. Jewell, 44 Minn. 427 46 N. W. Rep. 914, the court say: "There is some conflict in the decisions as to the responsibility of public officers and their sureties for the loss of public moneys without negligence or fault on the part of the officers. While in some cases the rule of responsibility of bailees hire has been applied, exonerating officers who have been found guiltless of negligence, this measure of responsibility is not generally accepted. The great weight of authority in this country will sustain the general propositions, with respect to the liability of such officers and their sureties for the loss of public moneys, that where the statute, in direct terms or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery; that the rule of the responsibility of bailees for hire is not applicable in such cases; that, where the condition of a bond is that the officer will faithfully discharge the duties of the office, and where the statute, as before stated, imposes the duty of payment or accountability for the money, without condition, the obligors in the bond are subject to the same high degree of responsibility; and that the reasons upon which these propositions rest are to be found both in the unqualified terms of the contract and in considerations of public policy." In Wilson v. Wichita Co. (Tex. Sup.), 4 S. W. Rep. 68, the court say: "It is too well settled to require discussion that an officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own. He is bound to account for and pay over the public money." In Rose v. Douglass Tp. (Kan. Sup.), 34 Pac. Rep. 1046, the court say: "By accepting the office of township treasurer, McNabb assumed the duty of receiving and safely keeping the money of the township, and paying it out according to law. He or his sureties are bound to make good any deficiency which might occur in the funds which came under his charge, whether they were lost in the bank or otherwise." In Griffin v. Board (Miss.), 15 South. Rep. 107, it is said: "The idea that the tax collector may make a general deposit of public money in bank, and thereby absolve himself from liability to pay over as he is by law required to do, is so utterly unreasonable as to need no combating. Like all others depositing funds in bank, the tax collector took the risks involved in so doing. The State looks to its officer, and the officer must look to his unreliable or unfaithful banker." In Nason v. Directors, etc. (Pa. Sup.), 17 Atl. Rep. 616, the court, speaking through Chief Justice Paxton, say: "The failure of the bank in which the defendant deposited the money is no defense. A receiver of public money, who has given bond for its safe-keeping, is not discharged from liability therefor by the failure of his banker." In Ward v. School Dist., 10 Neb. 293, 4 N. W. Rep. 1001, the court say: "It was Ward's duty, under the law, to keep the money securely. The money was within his control, placed there by force of the statute; and if he saw fit to intrust it to the care of another, he did so at his peril." In District Tp. v. Morton, 37 Iowa, 550, the defendant, as township treasurer, had given a bond conditioned (pursuant to the statute that, "if the said M, as treasurer, shall faithfully and impartially discharge the duties of said office as required by law, then this obligation shall be null." etc. It was held that the defendant was absolutely liable for all moneys coming into his hands, and that he could not plead, as a defense, that the money was, without his fault or negligence, stolen from him, the court saying: "These rules are applicable to all contracts, and the public interests demand that, at this day, when public funds in such vast amounts are committed to the custody of such an immense number of officers, they should not be relaxed when applied to official bonds. A denial of their application in such cases would serve as an invitation to delinquencies which are already so frequent as to cause alarm." In Com. v. Comly, 3 Pa. St. 372, Mr. Chief Justice Gibson says: keepers of the public moneys, or their sponsors, are to be held strictly to the contract; for, if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant." In addition to the foregoing, the following cases are to the same effect: Halbert v. State, 22 Ind. 125; State v. Moore, 74 Mo. 413; State v. Harper, 6 Ohio St. 607; Inhabit-

ants of New Providence v. McEachron, 33 N. J. Law, 339; State v. Clarke, 73 N. C. 255; Com'rs v. Lineberger, 3 Mont. 231; Thompson v. Board, 30 Ill. 99; McKinney v. Robinson (Tex. Sup.), 19 S. W. Rep. 699; Tillinghast v. Merrill (Sup.), 28 N. Y. Supp. 1089; Baily v. Com. (Pa. Sup.), 10 Atl. Rep. 764.

We think that, by the great weight of authority upon the question, an officer, such as a county treasurer, under our law, is held to the rule of strict accountability. As is said in Thompson v. Board, supra: "They know well, on assuming their positions, the hazards to which they are exposed, and they voluntarily assume the risk, and are paid for so doing." And if "it appears to be a harsh measure of justice to hold that the treasurer and his sureties are liable, on his official bond, for the money deposited under the circumstances disclosed in the affidavit of defense, and subsequently lost without his fault or negligence, it is impossible to reach any other conclusion without ignoring the authority of well-considered cases." Baily v. Com., supra. We have examined all the cases cited in the able brief of the appellant bearing upon this proposition, but are unable to perceive that they are in conflict with the doctrine above laid down. A single case need only be referred to—In re Law's Estate (Pa. Sup.), 22 Atl. Rep. 831. It was there held that the guardian, who deposited the moneys of his ward in a bank believed by him to be solvent, was not liable for the funds so deposited upon the failure of the bank. We think that the distinction is very clear between the liability and duty of one receiving moneys as a guardian, for the benefit of a private individual, and the liability imposed by statute and by express undertaking upon a public officer as in the case at bar. As to the former, "he is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee." People v. Faulkner, 107 N. Y. 488, 14 N. E. Rep. 415. The loss in this case was not occasioned by the act of God or a public enemy, and we are not called upon to decide whether. under the circumstances attending such a loss, the officer would be exempt from liability. This conclusion necessarily leads to an affirmance of the judgment entered below, and renders it unnecessary to decide whether a county treasurer may lawfully deposit the funds of his county in a bank or banks. Affirmed.

NOTE.—The decision of the court in the principal case is undoubtedly sustained by the weight of authority. It may be said that the general rule upon this subject is to the effect that public officers who are intrusted with public funds and required to give bonds for the faithful discharge of their official duties are not mere bailees of the money to be exonerated by the exercise of ordinary care and diligence; that their liability is fixed by their bond, and that the fact that money is stolen from them or is lost through failure of banks in which it is deposited, without any fault or negligence on their part does not release

them from liability upon their official bonds. A good case illustrating this proposition is State v. Nevin. 21 Cent. L. J. 309, where it was held that the sureties in the bond of a public treasurer who is required by law to keep the public moneys safely, are liable for moneys stolen from such treasurer without his fault or negligence. Appended to this case will be found a note in which the older authorities on the subject are collected. Still it is true that some respectable courts have held to the contrary, but the result in such cases may be due in part to the phraseology of the statute governing the officer. The leading case maintaining the view that the officer should be viewed in the light of a mere bailee for hire, responsible only for negligence is Cumberland County v. Pennell, 9 Cent. L. J. 305, decided by the Supreme Court of Maine. The court in that case say that, "in some of the States, however, by force of their statutes, treasurers and collectors became responsible as debtors for the money which comes into their possession by virtue of their office." A statement so broad is hardly warranted. There are still other cases as the dissenting opinion of Hoyt, C. J., in the principal case, shows, which antagonize the doctrine of the principal case. See Supervisors v. Dorr, 25 Wend. 440; Yerk Co. v. Watson, 40 Amer. Rep. 675; Wilson v. People (Colo.), 34 Pac. Rep. 944; State v. McFetridge (Wis.), 54 N. W. Rep. 1; State v. Houston, 56 Amer. Rep. 59. There are still other cases which though not deciding the exact question here presented in principle sustain the contention of those who argue against the relation of debtor and creditor as between a county treasurer and the people. The dissenting judge in the principal case thinks that it is a strained construction of the statute governing the liability of public officials and the obligation he has assumed which makes him the guarantor of the funds intrusted to him. If, he says, it is a part of his duty to produce the money, regardless of contingencies, he should be allowed to do what he pleases with it until called upon so to produce it. "It is unfair and illogical" the eminent jurist concludes, "to say that he is personally responsible for the safe-keeping of the money, and at the same time must make only such disposition of it as may be prescribed by the one for whom he holds it. The cases which have held public officers to be guarantors of the safety of funds coming into their hands are mostly from federal courts, and have been largely induced by the peculiar language of the federal statutes. To hold that the officer cannot make such disposition of the funds as he thinks proper, and yet must be responsible for its safe-keeping, is so illogical and fraught with such hardship upon the officer that I am not willing to follow the cases which have so held. If the relation of debtor and creditor was created by the receipt of the money by the officer, so that he could dispose of it as he pleased, there would be no reason in holding him responsible for its safekeeping; but this would be against public policy. In my opinion all that our statute requires of a county treasurer is either that he should produce the money coming into his hands when required by law, or that he should show that he had exercised the care required of a trustee for hire and that it had been lost without fault on his part. Such has been the holding of the courts under statutes of the same substance as ours, where the bond required was to the same effect."

JETSAM AND FLOTSAM.

ACQUIRING TITLE TO PROPERTY THROUGH CRIME.

The people who commit suicide in England from prudential motives-to provide for their families or to "do the insurance company" like the keen Yorkshireman—are not numerous, but in the land of the almighty dollar suicides deliberately planned are apparently so frequent as to make the title of the suicide-assured a matter of some moment. The offices are clearly at his mercy, and a learned American judge recognizing this fact has lately held that there is in every policy of life insurance an implied warranty not to commit suicide while sane. Ritter v. Mutual Life Insurance Co., 80 Am. L. Rev. (Jan.), 154. This fiction of law the learned judge rests on the ground that the insurance company bases its calculations on lives running out to their natural termination, that the assured knows this and contracts on that basis: but apart from the objectionableness of implying warranties, surely the natural comment on this is that suicide can be reckoned with like the gallows or drunkenness er any other factor of life assurance risk. In England an implied warranty is not wanted, because the policy of our law disentitles a man to reap the benefit of his own criminal actwhich felo-de-se is. In America this is not so. The better opinion seems to be that title may be acquired through a crime (Carpenter's Estate, 32 Atl. Rep. 637, 30 Am. L. Rev. [Jan., 130], even though that crime is parricide. Compared with this our English highwayman claiming an account against his fellow is quite a modest demand. The problem as it presents itself to American lawyers is how a crime can defeat the operation of statutes like the descent act or the wills act, and no doubt there is a difficulty where an heir murders his ancestor, or a legatee his testator, in reading into the descent act or the will a clause of disinheritance or revocation. English law does not attempt to do so, but creates, on grounds of public policy, a personal disability in the criminal to profit by his crime. This principle of public policy does not seem to be generally accepted in America, however it may be in the civil law or English law. The American view is that the law has assigned to each crime its proper punishment, and the courts have no right to add a fresh penalty in the form of forfeiture. -London Law Quarterly Review.

CORRESPONDENCE.

QUERY.

To the Editor of the Central Law Journal:

A owns a block of ground in a city which has an ordinance requiring a majority of the lot owners, fronting in said block, to sign a petition to allow a retail liquor license to be issued. A leases for ten years, to B, 50x150 feet on one of the corners of the block. The lease is general in its terms, save and except inhibitions against use of any business provided by law, and has this further clause in the lease: "The sale of retail liquors is not objectionable." B improved the property and put a saloon in the corner, other parts of the leased premises being improved in other ways. A conveyed all of the block to C during the term of B's lease. B's lease was recorded. B's license from the city has expired. He desires to re-

new the same, and has demanded of C to sign this application. C has refused. Can B, by injunction or otherwise, compel C to sign the petition? If so, for how much of the land now owned by C can he be compelled to sign for? Please cite authorities, if any.

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. XLVII. San Francisco: Bancroft-Whitney Company, Law Publisher and Law Bookseller. 1896.

HUMORS OF THE LAW.

Lawyer-What is your gross income? Witness-I have no gross income.

Lawyer-No income at all?

Witness—No gross income. I have a net income. I'm in the fish business.

"What was the most confusing case you ever had?" asked the doctor of his lawyer. "Case o'champagne," returned the lawyer. "I hadn't got half through it before I was all muddled up."

Hoax—There was a fellow in court to day charged with stealing a horse and leaving his bicycle in place of it.

Joax-What did they do? Convict him.

Hoax—No; the jurymen were all cyclers and they recommended that the prisoner be sent to an insane asylum.

WEEKLY DIGEST

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- 1. ACCIDENT INSURANCE—Designation of Beneficiary.
 —Where an accident policy designates the beneficiary by name, and states that she is the daughter of insured, and it was shown that insured had a daughter bearing that name, parol evidence was inadmissible to show that the wife of insured, bearing the same name, was beneficiary. STANDARD LIFE & ACCIDENT INS. CO. V. TAYLOR, Tex., 34 S. W. Rep. 781.
- 2. ADMINISTRATION Administrator's Sale—Notice.—Under Rev. St. 1889, § 147, providing that, when a petition is filed for the sale of a decedent's land, notice must be given to the heirs, by publication for four weeks in some newspaper, or by handbills posted in public places, an order of sale not on an annual accounting, made without such notice, and on the same day that the petition was filed, is void.—HUTCHISOS V. SHELLEY, Mo., 84 S. W. Rep. 838.
- 3. ADMINISTRATION Partnership Estate Liability for Interest.—Under Rev. St. 1889, § 224, providing that if executors and administrators lend deceased's money, or "use it for their own private purposes, they shall pay interest thereon to the estate," where a surviving partner administers the partnership estate, and during the first year uses the money of the estate in his own business, the probate court has no discretion to relieve him from payment of the interest.—REILLY V. REILLY, Mo., 34 S. W. Rep. 847.
- 4. ADVERSE POSSESSION Payment of Taxes.—The payment of taxes on property is not by itself evidence of corporeal possession of the property, and, without some act showing corporeal possession, will not support the plea of 10 years' prescription.—CHAMBERLAIN V. ABADIE, La., 19 South. Rep. 574.
- 5. ADVERSE POSSESSION Vendor and Vendee.—The possession of a vendee, holding under a bond for title, is not adverse to his vendor, in the absence of some hostile act on the part of the vendee under a claim of right, with intent to assert such claim against the vendor.—BRADSHER V. HIGHTOWER, N. Car., 24 S. E. Rep. 120.
- 6. ALTERATION OF NOTE.—The alteration of a note by the payee so as to have it bear interest from date, instead of from maturity, for the purpose of making it conform to the agreement of the parties, and without fraudulent intent, does not forfeit the original debt.—OTTO V. HALFF, Tex., 34 S. W. Rep. 910.
- 7. ALTERATION OF NOTE Liability of Accommodation Indorser.—Where the maker of a note previously indorsed for his accommodation alters the same without the indorser's consent, by adding the words "with interest at 10 per cent. per annum," there being at the time the maker received it, no blank space for the insertion of interest nor words indicating that interest should be expressed, the note will be invalid, as against the accommodation indorser, even in the hands of a bona fide holder.—Farmers' & Merchants' Nat. Bakk v. Novice, Tex., 34 S. W. Rep. 914.
- 8. APPEAL—Partition Interlocutory Decree.—A decree directing partition to be made by commissioners.

if it can be equitably done, and, if not, requiring them to so report to the next term of court, is an interio-cutory decree, from which no appeal will lie.—GIL-LEYLEN V. MARTIN, Miss., 19 South. Rep. 483.

9. APPEAL-Review-Evidence.-Where, in an action tried to the court, recovery is sought on two grounds, and no finding of facts is filed, the judgment cannot be disturbed unless unsupported on either ground. WALKER V. COLE, Tex., 34 S. W. Rep. 713.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS .- A conveyance of all of an insolvent's property by an instrument which empowers the grantee to sell the property, make deeds in his grantor's name, and apply the proceeds in payment of the latter's debts, and provides for the return to the grantor of any surplus, is not an assignment for the benefit of creditors, but a trust deed, in the nature of a mortgage.-TITTLE V. VANLEER, Tex., 84 S. W. Rep. 715.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS - Preferred Claim .- Where, in case of a general assignment, creditors attacked a claim secured by mortgage as fraudulent, and a verdict is rendered in favor of the mortgagee, which is accepted by the court, and a new trial denied, judgment should be entered for the mortgagee as a preferred creditor .- ROBERTS V. SABIN, Wash., 44 Pac. Rep. 108.

12. Assignment for Benefit of Creditors - Reservation of Homestead .- A reservation, in a deed of assignment, of such real and personal property of the assignor as is exempt under the homestead laws of the State, does not invalidate the assignment .- HAYNES V. HOFFMANN, S. Car., 24 S. E. Rep. 103.

13. Assignment for CREDITORS - Fraudulent Conveyances.—A sale of land by an insolvent debtor to his brother, on consideration that the grantee discharge debts of the grantor amounting to more than the value of the property conveyed, is not fraudulent, as against a creditor whose debt was not included in the agreement.-Baker v. Harvey, Mo., 84 S. W. Rep. 853.

14. Assignment of Chose in Action-Notice to Garnishee.—The assignment of a chose in action, if made in good faith and for value, is effectual, as against a garnishment, though no notice be given, prior thereto. to the person holding the property, if he receive notice in time to enable him to bring it to the attention of the court before judgment is rendered against him as garnishee.—Bellingham Bay Boom Co. v. Brisbois. Wash., 44 Pac. Rep. 153.

15. Assumpsit.—The indebitatus common count may be declared on, and a recovery thereunder had, in an action brought to recover money due the plaintiff for personal services rendered under a contract fully performed on his part, nothing remaining to be done ex cept payment by the defendant; and a cause of action may be established by evidence of either a special or an implied contract.—SWARTZEL v. KARNES, Kan., 44 Pac. Rep. 41.

16. ASSUMPSIT-Money Loaned.-The fact that money alleged to have been loaned and advanced to defendant was paid to creditors of defendant, by his express direction, supports an allegation that such money was so loaned and delivered to defendant .- OLARKSON v. Kennett, Mont., 44 Pac. Rep. 88.

17. ATTACHMENT - Complaint - Affidavit .- In an action commenced by attachment, that the attachment affidavit alleges a cause of action as for a trespass to land by cutting timber, whereas the complaint is for a conversion of the timber, is not ground for demurrer, but for a summary application to set the declaration aside .- LONGYEAR V. MINNESOTA LUMBER Co., Mich., 66 N. W. Rep. 567.

18. ATTACHMENT-Judgment.-A judgment for money creates a legal obligation on the part of the defendant for its payment, and an action on such judgment is one "upon a contract, express or implied," within the meaning of the statute authorizing attachments in such actions.—MEYER V. BROOKS, Oreg., 44 Pac. Rep.

19. ATTORNEY AND CLIENT-Executor-Notice.-While a client is chargeable with notice of all facts relating to a transaction in which he employs an attorney that are known to such attorney, and which it is presumed he will communicate to his client, notice of facts which came to the knowledge of the attorney while acting for another, and which he has no right to communicate, or which, from their nature, he would conceal, cannot be imputed to the client .- MELMS V. PABST BREWING CO., Wis., 66 N. W. Rep. 518.

20. Banks-Fraud of Officers.-It is a part of the duty of a banking corporation to loan money, and to collect such loans by sale of goods or other security; and where the president of the bank has the active control and management of the affairs of the bank, and, in conducting its business, enters into a conspiracy to defraud, and puts the same into execution, whereby another is damaged, the bank will be liable in tort for the damages .- JOHNSTON FIFE HAT CO. V. NATIONAL BANK OF GUTHRIE, Okla., 44 Pac. Rep. 192.

21. BILLS AND NOTES-Acceptance-Law of Place .- P, a member of a firm doing business in New York, called upon one H, in Y, 8 C, requesting him to buy certain cotton, and agreed that, upon receipt of the bills of lading therefor, his firm in New York would either remit currency for the price, or would promptly honor drafts therefor. In an action against H's firm to recover the amount of drafts, drawn in accordance with this agreement, which that firm had refused to accept or pay, held, that the contract to accept the drafts was governed by the law of South Carolina, where it was made, and was not affected by a statute of New York rendering a verbal promise to accept drafts invalid in favor of one who has taken a bill of exchange upon such a promise.-Hubbard v. Exchange Bank, U. S. C. C. of App., 72 Fed. Rep. 285.

22. CARRIERS OF GOODS - Delay-Measure of Damages .- Upon failure of a common carrier to deliver goods at the time agreed upon, or, if no time is specifled, within a reasonable time, the rule of damages is the difference between the value of the goods at the time and place of delivery and their value at the same place at the time they should have been delivered. In such case, the inquiry as to the values should be limited to the place of delivery .- MISSOURI PAC. RY. Co. v. McGrath, Kan., 44 Pac. Rep. 89.

23. CARRIERS OF PASSENGERS-Negligence-Contributory Negligence. - A passenger who, before he had seated himself in a car, was injured by the negligence of defendant in causing another car to come into violent contact with the former, is not precluded from recovering merely because he did not occupy the first vacant seat he came to, nor because he incumbered himself with bundles or with the care of children, which impeded his movements.—TILLETT V. NORFOLK & W. R. Co., N. Car., 24 S. E. Rep. 111.

24. CARRIERS-Passenger-Ejection.-Plaintiff, a passenger from New Orleans to Junction City, Ky., bought a ticket from the railroad company's agent, with the agreement that he should have the right to go by way of Louisville. The ticket did not so provide, and at Lebanon Junction, where, as his ticket read, he should have changed cars, he was ejected from the train: Held, that the ejection of the paseenger was lawful.—Louisville & N. R. Co. v. Breckinkidge, Ky., 34 S. W. Rep. 702.

25. CHATTEL MORTGAGE-Equity of Redemption .- A sheriff cannot, by attaching personal property subject to a chattel mortgage, at the suit of an unsecured creditor of the mortgagor, acquire any right to the residue of the proceeds of a sale under the mortgage after the demands secured by the mortgage are satisfled.—FAHY V. GORDEN, Mo., 34 S. W. Rep. 881.

26. CHATTEL MORTGAGES - Foreclosure. - A mortgagee of chattels, in the foreclosure of his mortgage, must comply substantially with the requirements of the statute, where they have not been waived by the mortgagor; and, if the mortgagee falls to do so in an essential matter, he is liable to the mortgagor for the

value of the property, less the mortgage lien thereon. —CALLES v. ROSE, Neb., 66 N. W. Rep. 638.

- 27. CHATTEL MORTGAGE—Validity.—A chattel mortgage in Oklahoma does not entitle the mortgagee to possession until after condition broken, but creates a lien in favor of the mortgagee, while the title remains in the mortgagor.—HIXON V. HUBBELL, Okla., 44 Pac. Rep. 222.
- 28. CONDEMNATION PROCEEDINGS—Damages.—Where plaintiff in condemnation proceedings maintained possession of the land by virtue of the proceedings, and did not offer to surrender it, it was properly denied the right to abandon the proceedings after verdict assessing defendant's damages.—Bellingham Bay & B. C. R. Co. v. Strand, Wash., 44 Pac. Rep. 140.
- 29. Conflict of Laws—Debt Contracted in Another State.—The rule that, if a certain right is given in one State as to property of a certain nature, comity requires that such right should be enforced in another State as to property of the same nature, is inapplicable to real property, and should not be extended to other property subsequently acquired in such other State.—La Selle v. Woolert, Wash., 44 Pac. Rep. 115.
- 30. CONSTITUTIONAL LAW—Rights of Accused.— The constitutional provision that the accused "in a criminal prosecution" shall 'be confronted with the witnesses against him" is not infringed by permitting a deposition of a living witness to be read against him in an action brought to recover the value of merchandise forfeited to the United States by reason of his acts in violation of law.—UNITED STATES V. ZUCKER, U. S. S. C., 16 S. C. Rep. 641.
- 31. CONTEMPT— Newspaper Article. To constitute any publication contemptuous, it must reflect upon the conduct of the court in reference to a cause or proceeding then pending in court and undetermined, and be of a character tending to influence its decision, or obstruct, interrupt or embarrass the due administration of justice.—ROSEWATER V. STATE, Neb., 66 N. W. Rep. 640.
- 32. CONTRACT—Assignment—Action by Assignee.—The same defenses may be interposed to an action brought by the assignee of a contract of sale, to recover the price of the goods sold, as if the suit had been instituted by the original party to the contract.—TYLER CAR & LUMBER CO. v. WETTERMARK, Tex., 34 S. W. Rep. 807.
- 83. CONTRACT Defenses Fraud. That defendant was induced to sign a contract for the purchase of a monument by plaintiff's false and fraudulent representations that he was acting as agent of a third person is a good defense to an action for breach of such contract, though defendant can show no damage from the fraud.—Fox v. Tabel, Conn., 34 Atl. Rep. 101.
- 84. CONTRACT—Bescission.—In an action of tort for fraudulent representations in the sale of certain stocks, plaintiff cannot recover back the purchase money, where the counts rest only on the ground of rescission, which is not established by the evidence, and the averment of fraud is limited to a misrepresentation of the cost of the stocks to defendant, at which figure they were to have been sold to plaintiff.—Gassett V. Glazier, Mass., 43 N. E. Rep. 193.
- 85. CORPORATION—Dissolution—Liabilities. Where a corporation is liable in damages to an agent for having wrongfully discharged him from its service under a contract for a definite period, and is subsequently dissolved by the judgment of a court on the petition of its stockholders, it remains liable to the party injured notwithstanding the dissolution.—TIFFIN GLASS Co. v. STOEHER, Ohio, 43 N. E. Rep. 279.
- 86. CORPORATION—Foreign Corporation.—The validity of a sale of land belonging to minors, by their guardian, is not affected by the fact that the decree for such sale was signed by the judge of the superior court, though the clerk of such court had authority to act as probate judge; Code, § 1590, prescribing the manner in which sales may be made by guardians, being a restriction

- upon the discretionary power of the guardian, and not upon the authority of the court.—BARCELLO v. HAPGOOD, N. Car., 24 S. E. Rep. 124.
- 87. CORPORATIONS—Agents.—A stockholder of a corporation is bound to know the extent of the authority of an agent of the corporation, and therefore cannot claim, where a renewal note with sureties is given for a subscription for stock to an agent under an agreement that it shall not be delivered to the corporation until similar notes are given by all the other stockholders, the agent being without authority to make such agreement, and is delivered to the corporation before similar notes are given by all the other stockholders, and the old note is returned by the company, that there was no delivery of the note.—Hardin v. SWEENEY, Wash., 44 Pac. Rep. 138.
- 88. CORPORATIONS—Officer.—The fact that one is a stockholder, director and officer of a corporation will not debar him from recovering on a quantum mermit for services rendered the corporation which were clearly outside his duties in either of such capacities, and which were rendered with the knowledge and acquiescence of the other directors.—Seversow v. BIMETALLIC Extension Mining & Milling Co., Mont., 44 Pac. Rep. 79.
- 39. COUNTY INDESTEDNESS Constitutional Limitation.—The cash assets of the county should be deducted from the outstanding indebtedness for the purpose of determining the amount of such indebtedness, within the meaning of the constitutional provision limiting the indebtedness to be incurred by counties.—STATE V. HOPKINS, Wash., 44 Pac. Rep. 134.
- 40. COURTS—Conflicting Jurisdiction.—Where a sufficient complaint has been filed and served, asking for the sequestration of the property of a debtor corporation and the appointment of a receiver, and the court has issued an order to show cause why a receiver should not be appointed, and forbidding interference with the assets of the corporation pending the motion, a like court in another cousty cannot, by declaring the corporation, insolvent, and appointing a receiver therefor, acquire superior jurisdiction, where such proceedings are had while the order to show cause and the restraining order are pending in the other courts.—NORTHWESTERN IRON CO. V. LEHIGH COAL & IRON CO., Wis., 66 N. W. Rep. 515.
- 41. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—On a trial for murder by shooting, evidence that deceased, half an hour after being shot, told the doctor that she believed she could not live, and that he then informed her that her case was hopeless, warrants the admission, as dying declarations, of her statements then made to the doctor, and her sworn statement made four hours later, though she did not die till six days later.—PEOPLE v. WEAVER, Mich., 66 N. W. Rep. 567.
- 42. CRIMINAL EVIDENCE—Murder—Similar Crimes.—On the trial of a defendant charged with crime, evidence of the commission by him of another similar crime, or of an attempt to commit another, is not admissible in proof of the substantive act charged; but where there is evidence tending to prove such act, but leaving room for question as to the intent with which it was done, evidence of other similar acts may be admitted to be considered on that issue alone.—PEOPLE V. THACKER, Mich., 66 N. W. Rep. 563.
- 43. CRIMINAL LAW—Gaming—Indictment.—An indict ment alleged that a game was played at cards or dice, and that defendant played at such game with cards or dice, or some substitute therefor, at a tavern, inn. storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time sold, retailed or given away, or in a public house, highway or some other public place, or at an outhouse where people resorted, and did bet money at said game, etc.: Held, that the indictment was not bad for duplicity.—Wickard v. State, Ala., 19 South. Rep. 491.
- 44. CRIMINAL LAW-Libel-Indictment.—An indictment for libel, alleging that defendant did "publish,



and did cause to be published in a certain newspaper called Torch of Liberty in a certain part of which newspaper so published as aforesaid they were and are contained the false, scandalous and malicious libel," etc., when attacked after verdict, will be held to sufficiently allege the publication of the libel.—Barnum v. State, Wis., 66 N. W. Rep. 617.

- 45. CRIMINAL LAW-Theft by Conversion.—Rev. Pen. Code, art. 877, makes it equivalent to theft for any person, having possession of personal property by contract of hiring, to fraudulently convert the same to his own use: Held, that one who obtains personal property by contract of hiring in one county, but converts the same in another, can be tried only in the latter county, though the intention to convert the same was conceived in the former.—ABBEY V. STATE, Tex., 34 S. W. Red. 980.
- 46. CRIMINAL LAW Threatening Letter.—A letter directing a person to deposit a sum of money in a certain place, and stating that, "should you fail to comply with our request, wee be unto you and yours," does not contain a sufficient threat upon which to predicate an information under Rev. Cr. Code, § 966, making it criminal to send a letter threatening to kill or injure the person of another.—Hansen v. State, Tex., 34 S. W. Ren. 929.
- 47. CRIMINAL LAW—Venue—County Officer.—A prosecution against a county officer for soliciting a bribe outside of his county must be in the county where the bribe was solicited, and not in the county where he holds office.—STATE v. KNIGHT, Ohio, 48 N. E. Rep. 281.
- 48. CRIMINAL PRACTICE—Seduction—Indictment.—St. 1894, § 1214, provides that "whoever" shall, under promise of marriage, seduce "any female" under 21 years old, shall, etc.; and that there shall be no prosecution when the person charged marries the girl, etc.; Held, that the indictment need not allege either that defendant or the female seduced was unmarried.—DAVIS V. COMMONWEALTH, Ky., 34 S. W. Rep. 699.
- 49. Damages—Exemplary Damages.—To justify the recovery of exemplary damages in an action for tort, the petition must so describe the wrongful act as to show that the case belongs to the class of cases in which such damages are recoverable. It is not sufficient to allege simply such matters as warrant the recovery of actual damages, without characterizing them as wanton, willful or malicious.—POTTER v. STAMPLI, Kan., 44 Pac. Rep. 46.
- 50. DEDICATION—Effect of Subsequently Acquiring.—The subdividing of property, and the making and filing of a plat thereof, by one not the holder of the legal title, though in actual possession and occupancy, is ineffectual as a statutory dedication of the streets designated on such plat.—KANSAS CITY MILLING CO. v. RILEY, Mo., 34 S. W. Kep. 835.
- 51. DEDICATION OF STREETS—Assent of Mortgagee.—When the owner of land, after mortgaging it, makes a plan thereof, a release by the mortgagee of certain of the lots included in the plan, by reference to the plan book, is such a recognition of the plan by the mortgagee as shows his assent to the dedication of all the streets included in the plan.—PRY V. MANKEDICK, Penn., 24 Atl. Rep. 46.
- 52. DEDICATION—Revocation.—Where the public authorities refuse to approve a plat dedicating a street to public use, or to recognize the street, in the absence of a public user equivalent to an acceptance the intended dedication is revocable, as to any part of such street, at the pleasure of the proprietor and abutting owners.—Mahler v. Brumder, Wis., 66 N. W. Rep. 502.
- 58. DEED Consideration Parol Evidence.—Parol testimony is admissible to show the actual consideration for a deed.—WHEELER V. CAMPBELL, Vt., 34 Atl. Rep. 28.
- 54. DEED—What Constitutes.—An instrument executed by a husband to a wife, whereby he conveys certain land in fee-simple, with a covenant that he shall remain in possession and enjoy the rents and profits

- during his natural life, is a deed and not a will.—CAR-PENTER V. HANNIG, Tex., 34 S. W. Rep. 774.
- 55. DIVORCE-Abandonment.—In an action by the husband against the wife for a divorce, wherein she filed a cross-petition against him for a divorce on the ground of abandonment for more than one year, held that the period of abandonment does not terminate with the commencement of the plaintiff's action, but may extend to the filing of the defendant's cross-petition.—NEDDO v. NEDDO, Kan., 44 Pac. Rep. 2.
- 56. ELECTION—County Seat—Rejected Ballots.—Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a piace other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because, in the certified return of the county election board, such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank" ballots.—STATE v. ROPER, Neb., 66 N. W. Rep. 559.
- 57. EVIDENCE Mining Custom.—In an action to abate, as a nuisance, a ditch over plaintiff's land, maintained by defendant to carry the detritus from an hydraulic mine to a river, evidence of a custom of using such a ditch in all hydraulic mining is admissible under the general issue.—JACOB v. DAY, Cal., 44 Pac. Rep. 243.
- 58. EVIDENCE Parol Agreement.—Evidence of a parol agreement, made at the time of the execution of notes, that the maker should have the right to offset an account then existing in his favor, is not a variance from the contract embodied in the notes.—BENNETT V. TILLMON, Mont., 44 Pac. Rep. 80.
- 59. EVIDENCE—Signature.—In an action on a note, where the signature of the maker was denied, bank checks and other writings containing genuine signatures, though otherwise incompetent, were admissible as standards of comparison.—MOORE V. PALMER, Wash., 44 Pac. Rep. 142.
- 66. EVIDENCE Written Memorandum—Parol Evidence.—A letter of instructions accompanying a release of a vendor's lien in escrow which recites that the consideration "is to be paid by vendee in thirty days," signed by the vendors only, and not purporting to be the contract itself, does not exclude parol evidence to vary the time of payment.—Johnson v. Portwood, Tex., 34 S. W. Rep. 787.
- 61. EXEMPTIONS—Construction of Laws.—Exemption laws being remedial, beneficial and humane in their character, will be liberally construed; and when it does not clearly appear whether certain property is or is not embraced within the exempting statute, the debtor will generally be allowed the benefit of the doubt, and suffered to retain the property.—NELSON V. FIGHTMASTER, Okia., 44 Pac. Rep. 218.
- 62. EXEMPTIONS—Waiver.—An insolvent debtor, who waived his right only to exemptions of personal property, can invest his money in a homestead, and thereby defeat his creditor.—REEVES V. PETERMAN, Ala., 19 South. Rep. 512.
- 63. EXPERT TESTIMONY-Competency of Employee.—
 In an action against a master for injuries alleged to
 have been caused by his negligence in employing an
 incompetent person as head sawyer in a sawmill, witnesses who had seen such person engaged in his employment, and who were familiar with the requirements of the place, may testify as to whether he was
 competent.—Lewis v. Emery, Mich., 66 N. W. Rep. 569.
- 64. FEDERAL COURTS-Circuit Court-Jurisdictional Amount.—A statute of Colorado provides that "share-holders in banks shall be held individually responsible for debts of said associations in double the amount of the par value of the stock owned by them respectively." Laws 1895, p. 264. Held, that the remedy of creditors of such corporations under this statute, unless in exceptional cases requiring an accounting, is at

law only, and that the claims of creditors against shareholders are several, and cannot be joined in one action to make up the amount required to give jurisdiction to the United States circuit court.—AUER v. LOMBARD, U. S. C. C. of App., 72 Fed. Rep. 209.

- 65. FRAUDULENT CONVEYANCES—Change of Possession—Chattel Mortgages.—A chattel mortgage on a stock in trade, which allows the mortgagor to retain possession and continue the sales, but requires a daily accounting of proceeds to the mortgagee, to be applied on the mortgage debt, is not fraudulent on its face, as to other creditors of the mortgagor.—BOCK ISLAND NAT. BANK V. WESTERN LUMBER CO., MO., 34 S. W. Rep. 889.
- 66. FRAUDULENT CONVEYANCES Partnership.—A mortgage of a partner's individual property to the firm, executed for the purpose of increasing the firm's credit with a bank to which it owed a bona fide debt, was transferred to the bank within 10 days after its execution,—both parties being then solvent,—and two years later the firm made an assignment for the benefit of creditors: Heid, that such transfer was not invalid as to subsequent creditors of the firm, though it was not recorded until the assignment.—Durham Feetilizer Co. v. Hemphill, S. Car., 24 S. E. Rep. 85.
- 67. GARNISHMENT—Lien—Priority.—Where checks on a general deposit are not presented to the bank till after it has been garnished by a judgment creditor of the depositor, though drawn before garnishment, the fund is liable to the satisfaction of the judgment.—COMMERCIAL BANK OF TACOMA V. CHILBERG, Wash., 44 Pac. Rep. 264.
- 68. GUARANTY OF CREDITS—Contract of Insurance.—A corporation which issues a contract whereby it guaranties a merchant against loss from sales on credit resulting from the insolvency of customers, to be determined in a manner specifically described, is an insurance company, within the meaning of Rev. St. 55 1977, 1978, and the contract is one of insurance.—SHAKMAN V. UNITED STATES CREDIT SYSTEM CO., Wis., 66 N. W. Rep. 528.
- 69. GUARANTY—Parol Evidence.—On an issue as to whether a guaranty "to hold myself responsible for all goods bought by G of 8" was a continuing guaranty, or was confined to the single purchase made at the time it was given, it is competent to show the nature of the contract between G and S, if known to the guarantor.—SULLIVAN V. ARCAND, Mass., 43 N. E. Rep. 198.
- 70. GUARDIAE Use of Ward's Funds.—A guardian who, in good faith, mingles his ward's funds with his own, and uses the same in his business, it not appearing that he was able at all times to invest the same, is chargeable only with legal interest thereon, with an unal rests, notwithstanding that the current rate of interest was greater.—COUSINS' ESTATE, Cal., 44 Pac. Rep. 182.
- 71. HABEAS CORPUS Custody of Child.—The retention of a child by one to whose custody it is awarded by a court in habeas corpus proceedings is not an unlawful detention for which the custodian can be held liable in damages, though the order is subsequently set aside on appeal.—LOVELL v. HOUSE OF THE GOOD SHEPHEED, Wash., 44 Pac. Rep. 253.
- 72. HIGHWAY Dedication.—To constitute a dedication of land for a highway, the owner of the land must set apart for such purpose so much of the land as he intends to be appropriated therefor, and must give it over to the public with the intention that it be used as such, and there must be an acceptance thereof by the public.—ALTON v. MEEUWENBERG, Mich., 66 N. W. Rep. 571.
- 73. HOMESTEAD Abandonment.—Proof of the acquirement of a new homestead is not essential to show abandonment of a former homestead.—MOORE V. JOHNSTON, Tex., 34 S. W. Rep. 771.

74. HOMESTEAD AND EXEMPTIONS—Filing of Declaration.—A married woman's declaration of homestead, filed on lands on which she resided, and which were

- her separate property, is not so affected by subsequent divorce proceedings, in which no reference is made to the homestead property, as to render it liable to the payment of a debt not within the exceptions recited in Civ. Code, § 1265, exempting a homestead so declared from forced sale for any liability of the owner.—City Store v. Coper, Cal., 44 Pac. Rep. 168.
- 75. Homestead Constituent of Family.—Where a granddaughter, with her parents' consent, lives with her grandmother, by whom she is supported until the grandmother's death, and the arrangement is terminable at the will of either the grandmother, the child, or her parents, such grandchild is not a constituent of her grandmother's family, so as to entitle her to the homestead on her grandmother's death.—PHILLIPS V. PRICE, Tex., 24 S. W. Rep. 784.
- 76. HOMESTEAD—Occupancy.—Where a tract of land is purchased for a homestead, in order to preserve a debtor's right to the homestead exemption he must actually occupy the same as a residence within a reasonable time after the purchase. The constitution and statutes require actual occupancy in order to preserve a homestead right.—Edgerton v. Connelly, Kan., 44 Pac. Rep. 22.
- 77. HOMESTEAD Sale on Judgment.—Under Civ. Code, §§ 1240, 1241, providing that the homestead shall be exempt from forced sale except on judgments recovered before the declaration of homestead is filed, and which constitute liens upon the premises, a homestead is not subject to forced sale under an execution issued on a justice's judgment which has not been recorded, so as to create a lien on the land, though the declaration of homestead was not filed until after the levy of the execution.—Beaton v. Reid, Cal., 44 Pac. Rep. 167.
- 78. HUSBAND AND WIFE-Community Property.—The presumption that property acquired by a husband or wife is community property is overcome by evidence that it was purchased wholly with the separate money of the wife.—WEYMOUTH v. SAWTELLE, Wash., 44 Pac. Rep. 109.
- 79. HUSBAND AND WIFE Separate Property of Wife.

 —Rev. St. 1879, § 3296, provides that property coming to a married woman by inheritance shall remain under her sole control. A husband purchased land with such property of his wife, taking title in his own nause: Held, that a mortgage by the wife alone on the land passed all the equitable interest the wife had in the land.—Owings v. Wiggins, Mo., 34 S. W. Rep. 577.
- 80. INJUNCTION—Bond.—No action can be maintained on an injunction undertaking, except in accordance with its terms; and this is true with respect to the principal as well as the sureties.—COLUMBUS, H. V. & T. RY. CO. V. BURKE, Ohio, 48 N. E. Rep. 282.
- 81. INJUNCTION Receiver—Notice.—2 Hill's Code, § 270, provides that no injunction shall be granted until it shall appear that one or more of the opposite parties have had notice of the application, except in emergency cases: Held, in an action by a partner for an accounting, that it was error to grant an order without notice restraining defendant from interfering with the firm property, or without making any provision therein for a hearing, before continuing the same in force.—Larben v. Winder, Wash., 44 Pac. Rep. 123.
- 82. Insurance Agent.—An agent of an insurance company, authorized to issue policies of insurance and consummate the contract, binds the company by any act, agreement, waiver, or representation, within the ordinary scope of insurance business, which is not known by the assured to be outside the authority granted to the agent.—MILWAUKEE MECHANICS' INS. Co. v. BROWN, Kan., 44 Pac. Rep. 35.
- 83. INSURANCE—Conditions Waiver.—Parol waiver by a local insurance agent of conditions of the policy is void where the policy requires such waiver to be indorsed on it in writing.—OSPKOSH MATCH WORKS V. MANCHESTER FIRE ASSUR. CO., Wis., 66 N. W. Rep. 535.



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- 84. INSURANCE—Limitation of Time.—Letters written to the general agents of an insurance company by a local agent who had nothing to do with the adjustment of plaintiff's loss, containing mere suggestions as to the settlement of the claim, and of whose contents plaintiff had no knowledge until long after the time limited by the policy for bringing suit had expired, are incompetent to show a waiver of such limitation.—HILL v. PHŒNIX INS. CO. OF BROOKLYN, N. Y., Wash., 44 Pac. Rep. 146.
- 85. Insane Person Power of Attorney.—Where a wife, executing a power of attorney to her husband, is at the time insane, to his knowledge, one to whom he transfers a note belonging to her cannot claim it as against her, though the money received therefor was expended in extinguishing claims against her, unless they were valid claims, which would not be the case with debts contracted by the husband under the power of attorney.—ELIAS V. ENTERPRISE BUILDING & LOAN ASS'N, S. Oar., 24 S. E. Rep. 102.
- 86. INSURANCE—Pleading.—In a suit on a policy of fire insurance covering a stock of liquors, the plea that, after the loss, plaintiff falsely represented in a sworn statement to the insurer, contrary to a condition in the policy that false swearing before or after a loss would invalidate the policy, that she had renewed her license to retail liquors, constitutes no defense, where there is no averment in the complaint or plea which establishes any relation between the license and the insurance.—Feibelman v. Manchester fire Assur. Co., Ala., 19 South. Rep. 540.
- 87. INSURANCE POLICY Reformation.—Evidence that plaintiff applied for insurance in his own name on property to which he alone had title, and that he did not discover, till after the loss, that the policy was made payable to his wife, justified a reformation of the instrument, no motive being shown for plaintiff to insure in his wife's name.—Lancashire ins. Co. v. Lucas, Ky., 34 S. W. Rep. 899.
- 88. I TOXICATING LIQUOR Indictment.—An indictment charging a defendant with selling or giving away liquors, without averring that it was contrary to law, is insufficient to support a conviction.—HUBBARD v. STATE, Ala., 19 South. Rep. 519.
- 89. INTOXICATING LIQUORS—Evidence.—In a prosecution for an illegal sale of intoxicating liquor, it is error for the court to instruct the jury that evidence of other unlawful sales may be considered, without any restriction, to determine whether the defendant is guilty of making the sale on which the State elects to rely for a conviction.—STATE V. MARSHALL, Kan., 44 Pac. Rep. 49.
- 90. JUDGMENT BY DEFAULT.—A refusal to set aside a default judgment against a corporation for excusable neglect was proper, where the complaint and summons were duly served on its secretary, and five days afterwards handed by him to its president, who read them, and observed their date, but took no action in regard to them till after judgment by default had been entered.—SHAY V. CHICAGO CLOOK CO., Oal., 44 Pac. Rep. 287.
- 91. JUDGMENT Injunction. A judgment of foreclosure of a ditch lien will not be enjoined on the ground that the work on the drain was not in fact done according to the plans and specifications.—SHRACK V. COVAULT, Ind., 48 N. E. Rep. 229.
- 92. JUDGMENT Payment.—Money voluntarily paid to satisfy a judgment which was subsequently reversed cannot be recovered back, where it appears that the original claim was a just one, and that the judgment was reversed for a mistake in procedure.—TRASDALE V. STOLLER, Mo., 34 S. W. Rep. 878.
- 93. JUDGMENT—Rendition.—A judgment rendered in vacation is void. Where a judgment is void because rendered in vacation, no appeal lies therefrom.—BACKER v. EBLE, Iud., 48 N. E. Rep. 233.
- 94. KIDNAPPING—What Constitutes.—A father, taking his child, who was of tender years, out of the State,

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- with its consent and with the consent of its mother, who had been awarded the custody of the child in divorce proceedings, in order that the child may not be present in a criminal trial in which it had been subpœnaed as a witness, is not guilty of kidnapping.

 —JOHN V. STATE, Wyo., 44 Pac. Rep. 51.
- 95. Landlord and Tenant—Lease—Damages.—In an action against a lessor, after expiration of the term, for breach of lease by refusal to deliver possession, where the rent was payable in shares of certain crops to be planted on certain parts of the land, witnesses familiar with the land were properly allowed to testify to its average yield of the various crops contemplated, cost of production and marketing, and the value of such crops during the year of the lease, to show damages.—Chew v. Lucas, Ind., 43 N. E. Rep. 285.
- 96. Landlord's Lien-Enforcement.—Where a tenant or a purchaser from him is about to remove and sell property which is subject to a landlord's lien, a warrant may issue for the enforcement of the lien, though such removal and sale is without any fraudulent intent.—Leonard v. Brockman, S. Car., 24 S. E. Rep. 96.
- 97. LANDLORD'S LIEN-Priority.—Where land is sold on the agreement that, on failure of the grantee to pay the purchase price note when due, he shall become a tenant of the grantor, and liable for a certain sum for rent, on non-payment of the note, the lien of the grantor on the crops, as landlord, is superior to that of a mortgagee advancing money thereon, under the belief that the grantee is the owner of the land, there being no question of ostoppel or waiver.—Waite v. Corbin, Ala., 19 South. Rep. 505.
- 98. LIBBL—Privileged Publication—Pleading.—In an action for libel, the defense of privileged publication, within Civ. Code, § 47, must be pleaded.—GILMAR V. MCCLATCHY, Cal., 44 Pac. Rep. 241.
- 99. LIFE INSURANCE—Beneficiary.—The insured in a life policy payable to his executor or administrator may, without the consent of the insurer, designate his mother as his beneficiary, and she is entitled to receive the proceeds thereof.—PRUDENTIAL INS. Co. v. YOUNG, Ind., 48 N. E. Rep. 253.
- 100. LIFE INSURANCE Suicide.—In an action on a life policy making "self-destruction by the insured, whether sane or insane," an avoidance of the policy, it was error to instruct that death from poison self-administered would not avoid the policy, unless it was shown that it was "willfully and deliberately" taken by the insured, with intent to commit suicide; and such error was not cured by a subsequent instruction directing a verdict for defendant if "deceased came to his death by poison taken with intent to commit suicide."—UNION CENT. LIFE INS. CO. v. HOLLOWELL, Ind., 43 N. E. Rep. 277.
- 101. LIMITATION OF ACTIONS—Executory Contract.—
 The statute commences to run against a cause of action in favor of the purchaser against the vendor in a contract to convey land for failure to convey from the date of its breach, as by a conveyance to a third person and not from the date of its execution.—MAITLAND v. ZANGA, Wash., 44 Pac. Rep. 117.
- 102. Limitation of actions—Indorsement of Nonnegotiable Note.—An action against the indorser of a non-negotiable note, on his contract of guaranty thereby arising, is not an action on the note, within the meaning of Gen. St. § 1870, fixing the statute of limitations in such actions at 17 years, but is merely an action on a written contract (Gen. St. § 1871), and must be brought within 6 years. — CARPENTER v. THOMPSON, Conn., 34 Atl. Rep. 106.
- 168. MARRIAGE—Breach of Promise Evidence.—In an action for breach of promise of marriage it is not necessary that there be direct and positive evidence of the marriage contract sufficient in itself to make proof of the same. The relations of the parties and the circumstances surrounding them are proper matters to be considered and given weight in deter-

mining that question.—KENNEDY V. RODGERS, Kan., 44 Pac. Rep. 47.

104. MARRIED WOMEN — Mortgage of Separate Estate.—Under the constitution and statutes of South Carolina relating to the property and contracts of married women, a married woman cannot pledge her estate by mortgage to secure the contract of another, which has no reference to her separate property, even though that other be her husband, and the mortgage purports in positive terms to bind her separate estate.

—AMERICAN MORTG. CO. OF SCOTLAND V. OWENS, U. S. C. C. of App., 72 Fed. Rep. 219.

105. MASTER AND SERVANT—Defective Appliances—Assumption of Risk.—An engineer, who, knowing the dangerous condition of a boiler, and after complaining of the condition thereof, continued to use the same assumed the risk of an explosion.—BRIDGES V. TENNESSEE COAL, IRON & RAILROAD CO., Ala., 19 South. Rep. 495.

106. MASTER AND SERVANT — Assumption of Risk.—A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards.—MALM v. THELIN, Neb., 66 N. W. Rep., 650.

107. MASTER AND SERVANT—Contract of Employment.
—A contract whereby one, in consideration of the release of a ciaim for damages against him, agrees to employ the claimant at certain wages so long as the works of the first are kept running, or until the other shall see fit to quit, is not void, either for uncertainty, for want of mutuality, or as within the statute of frauds.—Carter White Lead Co. v. Kinlin, Neb., 66 N. W. Rep. 536.

108. MASTER AND SERVANT — Contributory Negligence.—The inferential facts of due care and freedom from fault on plaintiff's part, found by the special verdict, will not warrant a judgment in his favor, unless the primary facts on which they are founded are such that the conclusion announced may be reasonably drawn therefrom.—TERRY v. LOUISVILLE, N. A. & C. RY. CO., Ind., 43 N. E. Rep. (278.

109. MASTER AND SERVANT-Injuries-Assumption of Risk.-In an action by a servant of a railroad company for personal injuries, it appeared that defendant was engaged in widening its tunnel; that the roof of the tunnel was supported by wooden bents, supported by upright posts, across which were laid loose boards of irregular lengths, which therefore jointed on varions bents; that, in removing such support, instead of taking the bents down in order, defendant's foreman directed plaintiff to pull out the fourth bent, upon doing which the three bents, left disconnected from the others, fell upon plaintiff; and that neither plaintiff nor defendant knew that the boards jointed "partly on each of the four bents:" Held, that it did not appear that plaintiff had not assumed the risk of such danger .- LOUISVILLE, N. A. & C. RY. CO. V. QUINN, Ind., 43 N. E. Rep. 240.

110. MASTER AND SERVANT—Negligence.—A railroad company cannot be held liable for an injury resulting to a brakeman who, in coupling cars, steps into a cattle-guard, in the daytime, and a place where he is familiar with the track.—FULLER v. LAKE SHORE & M. S. RY. CO., Mich., 66 N. W. Rep. 593.

111. MECHANICS' LIENS—Completion of Contract.—A building contract provided that all payments to the contractor should be made on certified statements of the architects, who were employed to supervise the construction of the building at a compensation of 5 per cent. of its cost, and that final settlement should be made on their certificate, showing completion of the contract according to specifications: Held that, as the last act required of the architects was to give a final certificate of satisfactory construction, their time

for filing a lien for services did not begin to run until the performance of such act.—BENTLEY V. ADAMS, Wis., 66 N. W. Rep. 505.

112. MECHANIC'S LIEN—Payment by Note.—The mere fact that the owner of real property has given his note for a portion of the amount due for materials furnished for making erections on his property does not relieve such property from a mechanic's lien filed against the same for the entire amount of the material so furnished.—LIVESY V. HAMILTON, Neb., 66 N. W. Rep. 644.

118. MINING CLAIMS—Location in Town Limits.—The fact that land on which discovery and location of a mining claim are made is within the patent limits of a town will not affect the title of the locator, where it was known prior to the patent to the town that a mifferal vein existed where the discovery and location were made.—MOTLE V. BULLENE, Colo., 44 Pac. Rep. 69.

114. MORTGAGE—After-acquired Title.—A mortgagor, who was entitled as heir, to a one-fourth interest in certain lands, conveyed, by mortgage, "all her interest, either in fee-simple or expectancy or remainder, in the lands inherited by her," and covenanted that she was seised of a one-fourth interest in such lands. Subsequently she purchased the entire tract at a sale by the administrator of her decedent, from money received from decedent's estate: Held, that the after-acquired title, beyond the one-fourth interest in the land, did not inure to the mortgagee, or purchaser from him at a foreclosure sale.—WHEELER V. ATCOCK, Ala., 19 South. Rep. 497.

115. MORTGAGE—Construction—Conveyance of Homestead.—An agreement in a trust deed to a foreign corporation, made in Louisiana, that it and notes secured thereby should be construed and governed by the laws of Arkansas, is not an admission or agreement that the making of the contract evidence by such deed and notes was a doing of business in Arkansas, within the statutes imposing conditions upon foreign corporations in order that their contracts made in the course of such business may be binding on citizens of Arkansas who are parties thereto.—BRITISH & A. MORTG. Co. v. WINCHELL, Ark., 24 S. W. Rep. 891.

116. MORTGAGE—Deed Absolute in Form.—While a preponderance of the evidence is sufficient to establish an issue in any civil action, and while this court will not, in the exercise of its appellate jurisdiction, weigh conflicting evidence, still, in order to sustain a finding for the plaintiff in an action to have a deed absolute in form declared a mortgage, the evidence on behalf of plaintiff, when taken together, and without regard to the contradicting evidence, should present a state of facts consonant with reason, and consistent in its different parts.—STALL v. JONES, Neb., 66 N. W. Rep. 668.

117. MORTGAGE-Fixtures.—Under a mortgage of a brewery, and its machinery and appliances for making beer, all the machinery and appliances used for that purpose, and on the premises, and such as may be substituted in lieu of other machinery that becomes useless or requires repairing, passes to the mortgagee.—REIMANV. HENDERSON NAT. BANK, Ky., 34 S. W. Bep. 697.

118. MORTGAGE—Property Covered.—A provision in a trust deed, that "all machinery now upon, or which may hereafter be put upon, said premises, whether attached or detached," shall be covered by the deed, does not apply to machinery afterwards put on the land by a tenant.—POLLE v. ROUSE, Miss., 19 South. Rep. 481.

119. MORTGAGES—Acknowledgment—Impeaching Officer's Certificate.—Where mortgages were admitted to have been signed by husband and wife in the presence of the notary, and no fraud or duress is shown, the certificate of the notary as to their due acknowledgment cannot be impeached by parol evidence.—American Freehold Land Mortgage Co. v. THORESTON, Ala., 19 South. Rep. 529.



120. MORTGAGES—Foreclosure—Lis Pendens.—A judgment rendered in an action to foreclose a mortgage, in which a *lis pendens* was not filed within the time required by Sanb. & B. Ann. St. § 3187, though irregular, is good on collateral attack.—HUNTINGTON v. MEYER, Wis., 66 N. W. Rep. 500.

121. MORTGAGES — Foreclosure — Pleading.—A complaint which states facts sufficient to entitle plaintiff to a foreclosure of a mortgage on premises on which defendant has a subsequent lien is good against a general demurrer, though the action purport to be one to remove a cloud from title.—DAMON v. LEQUE, Wash., 44 Pac. Rep. 261.

172. MORTGAGES—Foreclosure Sale.—The right of a mortgagee to confirmation of a sale under his mortgage is not affected by the pendency of a separate action by the mortgagor against the purchasers, to which the mortgagee was not made a party, to set aside the sale.—Southbern MUTUAL BUILDING & LOAN ASS'N OF ATLANTA, GA., v. RYAN, S. Car., 24 S. E. Rep. 195.

123. MORTGAGES—Reformation—Mutual Mistake.—A pre-existing debt is sufficient consideration for a mortgage to entitle the mortgagee to a correction of a mutual mistake therein, as against the mortgagor and a subsequent purchaser with notice.—CITIZENS' NAT. BANK OF ATTICA v. JUDY, Ind., 43 N. E. Rep. 259.

124. MUNICIPAL CORPORATION—Election for Issuance of Bonds.—A city charter provided that bonds for a city market shall not be issued "unless the qualified electors of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election, or at a special election called for the purpose;" and a provision subsequently added to such charter that no debt should be incurred by the city for an electric plant unless authorized by the qualified electors of said city "voting thereon" shows a legislative intent to provide a different rule in each case: Held that, where a proposition for issuance of market bonds was placed on a general election ticket, a majority of all votes cast at the general election controls, and not a majority of those cast on the bonding proposition.— STEBBINS V. JUDGE OF SUPERIOR COURT OF GRAND RAPIDS, Mich., 66 N. W. Rep. 594.

125. MUNICIPAL CORPORATIONS—Public Health—Filling Low Lots.—Act 1830, amending the charter of the city of Charleston, authorizing the city to fill up low lots, declared to be public nuisances by the board of health, and to recover the cost from the landowner if it does not exceed one-half the value of the lot, is a walld exercise of the police power; the general assembly having the right to delegate such power to the city authorities.—City Council of Charleston v. Werner, S. Car., 24 S. E. Rep. 207.

126. MUNICIPAL CORPORATIONS—Street Improvements.—The provisions of Rev. St. 1694, § 4288 et seq., authorizing city councils to improve streets and contract for the work to be let to the best bidder after advertising, the cost of such improvement to be ultimately assessed against abutting property, must be strictly followed, and the letting of a contract containing provisions materially more favorable to the contractor than the requirements under which the bids were invited and received destroys the benefit of the competition intended to be realized by the statute. Such contract is illegal, and its performance may be enjoined.—Wickwire v. City of Elkhart, Ind., 43 N. E. Rep. 216.

127. MUNICIPAL CORPORATIONS—Street Paving—Contract.—A provision in a paving contract requiring the contractor to keep the pavement in good repair for five years, except repairs due to cutting through the pavement for laying pipes, etc., renders the assessment therefor against the property owners invalid, the charter of the city requiring the expenses of repairing streets to be paid from the ward fund.—BOYD V. CITY OF MILWAUKEE, Wis., 66 N. W. Rep. 603.

128. MUTUAL BENEFIT INSURANCE — Assessments.— Where the board of trustees of a mutual benefit association, when less than a quorum was present, after official notice of the death of members, ordered assessments, the irregularity, if any, was cured by the approval of the minutes of such meeting at a subsequent meeting, when a quorum was present.—Wolf y. Michigan Masonic Mut. Ben. Ass'n, Mich., 66 N. W. Rep. 576.

129. NATIONAL BANKS—Insolvency—Assessment.—The complaint, in an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the comptroller of the treasury, need not aver that there was a necessity therefor, or that the comptroller determined that there was such necessity though the law provides that the comptroller may enforce the individual liability of the stockholders, if necessary to pay the debts of the bank. It is enough that the complaint alleges that the comptroller made the assessment and directed its enforcement.—O'Connor v. Witherby, Cal., 44 Pac. Rep. 237.

130. NEGOTIABLE INSTRUMENT—Bona Fide Purchasers.

—A writing by which a debtor gives his creditor the option of selecting from all notes belonging to the debtor in the hands of his pledgee which shall remain after payment of the amount for which they were hypothecated such paper as the creditor is willing to take in payment of his claim does not make the creditor a purchaser "in the usual course of business" of any particular note in the pledgee's hands.—Burnham v. Mer. Exch. Bank, Wis., 66 N. W. Rep. 510.

131. NEGOTIABLE INSTRUMENTS—Forged Renewals.—A bank, which holds a note made by two persons as principal and surety, in accepting, in good faith, at maturity, a renewal note to which the name of the surety was forged by the principal, is not bound to know the handwriting of the surety, and is, hence, not guilty of negligence, entitling the surety to a discharge from liability on the original note, in failing to compare the surety's signatures on the two notes, respectively, with reference to ascertaining the genuine-tess of that on the renewal note.—Lyndonville Nat. Bank v. Fletcher, Vt., 34 Atl. Rep. 38.

182. NEGOTIABLE INSTRUMENT—Note—Consideration.—A note without other consideration than the transfer, by delivery, of a certificate of the register of the United States land office, to the effect that the person to whom it was issued had taken the preliminary steps towards entering as a homestead the land described therein, which land had, before the making of such note, been abandoned by such entryman before he was entitled to a final certificate or patent therefor, is invalid for want of consideration.—McCollum v. Edmonds, Ala., 19 South. Rep. 501.

133. NEGOTIABLE INSTRUMENT—Notes — Liability of Trustee.—Unsubscribed stock of a bank was issued to T, its president as trustee for the bank, and a note was given by the president, payable to the bank, signed, "T, Trustee for Bank." The proceeds from any of such stock, when sold, as well as all dividends there on, were credited to the bank. The note was renewed each six months the amount of the new note being reduced according to the amount received from the sale of such stock: Held, that on the insolvency of the bank, T was not personally liable on the note to the receiver appointed for the bank.—NEPTUNE v. Pax-TON.1nd., 48 N. E. Rep. 276.

134. NEW TRIAL—Newly-discovered Evidence.—Before a new trial should be granted on the ground of newly-discovered evidence, due diligence prior to the trial in respect to such evidence must be shown; and to this end it is not sufficient for the moving party to merely allege that he used due diligence, but he must show the facts, so that the court can see whether there was due negligence.—LUKENS v. GARRETT, Kan., 44 Pac. Rep. 23.

135. NEGOTIABLE NOTE—Agreement to Pay Taxes.—A promissory note containing a stipulation to "pay all taxes assessed against the real estate and the mortgagee's interest therein, described in the mortgage

given to secure this note, until it is paid," is not negotiable.—Walker v. Thompson, Mich., 66 N. W. Rep. 584.

186. OFFICE AND OFFICERS — Civil Liability.—An attorney for persons having claims against the government on account of a readjustment of their salaries as postmasters, has no right of action against the postmaster general because, in sending drafts to the claimants on account of their claims, he informed them that no attorney's services were necessary to the presentation of such a claim, that congress desired all the proceeds to reach the person really entitled thereto, and that the claims were sustained or rejected according to the evidence furnished by the records of the department.—Spaldping v. Villas, U. S. S. C., 16 S. C. Rep. 631.

187. PARTITION—Judgment.—A judgment ordering partition according to the will of testator, and directing the commissioners to charge the shares of certain of the parties with the sums expressly laid upon them by the will, is not void as conditional, because it further directs that, if the sums so charged shall be paid before the commissioner acts, the shares should be relieved of the charges.—SIMMONS v. JONES, N. Car., 24 S. E. Rep. 114.

133. Partition — Limitations.—While the 15-years statute is the proper one to be pleaded in an action for partition, yet a plea of the 20-years statute in such action is also good.—WAYMIRE V. WAYMIRE, Ind., 48 N. E. Rep. 267.

139. PARTMERSHIP.—Evidence that two farmers, purchasing a threshing machine, paid for the same with their joint and several notes, secured by a chattel mortgage on the machine purchased, and jointly took possession of and used the machine in threshing grain for others, will not support a finding that the threshing machine was partnership property, nor that a copartnership relation existed between the farmers. Such evidence warrants, rather, the conclusion that the farmers were joint owners, or tenants in common of the machine.—Exame Bank of Lushton v. O. S. Kelley Co., Neb., 66 N. W. Rep. 619.

140. PARTNERSHIP—Evidence.—A statement to plaintiff, by one not a party to the suit, that he was not a
partner of the parties, is incompetent to bind defendant, who was not present when the statement was
made.—WIGGIN V. FIRE, Mont., 44 Pac. Rep. 75.

141. PLEDGE—Sale of Piedged Property.—A piedgee, in selling the piedged property on default, is bound to use reasonable diligence to obtain its full value, and this duty includes the fixing of a reasonable time and place of sale.—Guinzburg v. H. W. Downs Co., Mass., 48 N. E. Rep. 194.

142. PLEDGE — When Title Passes.—Where goods which the consignee had agreed to pledge as security for a bona fide debt were delivered to a carrier for transportation to the pledgee, under a bill of lading expressly naming him as consignee, there was a valid delivery of the piedge, which, in the absence of fraud, passed title, as against an attachment levied on the goods in transit.—Toms v. Whitmore, Wyo., 44 Pac. Rep. 56.

143. PRINCIPAL AND AGENT—Agency.—Merely holding out a person as agent does not estop the alleged principal from denying such person's authority to contract in his behalf, unless the representations were made under such circumstances that the principal should have expected that they would be relied upon, and unless they were actually relied upon in good faith, to the injury of an innocent party.—CLARK V. DILLMAN, Mich., 66 N. W. Rep. 570.

144. PRINCIPAL AND AGENT — Authority to Employ Subagent.—An agent who, in good faith and with the consent of his principal, selects a suitable person as subagent, is not liable to the principal for the acts of such subagent.—Davis v. King, Conn., 34 Atl. Rep. 107.

145. PRINCIPAL AND AGENT — Authority to Receive Payment.—The fact that one acted as agent for a mortgage in taking a mortgage, and in receiving interest

payments on coupon interest notes, did not authorize the mortgager to pay the principal to him, where the mortgagee himself kept possession of the securities, and did not surrender the several interest coupons till he received the money from the agent.—WESTERN SE-CURITY CO. v. DOUGLASS, Wash., 44 Pac. Rep. 257.

146. PRINCIPAL AND SURETY — Liability of Surety.—Sureties on an official bond securing the faithful performance of the duty of an officer holding an office the term of which is fixed are not liable for any default of the principal beyond the term under which the bond is given; and provisions of law authorizing officers to hold over until their successors are appointed and qualified can only extend the liability of sureties for such reasonable time as, with due diligence, would enable his successor to be appointed and qualified.—BOARD OF ADMR'S OF INSAME ASTLUM OF THE STATE OF LOUISIANA V. MCKOWEN, La., 19 South. Rep. 553.

147. PRINCIPAL AND AGENT — Proof of Agency.—Agency cannot be proven by the mere declarations of one assuming to act in that capacity.—ANHEUSER-BUSCH BREWING ASS'N V. MURRAY, Neb., 66 N. W. Ren. 835.

148. PUBLIC LANDS — Permit to Cut Timber.—A permit, granted by the secretary of the interior, to cut timber on the public lands of the United States, did not attach to land upon which a homestead filing had been previously made, and remained uncanceled.—NELSON V. BIG BLACKFOOT MILLING CO., Mont., 44 Pac. Rep. 81.

149. Public Lands — Riparian Rights.—Land under navigable waters passes by a private grant only when so expressly provided for by the sovereign authority, and there is no presumption that there has been any act of the government which could have the effect of passing away its title.—Rosborough v. Picton, Tex., 34 S. W. Rep. 791.

150. QUO WARRANTO—Forfeiture of Franchise.—On application by the attorney-general for leave to bring proceedings to forfeit the franchise of a city water company for failure to keep an account of the cost of the construction of its plant, so as to enable the city to exercise its option to purchase the plant, as required by the city ordinance granting the company the franchise, the acts of the city should be considered in determining whether the right to bring such a proceeding has been waived.—STATE V. JANESVILLE WATER-POWER CO., Wis., 66 N. W. Rep. 512.

151. RAILROAD AID BONDS-Validity.—A power given by a municipal charter granted by the State of Indiana in 1847 "to take stock in any chartered company for making roads to said city" authorized a subscription to the capital stock of a railroad company building to the city.—CITY OF EVANSVILLE V. DENNETT, U. S. S. C., 16 S. C. Rep. 615.

152. RAILROAD COMPANIES — Accident at Crossing—Negligence.—The driver of a vehicle, who, at the signal of the street flagman, which, by Birmingham City Code, § 465, is an assurance that the railroad track may be crossed in safety, goes upon the track without stopping his team in order to look and listen, is not chargeable with negligence.—ALABAMA, G. S. R. Co. V. ANDERSON, Ala., 19 South. Rep. 516.

153. RAILROAD COMPANY — Crossings — Contributory Negligence. — Where plaintiff, who approached a railway crossing along a highway which ran parallel with the railway track, and from which the approaching train was visible at the distance of 500 feet from any point on the highway within 200 feet of the crossing, failed to look for the train at any time before attempting to cross the track, as a matter of law, he cannot recover for injuries received in a collision, though the defendant railway company failed to give the signal of its approach required by statute.—MILLER v. TERRE HAUTE & I. R. Co., Ind., 43 N. E. Rep. 257.

154. RAILROAD COMPANY—Evidence.—In an action for the death of a railway employee, alleged to have been due to the faulty construction of the railroad, an esgineer, testifying as to the construction of the track and the probability of deposits of sand thereon in rainy weather, could not, on cross-examination, state that the engineers on the road were all aware of that fact, this being a mere inference.—UNION PAC. RY. CO. v. O'BRIEN, U. S. S. C., 16 S. C. Rep. 618.

155. RAILROAD COMPANY — Grant of Free Transportation.—An agreement by a railroad company, in consideration of the grant to it of the right to use water from certain land, that the owner of the land should be entitled forever thereafter to travel without charge upon the trains of the company, did not give him a right to free transportation over lines subsequently constructed or leased by it.—WESTERN MARYLAND R. CO. v. LYNCH, Md., 34 Atl. Rep. 40.

156. RAILROAD COMPANY — Operation in City — Ordinance.—Municipal consent is requisite to enable any railroad company, whether incorporated by special act of assembly or under the general railroad laws, to enter upon and occupy the public highway of the city, unless its charter contains authority therefor in express terms or by necessary implication.—CITY OF PHILADELPHIA V. RIVER FRONT B. CO., Penn., 34 Atl. Rep. 60.

157. RAILROAD COMPANY—Street Railroads—Contributory Negligence.—Defendant requested the court to charge that, if defendant's employee was negligent, yet if plaintiff's employee was likewise negligent, and such negligence directly contributed to the injuries, the verdict should be for defendant, unless "defendant's employee in charge of the car became aware of the negligence of plaintiff's servant in time to have avoided injuring the team, by the exercise of proper care:" Held, that it was error to modify such instruction by inserting, after the words "plaintiff's servant," the words "or might have become aware thereof by the exercise of reasonable care."—Johnson v. Stewart, Ark., 34 S. W. Rep. 890.

158. RAILROAD COMPANY—Street Railroads—Contributory Negligence.—A person about to cross the track of a street railway at a street crossing is bound to exercise care proportioned to the danger to be avoided, and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances surrounding him; but it is only ordinary care which is required—that which might reasonably be expected of persons of ordinary prudence. Ordinary care does not require him to anticipate negligence on the part of those operating the railway. And while he should use his faculties for his own protection, it is not negligence per se for him to omit to look in both directions for the approach of a car. Whether it is or not negligence depends upon the circumstances.—CINCINNATI ST. RY. Co. v. SNELL, Ohio, 48 N. E. Rep. 207.

159. RAILEOADS—Consolidation — Filing Articles of Agreement.—Under Acts 1891, p. 84, §§ 1, 2, providing that the secretary of State shall charge certain fees for filing and recording an agreement of railroad companies to consolidate, and providing that he shall "neither file nor record any of the articles "niess all the fees for filing are first paid," the payment of the fees is a condition precedent.—STATE v. CHICAGO & E. I. R. CO., Ind., 43 N. E. Rep. 226.

160. RECEIVERS—Appointment.—Gen. St. § 1318, providing, on application by one partner for the appointment of a receiver for the firm, that the court "shall forthwith appoint a day for the hearing upon the same, and shall make such order relative to notice of such application and hearing to the other partners as may be deemed proper; said hearing to be at least six days from the service of such order of notice," does not prevent the court, with the consent of all the parties, from sppointing a receiver immediately on application.—LONGSTAFF V. HURD, Conn., 34 Atl. Rep. 91.

161. RELIGIOUS SOCIETIES—Injunction.—To settle the rights of contending factions of an unincorporated church to the use of the church property, injunction will lie at the instance of the faction entitled to the

property to restrain trespasses by the other faction thereon.—FULBRIGHT V. HIGGINBOTHAM, Mo., 84 S. W. Rep. 875.

162. REPLEVIN—Dismissal.—A plaintiff, in an action of replevin, who has obtained possession of the property under the writ, cannot be permitted, without the consent of the defendant, to dismiss the action. When a plaintiff in replevin, who has obtained the property, fails in his proof, or fails to prosecute the action, the defendant is entitled to judgment, and a trial of his right of property or possession, for the purpose of establishing his damages.—Garber v. Palmer, Blanchard & Co., Neb., 66 N. W. Rep. 656.

163. REPLEVIN—Fraud.—In replevin for a stock of goods, which defendant agreed to exchange with plaintiff for land, where the jury find that the trade was not induced by fraud on plaintiff's part, and also that the stock of goods was delivered to plaintiff according to contract, defendant cannot claim that he was injured by a refusal to charge that one may refuse performance of a contract which he thinks was induced by fraud.—GLASS v. RAUWOLF, Penn., 34 Atl. Rep. 55.

164. SALE-Breach by Vendee.—A vendor cannot recover for breach of a contract to purchase horses where he was unable to make delivery on the contract date because the horses were in possession of a third person, who claimed an interest therein and refused to surrender possession of them.—Davis v. Gilliam, Wash., 44 Pac. Rep. 119.

165. SALE BY BROKER-Custom-Evidence -In an action for goods sold through brokers, testimony that, when a broker makes a sale, each party receives a memorandum from the brokers, but that neither party receives any writing from the other, is not admissible to prove the contract.—E. GODDARD & SONS V. GARNER, Ala., 19 South. Rep. 513.

166. SALE—Construction of Contract.—A sale of stock in a corporation, together with the seller's interest in all manufactured goods "on hand in the factory of said company," did not affect his right to hold manufactured goods which were then in his own store, and which had been transferred or pledged to him for money advanced, under a valid agreement with the corporation to carry on its business.—NOVELTY PAPER BOX & SUPPLY CO. V. STONE, Wis., 66 N. W. Rep. 600.

167. SALE—Rescission.—Where the purchaser of goods used no artifice nor made any misrepresentations either as to his habits or financial condition, the fact that his liabilities exceeded his assets at the time of the purchase, or that he was a man of reckless habits, will not justify the seller in setting aside the sale, and in replevying the goods from one to whom they were transferred for the benefit of certain preferred creditors.—Sweet v. Campbell, Ind., 43 N. E. Rep. 236.

168. SALE—Rescission.—In a trial of the right of property between vendors claiming the goods sold for the fraud of the vendee and attaching creditors of the vendee, it was error to charge that the refusal of the vendors to surrender a note executed by the vendee for the price would not be an affirmance, where it was not clear whether the note was retained as indemnity for the goods disposed of by the vendee, or whether in retaining it, the vendees intended to affirm the sale.—RABY V. SWEETZER, Tex., 34 S. W. Rep. 779.

169. SALE—Rescission for Fraud.—Where the vepdee had sold part of the goods procured by fraud, the vendor, by claiming the part remaining in possession of the vendee, and receiving from the vendee's purchaser the price of the goods he received, disaffirmed the sale—RABI V. FRANK, Tex., 34 S. W. Rep. 777.

170. SALES—Manufacture from Sample—T'tle.—In the sale of articles to be manufactured, the title to the articles passes, if manufactured in accordance with the contract, immediately upon receipt thereof by the buyer.—JOHNSON V. HIBBARD, Oreg., 44 Pac. Rep. 287.

171. TAXATION—Exemptions.—Statutory exemptions from taxation will not be extended by judicial con

172. Taxation — Exemptions — Church Property. — Gen. 8t. § 3923, provides that any church or ecclesiastical society may hold, exempt from taxation, personal property, consisting of bonds, mortgages or funds invested, to an amount not exceeding \$10,000, etc.: Held, that the investment of the funds of such church or society in productive real estate does not render it exempt from taxation.—First Unitarian 80c. Of Hartford v. Town of Hartford, Conn., 84 Atl. Rep. 89.

173. TAXATION — Payment of Taxes — Recovery. — Where a threatened sale of land for alleged delinquent taxes will create a cloud on title, the owner may, on payment of the amount under protest, recover the same.—MONTGOMERY V. COWLITZ COUNTY, Wash., 44 Pac. Rep. 259.

174. Taxation—Void Taxes—Injunction.—A complaint to have an order increasing the assessed value of property a specific amount declared void, and to enjoin the collection of taxes assessed thereon, need not allege payment or tender of any taxes.—YOCUM V. FIRST NAT. BANK OF BRAZIL, Ind., 43 N. E. Rep. 281.

175. TAX SALE—Mandamus.—19 St. at Large, p. 863, § 2, requires the sheriff to sell land for taxes, and to make title to the purchaser on his compliance with his bid, and to pay any surplus from the proceeds to the delinquent taxpayer: Held, that where the sheriff makes a sale, and enters the purchaser's name in the book of sales, mandamus will lie to compel him to make a deed, on his refusal to do so after the purchaser effers to comply with his bid, etc.; and this though the sheriff, after the sale, and before such refusal, receives from a mortgagee the taxes due on the land.—STATE V. LANCASTER, S. Car., 24 S. E. Rep. 198.

176. TRIAL — Document in Evidence.—A trial court should never permit a document introduced in evidence to be withdrawn, unless the party so withdrawing it, at the time, leaves with the reporter a concededly correct copy of the document withdrawn; and the furnishing of such copy should be made a condition precedent for leave to withdraw the original document.—MCFARLAND v. WEST SIDE IMP. Co., Neb., 68 N. W. Rep. 637.

177. TROVER AND CONVERSION—Landlord's Lien.—A conversion of goods on which a landlord has the statutory lien for rent provided for by Code, § 3069, by one who has notice of such lien, gives the landlord a right of action against the wrongdoer for the damage sustained.—COUCH v. DAVIDSON, Ala., 19 South. Rep. 507.

178. TRUST DEED—Foreclosure—Parties.—In a suit to foreclose a deed of trust given to secure the bonds of a corporation, the trustee is not a necessary party.—HAMMOND V. TARVER, Tex., 34 S. W. Rep. 729.

179. VENDOR AND PURCHASER—Purchase Money—Limitations.—Since an action at law may be maintained by a vendor to recover from a purchaser on an implied promise to pay the purchase money, an action to enforce such promise in equity is governed, as to limitations, by Code, § 2762, providing that whenever there is concurrent jurisdiction the provisions limiting a time for such action at law shall apply to all suits for the same cause in equity.—WASHINGTON V. SORIA, Miss., 19 South. Rep. 485.

190. VENUE—Undue Influence.—Plaintiff is entitled to a change of venue on an application which alleges that defendant has undue influence over the judge, and over the inhabitants of the county, and that knowledge of such facts first came to plaintiff on the day of filing his reply, and which was made as soon as such knowledge was acquired, and on the day on which the cause was set for hearing, and was filed in the presence of defendant and his attorney, and immediately thereafter delivered to such attorney with the file mark thereon, though formal notice of filing (Rev. St. § 2262), was not given.—Douglass v. White, Mo., 84 S. W. Rep. 867.

181. WATER RIGHTS — Ice.—The lessee of a mill with water power and rights of flowage appurtenant thereto, not being a riparian proprietor upon the mill pond, cannot sue for the removal of ice therefrom, his right of flowage or water power not being lessened thereby.

—REYSEN V. ROATE, Wis., 66 N. W. Rep. 599.

182. WATERS-Riparian Rights-Irrigation.—A riparian owner may pump water from a stream for irrigation purposes, provided he takes no more than his proportionate share, the method of diversion being immaterial.—CHARNOCK V. HIGUERRA, Cal., 44 Pac. Rep. 171.

193. WATERS—Surface Water — Obstruction.—A railroad company whose line of road runs through low lands, subject to overflow from streams, cannot be held liable for damages because of the obstruction which its embankment opposes to the drainage of the flood and surface waters, where no streams are obstructed, and it is not shown that its road is improperly constructed for railroad purposes, such obstruction being an incident to the use of its property, for which it paid in obtaining its right of way.—YAZOO & M. V. R. CO. V. DAVIS, Miss., 19 South. Rep. 487.

184. WILL—Attestation—Witness.—The signing of the name of a witness to the execution of a will by another, at the request of the witness, and in her presence and that of the testatrix, is a sufficient attestation; the witness, though able to write, being temporarily so far incapacitated that she wrote with difficulty, and was in the habit of using an amanuensis.—IF RE CRAWFORD'S WILL, S. Car., 24 S. E. Rep. 70.

185. WILL—Construction.—Testimony as to the intention of a testatrix to remove the situs of her property from one State to another, or of her belief as to the division that would be made of her property under the will in case of the death of a beneficiary, no such contingency being provided for in the will, is inadmissible in an action for construction of her will.—CLARKE V. CLARKE, S. Car., 24 S. E. Rep. 202.

186. WILL — Executory Devise.—A limitation over, after an estate in fee conditional, may be supported as an executory devise, provided such limitation be not void for remoteness.—SELMAN V. ROBERTSOF, S. Car., 24 S. E. Rep. 187.

187. WILL — Personal Effects.—Testator bequeathed to claimant "all my jeweiry, wearing apparel, and personal effects, except such of the same as are herein otherwise disposed of." He also made several specific bequests of effects of the nature of jeweiry and wearing apparel, but nowhere specifically disposed of articles of furniture: Held, that the phrase "personal effects," in the bequest to claimant, did not include personal property in testator's house, such as furniture and pictures.—IN RE LIPPINCOTT'S ESTATE, Penn., 34 Atl. Rep. 58.

188. WILLS — Interpretation — Legatees.—Testator gave his residuary estate to the "children" of certain deceased brothers and sisters, to be divided equally between them, the will reciting that it was testator's intention to give to each one of said children an equal portion, and that the children "now reside" in a certain place: Held, that the descendants of children dying after the date of the will took the portion their decedent would have received.—Jones v. Hust. Tenn., 34 S. W. Rep. 698.

189. WITNESS—Transactions with Decedent.—Code, § 400 (providing that no party to an action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event, shall be examined as a witness as to a transaction between the witness and a person then deceased, against an executor, when such examination or the judgment in such action or proceeding can in any way affect the interest of the witness), does not render one of two executors, who is a defendant, but who has no interest except in his representative capacity, incompetent as a witness for the plaintiff.—Deverbeux v. McCradf. S. Car., 24 S. E. Rep. 77.

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CORRECTION.

In our issue of May 15th (last issue) the head notes of notes of recent decisions on Garnishment of Receiver on page 408 and Landlord and Tenant on page 411 became transposed. The decision on subject of Garnishment of Receiver had a head note on the subject of Landlord and Tenant and the decision on subject of Landlord and Tenant had a head note on the subject of Garnishment of Receiver.

The vexatious question as to the citizenship of corporations for the purpose of jurisdiction by federal courts has come squarely before the Supreme Court of the United States in the recent case of St. Louis & S. F. Ry. Co. v. James, 16 S. C. Rep. 621. Mr. Justice Shiras, who read the opinion of the court, wisely refrained from attempting to reconcile all the expressions used in the many apparently conflicting decisions on the subject, beginning with Insurance Co. v. Boardman, 5 Cranch, 57, and ending with Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, but contented himself with the deduction of the following propositions from them, viz.: 1st, that it is conclusively presumed that a State-corporation suing or sued in a United States Circuit Court is composed of citizens of the State which created it, and hence it is deemed to come within the constitutional provision conferring jurisdiction upon the federal courts "in controversies between citizens of different States;" 2d, that a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, may accept authority from another State to extend its railroad into such State, and receive a grant of powers to own and control, by lease or purchase, railroads therein, and may subject itself to such regulations as may be prescribed by the second State, such legislation on the part of two or more States not being, in the absence of inhibitory legislation by congress, within the constitutional prohibition of agreements or contracts be-

tween States; 3d, that such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations: 4th, the presumption that a corporation is composed of citizens of a State which created it accompanies it when it does business in another State, and it may sue or be sued in the federal courts in such other State as a citizen of the State of its original creation; 5th, that a corporation of one State which is authorized by the law of another State to do business therein, and is endowed for local purposes with all the powers and privileges of a domestic corporation, is not deemed to be composed of citizens of the second State in such a sense as to confer jurisdiction on the federal courts in a suit against it by a citizen of the State of its original creation; 6th, that Act Ark. 1889, providing that every railroad corporation of any other State which had leased or purchased any railroad in Arkansas should file a certified copy of its articles of incorporation with the secretary of state, and should thereupon become a corporation of Arkansas, did not create an Arkansas corporation out of a foreign railroad corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the federal constitution, so as to subject it, as such, to a suit in the federal circuit court by a citizen of the State of its origin. Mr. Justice Harlan dissented.

Our readers will perhaps recall that when the notorious Durrant murder trial was pending in the criminal court of San Francisco. one of the local theaters undertook to produce a play, the scenes, incidents and characters in which bore a striking resemblance to the facts of the defendant's case as established at the preliminary examination. Upon the application of the defendant who claimed that the production of the play, during the progress of his trial would be an interference with the administration of justice and deprive him of a fair and impartial trial, the court made an order directing the manager of the theater, who was advertising the production of the play, to desist and refrain from giving any public performance of the same and to cease from advertising it. writ of certiorari the Supreme Court of California has annulled that order. The case is Dailey v. Superior Court, 44 Pac. Rep. 458.

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The reasons for that conclusion are interesting and perhaps sound, though two of the members of the court dissent in a plausible opinion. The majority of the court take the ground that such an order was an attempted infringement upon rights guaranteed by the constitution which provides that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. The right of the citizen to freely speak, write, and publish his sentiments they say is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution in the opinion of the court was the abolishment of consorship, and for courts to act as censors is directly violative of that purpose. The court is also of the opinion that there is no jurisdiction in equity to restrain a threatened publication of an injurious character. The trial court had ample power to protect itself in the administration of justice after the contempt was committed. As to the offender, it could punish him; as to the defendant on trial, he could be deprived of no rights by any act of this petitioner. If the publication deprived him of a fair and impartial trial at that time, a second trial would have been awarded him.

NOTES OF RECENT DECISIONS.

CONFLICT OF LAWS—NOTE—PLACE OF EXECUTION.—In William Glenny Glass Co. v. Taylor, 34 S. W. Rep. 711, decided by the Supreme Court of Kentucky, the joint note of two persons payable in New York, given to raise money for one of them, was first signed by one of them in Washington, D. C., and forwarded by him to the other, residing in Kentucky, who there signed it and forwarded it by mail to the payee in New York

who there received it. It was held a Kentucky note. The court says in part:

We will not assume, nor does the evidence authorize such a conclusion, that the brother living in Washington City, and executing the note in that place, and his sister executing the note in Bracken county, Ky., regarded or expected their liability to be determined by the statute of New York, and, when sued in Kentucky, could defeat the recovery upon the paper on the ground that the charge of the extra interest rendered the entire obligation void. The note, when signed by Mary D. Bradford in Kentucky, and inclosed to the payee, was an executed instrument; as much so as if the payee had been present, and the note delivered to her, in Kentucky. As said in Bank v. Low, 81 N. Y. 572: "It cannot be contended that a party who goes into another State, and there makes an agreement with a citizen of that State for the loan or forbearance of money, can render his obligation vain by making it payable in another State, according to whose laws the contract would be usurious." In the case of Vliet v. Camp, 13 Wis. 198, it is said: "The law of the place of payment does not necessarily govern the rate of interest which may be contended for." It is a question of intention, and all the facts must be considered in order to determine what law the parties looked to as controlling their rights under the contract-whether the law of the place where the contract was entered into, or the law of the place where it was to be performed. Nor is the rule here recognized in conflict with the cases heretofore decided by this court in Goddin v. Shipley, 7 B. Mon. 575; Hyatt v. Bank, 8 Bush, 193; Young v. Harris, 14 B. Mon. 447. Ordinarily, the place of performance fixes the nature and interpretation to be given the contract, and, as in the case of Young v. Harris, if the payee of a note residing in Covington, Ky., indorses it in blank at that place, and puts it in his pocket, and after this goes to Cincinnati, and there sells and delivers it to another, who pays him the consideration, the mere physical act of indorsement, although performed in Covington, forms no contract, but it is the transaction in Cincinnati that creates the contract, and therefore the law of Ohio must govern. In this case we are asked to forfeit the principal and interest of a note executed out of the State of New York, and doubtless the proceeds were used out of that State, in the hands of one to whom it was assigned, by a payee having no beneficial interest in the proceeds, but who had agreed to become the payee, and perhaps to advance the money to meet the necessities of one of the obligors, who was the brother of the other; and to do so would be, in our opinion, to enforce a law of a State other than that in which the note was fully executed, and by which (the Kentucky law) the legal effect of the transaction must be governed.

CRIMINAL LAW—LARCENY—CONVERSION BY BAILEE.—In Commonwealth v. Rubin, 43 N. E. Rep. 200, decided by the Supreme Judicial Court of Massachusetts, defendants induced a servant to deliver a horse belonging to his master (which he had in his possession) to them, under an agreement that they should deliver it to the master; but, instead, they soon thereafter converted it to their own use. It was held that a conviction for larceny was



warranted, as the conversion, following hard upon the receipt, warranted the jury in finding that the intent at the time of the receipt was to convert the horse. The court says in part:

But the horse was delivered to the defendants, and the question remains whether their conduct falls underany recognized exception to the requirement of a taking by trespass. One such exception is when the possession of a chattel, but not the title, is gained by a trick or fraud, with intent to convert it. Com. v. Barry, 124 Mass. 325; Com. v. Lannan, 158 Mass. 287, 289, 26 N. E. Rep. 858. It may be assumed that acceptance of a chattel upon a contract or promise, with intent not to carry out the promise, but to convert the chattel, is within this exception. Com. v. Barry, supra; 2 Bish. Cr. Law (8th ed.), § 818. So that the question is narrowed to whether there was any evidence of intent at the time when the defendants received the horse, the only fact bearing upon the matter being what they did shortly afterwards. This has been settled, so far as precedent can settle it, from very early days, although the principle has been disguised in an arbitrary seeming form. The rule that, if a man abuse an authority given him by the law, he becomes a trespasser ab initio, although now it looks like a rule of substantive law, and is limited to a certain class of cases, in its origin was only a rule of evidence, when such rules were few and rude, by which the original intent was presumed conclusively from the subsequent conduct. It seems to have applied to all cases where intent was of importance. Hill, J., in Y. B. 11 Hen. IV. p. 75, pl. 16; 13 Edw. IV. p. 9, pl. 5; Six Carpenters' Case, 8 Coke, 146, a, b; See Y. B. 9 Hen. VI. p. 29, pl. 34. Compare, as to burglary, 1 Hale, P. C. 559, 560; 1 Starkie, Cr. Pl. 177; 2 East, P. C. 509, 510, 514. This rule was mentioned in the well-known case in which it was decided that a carrier breaking bulk is guilty of felon (.Y. B. 18 Edw. IV. p. 9, pl. 5), and in the time of Charles II., even, was thought to explain the decision there. J. Kel. 81, 82. It is true that this explanation hardly can be accepted. 2 East, P. C. 696. It was repudiated by the judges who decided the case. But seemingly the reason for the repudiation was that at that time the intent of the bailee was supposed to be always immaterial, and that as yet, and, indeed, as late as Lord Coke and Lord Hale, no exception had been made to the general rule that delivery by the owner prevents a conversion from being felony. Y. B. 18 Edw. IV. p. 9, pl. 5. See 8 Coke, 146b; 1 Hale, P. C. 504; Y. B. 12 Edw. IV. p. 8, pl. 20; 21 Edw. IV. pp. 19. 75, 76. Probably the first suggestion that intent can be important when there is a bailment is in J. Kel. 81, 82, just cited. Since the law has changed, or has been developed, the Carrier's Case sometimes has tended to make confusion. 2 East, P. C. 695, § 115. The rule as to trespass ab initio, in its technical form, became ossified, and was not extended to new cases, in which intent was held material. To this day it does not apply to bailments, and there are many cases in the past where the intent of the bailee was open to question, but was not tried; e. g., Raven's Case, J. Kel. 24; Tunnard's Case, 2 East, P. C. 687, 694. But, since it has been settled that the intent may be decisive as to larceny, the less extreme and more rational proposition which led to the technical rule, namely, that the subsequent conduct is some evidence of the original intent, has been acted on frequently in England, by leaving the case to the jury

when the whole evidence consisted of an ambiguous receipt, and a subsequent conversion. J. Kel. 81, 82; Pear's Case, 2 East, P. C. 685, 687; Charlewood's Case, 1 Leach (4th ed.), 409; 2 East, P. C. 689; Leigh's Case, Id. 694; 1 Leach (4th ed.), 411, note a: Armstrong's Case, 1 Lewin, 195; Spence's Case, Id. 197; Rex v. Gilbert, 1 Moody, 185; Queen v. Cole, 2 Cox, Cr. Cas. 340. See, also, Chisser's Case, T. Raym. 275, 276, and 2 East, P. C. 697, citing 2 M. S. Sum. Cases like those mentioned in 1 Hawk. P. C. bk. 1, ch. 33, "Larceny," § 10, of a watchmaker stealing a watch delivered to him to clean, and the like, cannot be explained on the ground suggested,—that the possession remains in the owner,-but it would seem must be accounted for on the same ground as the last. See 2 East, P. C. 683, 684, ch. 16, § 110.

In the case at bar the conversion followed hard upon the receipt of the horse, and the inference is not unnatural that the intent existed from the beginning, as it is proved to have existed a very short time afterwards. There is the less cause for anxiety upon the point, in view of the merely technical distinction between larceny and embezziement.

Of course, if the defendants received the horse with felonious intent in Norfolk, and carried it away into Middlesex, they could be indicted in the latter county.

CONTRACTS FOR SALE OF LOTS - ALLOT-MENTS BY CHANCE - PUBLIC POLICY .- In Lynch v. Rosenthal, 42 N. E. Rep. 1103, decided by the Supreme Court of Indiana, it was held that a contract for the sale of several lots of land, of unequal values, to several subscribers, which provides that the subscribers shall meet, and determine "by lot" the particular lot to be deeded to each respective subscriber, and stipulates that a certain lot, which had been reserved as a "prize" lot, is "to be given away" and "awarded" to some one of the subscribers in like manner, is void, as against public policy, and that in a suit to enforce such contract against one of the subscribers, defendant is not estopped from exposing the vice of the contract, though he did not urge it as a defense before suit was brought. The following is from the opinion of the court:

The argument is not made that contracts tainted with the vice of lottery schemes are enforceable. That such contracts are against public policy, and that those who have entered into them shall have no relief, in the courts, to enforce those that are executory, or to recover that which has passed under such as have been executed, is without doubt. Const. art. 8, § 15; Burger v. Rice, 8 Ind. 127; Swain v. Russell, 10 Ind. 438; Rothrock v. Perkinson, 61 Ind. 39; U. S. v. Olney, 1 App. (U. S.) 275, Fed. Cas. No. 15,918; Whitney v. State, 10 Ind. 404; Crews v. State, 38 Ind. 28; Hudelson v. State, 94 Ind. 426; Riggs v. Adams, 12 Ind. 199; 13 Am. & Eng. Enc. of Law, p. 1187; Rev. St. 1894, §§ 2170-2172 (Rev. St. 1881, §§ 2076-2078). The important question here is as to the character of the present contract. Does it infringe this principle of public policy? This inquiry depends upon what a lottery scheme is. In Hudelson v. State, supra, it

was held that where a merchant, with each sale of merchandise to the value of 50 cents, gave the purchaser the right to guess as to the number of beans in a glass globe—the nearest guesser to receive a gold watch—the transaction was a lottery. The court there quoted with approval several definitions of a "lottery," some of which are as follows: "Whether the enterprise . . . be called a scheme of chance, a gift enterprise, or lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise." Lohman v. State, 81 Ind. 15. "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." Hull v. Ruggles, 56 N. Y. 424. "A lottery is a scheme for the distribution of prizes by chance." Dunn v. People, 40 Iil. 465. In Rothrock v. Perkinson, supra, it was said: "It is well settled in this State that every scheme for the division or disposition of property or money by chance, or any game of hazard, is prohibited by law, and that every contract or agreement in aid of such a scheme is void, as against public policy;" citing, in connection with some of the cases we have cited, those of Higgins v. Miner, 18 Ind. 346; Thatcher v. Morris, 11 N. Y. 437. "Lot" is defined to be "a contrivance to determine a question by chance, or without the action of man's choice or will." Chavannah v. State, 49 Ala. 896; 13 Am. & Eng. Enc. of Law, p. 1181. Webster's International Dictionary defines "lot" as "anything used in determining a question by chance, or without man's choice or will." If the property subject to distribution possesses unequal values, so that one's good or ill luck in the scheme of distribution may determine whether he shall receive more or less for his investment, the scheme is a lottery. Dunn v. People, 40 Ill. 465. Nor is it less a lottery because the person whose property is distributed, or the person who pays, does not personally participate in the drawing. Fleming v. Bills, 3 Oreg. 287; Riggs v. Adams, supra.

By the definite language of the contract in this case, the lot which the appellee agreed to purchase was to be determined by lot. It was to be one of the 54 parcels, to be designated wholly by chance, and without the will or choice of the appellant or the appellee. Whether he was to pay \$100 or \$300 was a question over which he had no choice, and the appellant was without control. Any advantage in the selection—by reason of location, character, size, or condition-of a lot from any of the various classes, as arranged by the prices marked, was not to be determined by the judgment of a subscriber or the seller, but depended wholly upon the chances to be settled by "lot," as the contract provided. Distribution by chance was never more certainly contemplated, and, if not so contemplated, the manner in which the appellee's alleged purchase was determined was never outrivaled, as a method of chance—not even by the guessing upon the number of beans in the globe, for in that instance the person to be benefited exercised his own judgment in determining upon a number. The method adopted was no less objectionable, as one of mere chance, than the methods of the old Louisville Library Association, or the more recent Louisiana Lottery. If there had been nothing in the contract directing the choice by lot, and the choice had been made in the manner alleged in some of the answers, every objection would prevail against it that would obtain if the appellee had been assigned a lot as the result of a game of cards, the throwing of dice, or the turning of the roulette. In any one of these methods the result depends entirely upon chance, and excludes the exer-

cise of the judgment. In the case of Swain v. Bussell, supra, this court quoted with approval from State v. Clark, 83 N. H. 834, "that where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery." In the present case the subscriber is to get a lot more or less valuable, depending alone upon chance; and he is to pay for it a sum, more or less, depending alone upon chance. It was further said by this court in the case mentioned, referring to Den v. Shotwell, 23 N. J. Law, 470: "Wooden had divided a parcel of land into fifty-eight lots, of unequal value, from \$50 to \$600 per lot, and disposed of them at \$75 each, and the particular lot of land to which each person was to receive a title was determined by lot. The Supreme Court of New Jersey say this was, both in form and substance, a lottery." The difference between that case and the present is merely in degree of advantage or disadvantage to the parties, in the amount to be paid, and the proportionate values to be received, as between those who make the payments. The method of distribution in either involves the objectionable feature of chance, upon which the choice of property of higher or lower value, and greater or less price, is determined without the exercise of the will and judgment of the parties. The manner in which the chances in this case were determined is even more objectionable. Here 47 lots were made the subject of choice for the selection of but 85 lots, and thereby added to the objection of distributing 35 lots by chance the further vice of placing the appellant's remaining 12 lots in the scale, and his ownership, with locations, character, and values, all depending upon the result of the drawing.

MUNICIPAL CORPORATION — CONTRACT — PRIVITY.—It is held by the Supreme Court of Missouri, in City of St. Louis v. Von Phul, 34 S. W. Rep. 843, that a contract between two parties upon a valid consideration may be enforced by a third party, though not named in the contract, where the promisee owes to him some obligation or duty which would give him a just claim; that the duty which a city owes to those who labor upon, or furnish material for, its public streets, creates such a privity between them as would entitle the laborers and material-men to the benefits of a bond given to the city by a contractor, conditioned on the payment of all amounts due for labor and material; and that a municipal corporation whose charter authorizes it to improve its streets by contract, and requires it to take a bond from the contractor for the faithful performance of the work, may make it a requirement of the contract and a condition of the bond that the contractor shall "pay to the proper parties all amounts due for material and labor" employed in the performance of the contract. The court says as to the point last stated:

But it is said (that the bond, in so far as it undertakes as a condition to require the contractor "to pay to the proper parties all amounts due for material and labor used and employed in the performance" of the contract, is void, for the reason that the city had no power to exact it. It must be and is conceded that "a municipal corporation has no general authority to exchange promises with other corporations or with individuals. Its contracts must be within the scope of the authority conferred upon it by law, and for municipal purposes." Thomas v. City of Port Hudson, 27 Mich. 320. But municipal corporations have not only the rights and powers expressly granted them, but also such implied powers as are necessary to carry into full effect those expressly granted. "Their contracts will be valid when made in relation to objects concerning which they have a duty to perform, an interest to protect, or a right to defend." Vincent v. Inhabitants of Nantucket, 12 Cush. 105. The charter grants to the city of St. Louis not only the power to improve its streets, and keep them in repair, but requires all such improvements to be let out by contract to the lowest bidder, and further requires a bend to be given by the contractor, with at least two sufficient sureties. These powers and duties are express. Can it be doubted that under these express powers would be also implied the authority to provide by contract every detail of the duty of the contractor? The power to make improvements and to let contracts therefor, and to exact of the contractor a bond for the faithful performance of his contract, necessarily implies the power to do everything necessary for the faithful performance of the work, for the protection of the city and its citizens, and for securing the best and lowest possible bids. Indeed, we are unable to conceive of any matter of detail incident to the contract and the work that the city might not require that a private person could require. The charter requires a bond from the contractors to be taken. The conditions of the bond are not specified, except that it shall be for the faithful performance of the contract. The form and conditions are therefore left to the practical wisdom and business experience of the municipal authorities to whom it is intrusted.

The same may be said in reference to the terms of the contract. The question, then, is this: Is the requirement of the contract and the condition of the bond that laborers and material-men shall be paid a proper and reasonable incident to the express power to improve the streets by contract, and to require a bond of the contractor? We think it is, even aside from any moral obligation the city was under to protect the laborers and material-men. Such a requirement gives credit to the contractor, and enables him to secure labor and purchase material more readily and on better terms than could be done without the credit. Thus the contractor can secure better labor and cheaper materials, and is enabled to take the contract on lower terms, than he could otherwise safely do. It also enables one with small means and limited credit to compete with those more advantageously circumstanced. The city is thus enabled to secure greater competition in bidding, and to obtain better execution of the work on lower terms. It was not only to the interest of the city, but its plain business duty, to secure those advantages. We therefore think the city had the implied power to require the condition in the bond upon which plaintiff seeks to recover.

We are unable to draw a substantial distinction between the power exercised by the city in making this provision for laborers and material-men and that ex-

ercised in requiring the contractor to pay all such creditors as a condition to receiving his compensation from the city for the improvement. It is a question of power in each case. The power to protect such creditors by the means last mentioned has never been questioned in this State, so far as we have been advised. It was expressly recognized in City of St. Louis v. O'Neal Lumber Co., 114 Mo. 82, 21 S. W. Rep. 484, in which Judge Thompson, of the court of appeals, whose opinion was approved, said: "It is true, such persons are not, under the law, as judicially construed, entitled to a mechanic's lien against any property belonging to the city; but that does not seem to afford a good reason why no effect whatever should be given to this clause of the contract." The clause referred to was one requiring the city to withhold enough of the contract price to meet the claims of any laborer or material-man to whom the contractor might be indebted. The same power was recognized in the board of public schools in Luthy v. Woods, 6 Mo. App. 68, and in the city of St. Louis in the case of City of St. Louis v. Keane, 27 Mo. App. 644. In the case of Knapp v. Swaney, 56 Mich. 349, 28 N. W. Rep. 162, in discussing a like provision in a contract of the county for the construction of a court house, after conceding the proposition that corporations and quasi corporations possess only the powers expressly granted them, and such as are implied in order to effectuate the purpose of those given, Judge Cooley says: "But when this case is properly considered, it does not appear to be a case in which the municipality has in any particular stepped aside from its proper functions, or stepped over its proper bounds. It has simply made a contract for the construction of a necessary public building, and agreed upon the method and the conditions of payment. It has gone no further, and so far it had indisputably a right to go. But it is said that among the conditions is one which the corporate board had no right to impose, because it did not concern the public, but was a matter exclusively between the contractors and those who should deal with them. It is for this reason that the condition is assumed to be ultra vires. And, had the condition been made the subject of independent contract, instead of being incorporated in a contract for a proper public work, the objection to it would have been insurmountable. Whether it was invalid here is a very different question. The purpose of the stipulation is very manifest. It is that a contract the county has made shall not be the means of mischief to those who, though not contractors with the county, may perform labor or furnish materials in reliance upon the moneys to be paid under it. It would seem that to prevent such mischief was a proper object to be had in view by the public board when entering into a public contract. It would seem that there was a moral obligation in the case which the board might well recognize, even though not compellable to do so. And individuals clothed with pub. lic functions, even when constituting a corporation, are no more excused from moral obligations than when acting in a private capacity. A corporation, when constructing a public building or other public work, is chargeable with moral duty, as an individual would be, to see that it is so constructed that people may not be injured in coming near to or making use of it in a proper manner. In some cases they may not be legally responsible for failue to perform this duty; but, where the moral obligation exists, it cannot be said that any provision for its performance, not improper in itself, is ultra vires. A county may go to great pains and great expense to make its court



house unquestionably safe, that individual citizens may not suffer injuries consequent upon its construction. But if it may do this, it would be very strange if it were found lacking in authority to stipulate, in the contract for the building, that the contractors, when calling for payment, shall show that they are performing their obligations to those who supply the labor and materials, and that the county is not obtaining the building at the expense of a few of its people. We cannot think such is the case." We quote at length from this sensible and eminently just and equitable treatment of such contracts. The reasoning is equally applicable to the contract here in question. See, also, to same effect, Bank v. Winant, 123 N. Y. 267, 25 N. E. Rep. 262; Merchants' & Traders' Nat. Bank v. Mayor, etc. of City of New York, 97 N. Y. 355.

The following cases uphold the right of third persons, such as subcontractors, laborers, and material-men, to maintain an action on a bond given by a contractor to a State, county, city, or school district, conditioned for the faithful performance of a contract for a public improvement, and for the payment of all claims of such third persons, though no express power was given the obligee to require such conditions. Baker v. Bryant, 64 Iowa, 562, 21 N. W. Rep. 83; Lyman v. City of Lincoln, 38 Neb. 799, 57 N. W. Rep. 531; Sample v. Hale, 34 Neb. 221, 51 N. W. Rep. 837; Heating Co. v. McClay, 48 Neb. 649, 62 N. W. Rep. 50; Kauffmann v. Cooper (Neb.), 65 N. W. Rep. 796. In the case first cited, which was a suit on a bond given a school district, it is said by Beck, J.: "The authority to contract is general, and broad enough to cover all the covenants which the directors, in their wisdom, may deem necessary or proper in order to secure the erection of the house, and the protection of the interest of the district, the object for which the contract was made. If the directors of the district, in the exercise of their discretion, concluded that the work would be prosecuted with more rapidity, or would be better done, by securing the subcontractors, they surely would be authorized to provide therefor." In the Lyman Case, supra, the bond was given to the city of Lincoln to insure the erection of public buildings. The contract required of the contractor the payment "of claims of all parties furnishing materials or labor" in the construction of the buildings. The bond was upon condition that the contractor should "well and truly execute all and singular the foregoing stipulations." The court held that one furnishing materials which were used in the construction of the buildings could maintain an action therefor upon the bond. In its opinion the court says: "Obviously, the city of Lincoln intended by this bond to protect from the defaults of the contractors all those who might labor on or furnish materials for its buildings. The petition assailed sets out no statute or ordinance authorizing the city of Lincoln to do this, but we do not deem such a statute or ordinance indispensable. The awarding of the contract to Lane & Sweet was a sufficient consideration to them and their sureties to support their promise to pay for this labor and material. The promise they made the city of Lincoln was for the benefit of all who labored on these buildings, and who furnished material that was used in their construction; and since Lyman had furnished material to these contractors, which was used in these buildings for the city, the bond inured to his benefit and he can maintain a suit thereon." Several cases have been cited by defendants in support of their position that the action will not lie for want of authority in the city of St. Louis to require such con-

ditions. It has been held in this State, and in some others, that a private citizen whose property was consumed by fire was not entitled to the benefit of a clause in a contract between the city and a water company whereby the latter obligated itself to furnish a supply of water sufficient to extinguish all fires, and to be responsible for all damages resulting from a failure to do so. Howsmon v. Water Co., 119 Mo. 305, 24 S. W. Rep. 784, and cases cited. Those cases are distinguishable from this one in the fact that the contracting cities were under no legal or moral obligations to its citizens to extinguish fires, and there was, therefore, not such privity between the city as promisee and the citizen, as would give the latter a right of action on the contract. It may also be said, as another distinguishing feature, that the general power granted a city to provide for the prevention and extinguishment of fires carried with it no implied power to make contracts for indemnifying citizens for losses by fire. Such contracts are neither beneficial to the city nor incident to the power conferred. They are merely independent contracts, which the cities have ne more power to make than they have to make contracts with an insurance company for insuring the property of all citizens against loss by fire. The case of Kansas City v. O'Connell, 99 Mo. 859, 12 S. W. Rep. 791, is also cited and relied upon as an authority against the power of the city to make the contract. But it will, be observed that the clause of the contract relied upon by plaintiff in that case was held not to have been intended as an agreement for the benefit of third persons, but for the protection and benefit of the city; that it was simply a contract of indemnity to the city. The court expressly declined to express an opinion on the question of the power of the city to enter into a contract for the benefit of third parties. It is said: "Whether the city could require the contractor to give bond which would be available to third persons in case of injuries received by them on account of the negligence of the contractor is a question which need not be considered." The case of City of New Haven v. New Haven & D. R. Co., 62 Conn. 258, 25 Atl. Rep. 816, is also cited by defendants as an authority sustaining their position. But it will be observed that the contract relied upon in that case was made solely for the benefit of third persons. The railroad company agreed with the city to pay all damages property owners should sustain on account of a contemplated change of its track. The contract had no other object. In a suit on this contract by the city for the use of property owners, the court held that the city had no power to engage in the collecting business, or to act as trustee for its citizens at its own expense. That contract had for its chief object the benefit of third persons, while in the case at hand the contract is for the henefit of the city, and the protection given third persons was fairly incidental to it. The case of Pipe Co. v. Thompson, 120 Mo. 221, 25 S. W. Rep. 522, in its facts is not fairly distinguishable from this one, and is an authority directly sustaining the position of defendants. But, after a careful reconsideration of the question decided, we are all of the opinion that the principles announced in that case cannot be sustained, either on reason or authority, and it should be, and with the concurrence of all the judges of division 2, is, overruled. The judgment of the circuit court is reversed, and the cause is re-

Intoxicating Liquor — Sale by Social Clubs.—In People v. Adelphi Club, 43 N. E.



Rep. 410, the Court of Appeals of New York for the first time decided the question whether a social club is within the meaning of the statute requiring payment of liquor license. The holding of the court was that the dispensing of liquors by a social club which has a limited and select membership, and was organized for a legitimate purpose to which the furnishing of liquors to its members on payment therefor is merely incidental, is not a sale within the meaning of the statute. The court says in part:

We are aware that it has been generally understood that this court in the case of People v. Andrews, 115 N. Y. 427, intended to hold clubs liable under the statute, and that the general terms, in several instances, have subsequently so held, resting their decisions upon that case. People v. Sineil (Sup.), 12 N. Y. (Supp. 40; People v. Bradley (Sup.), 11 N. Y. Supp. 594; People v. Luhrs, 7 Misc. Rep. 508, 28 N. Y. Supp. 498. But such was not the intention of this court, and to that extent its determination has been misunderstood. The question here presented must therefore be regarded as undecided, and still open for consideration. In 11 Am. & Eng. Enc. Law, 727. it is said that: "The distribution of liquors by a bona fide club among its members is not a sale, within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it, and the law prohibiting the sale of liquor on Sundays does not apply to such a club. It is otherwise, however, where the club is simply a device resorted to as a means of evading the statute." Black on Intoxicating Liquors, at section 142, after referring to the authorities in the different States upon the subject, concludes as follows: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book, or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law." In Graff v. Evans, 8 Q. B. Div. 373, the appellant was a manager of a club under the supervision of trustees, in whom all the property of the club was vested. The club was not licensed for the sale of intoxicating liquors, but these were supplied at fixed prices to members for consumption, the money produced thereby going to the general fund of the club. The manager, in the course of his employment, supplied liquors to a member. It was held that it was not a sale, within the meaning of the licensing act. Field, J., in delivering the opinion of the court, says: "The question here is, did Graff, the manager who supplied the liquor to Foster, effect a sale by retail? I think

not. I think Foster was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of associatiom, by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him, as a member, at a certain price." In State v. St. Louis Club (Mo. Sup.), 28 S. W. Rep. 604, it was held that the distribution of wines or other liquors among the members of a social club which is a bona fide organization, with limited membership, admission to which is only on a vote of the governing board, and with common ownership of property, is not a sale of liquor, within the meaning of the Missouri dramshop act. This is a recent case. and the opinion contains a review of all of the decisions upon the subject. The courts in our sister States are in conflict upon the question discussed in the above cases. Many of the decisions are based upon local statutes differing materially from our own, and other cases are disposed of upon the ground of the fraudulent character of the organization. Attention is called to Com. v. Ewig, 145 Mass. 119, 18 N. E. Rep. 365; Seim v. State, 55 Md. 566; Tennessee Club v. Dwyer, 11 Lea, 462; Piedmont Club v. Com., 87 Va. 541, 12 S. E. Rep. 963; State v. McMaster, 35 S. C. 1, 14 S. E. Rep. 290; Barden v. Montana Club, 1Q Mont. 330, 25 Pac. Rep. 1042; Koenig v. State (Tex. Cr. App.) 26 S. W. Rep. 885; People v. Soule, 74 Mich. 250, 41 N. W. Rep. 908; State v. Horacek, 41 Kan. 87, 21 Pac. Rep. 204; State v. Essex Club, 58 N. J. Law, 199, 20 Atl. Rep. 769; State v. Lockyear, 95 N. C. 683; State v. Nets, 108 N. C. 787, 13 S. E. Rep. 225; State v. Mercer, 32 Iowa, 405; Rickart v. People, 79 Ill. 85; State Easton Social, Literary & Musical Club, 73 Md. 97, 20 Atl. Rep. 783; Kentucky Club v. City of Louisville, 92 Ky. 309, 17 S. W. Rep. 748; Newell v. Hemmingway, 16 Cox Cr. Cas. 604; Com. v. Pomphret, 187 Mass. 564 567.

For a full and elaborate consideration of the cases, we refer to Black on Intoxicating Liquors (section 142) and to State v. St. Louis Club, supra.

JUDICIAL DISCRETION IN DIVORCE.

The relation of married persons is not only a personal relation, it is a status, a condition established by law. The marriage relation partakes of the character of a civil contract though it is much more than that. It is not a vested right. So that the State claims for itself the right to put an end to the marriage relation of its subjects upon such terms as it may dictate. The power of each State is derived from the federal constitution, which concedes to the separate States power to regulate the domestic relations of their subjects. Of course the State may refuse to exercise this authority, and may prohibit it by constitutional provision or amendment. Thus we find that the remedy for domestic infelicity is originally vested in the State. The

legislature of the State acting in pursuance of the power vested in the State fixes the ground or terms, upon the existence of which a decree of separation or divorce may be rendered by its courts having jurisdiction thereof.

The statutes of the different States fix the grounds for a divorce, and therefore, it need not occasion so much surprise that there does not exist more uniformity in the law upon which a divorce may be predicated. All of the States, with, perhaps, a single exception have their courts of competent jurisdiction over the matter of divorce. Drawing their inspiration, perhaps, from Holy Writ they all agree that adultery shall constitute a valid ground for divorce. But apart from this one cause there is a great diversity of opinion expressed through the statutory provisions of the different States as to what failing or weakness of which humanity is heir to, shall constitute a good and sufficient cause for severing "the tie that binds." The incapacity of one of the parties, which incapacity may be mental or physical; non-age; consanguinity; difference of race; deceit; error; fraud and duress; desertion; extreme cruelty; habitual drunkenness; non-support; crimes followed by imprisonment in a penitentiary; decree granted in another State; any offense within the discretion of the court; and this last cause, although not in high favor, serves to illustrate the principle of State paternity in the matter of the domestic relations of its subjects, For instance, a Connecticut statute permits a decree of divorce for "any such misconduct as permanently destroys the happiness of the petitioner, and defeats the purpose of the marriage relation; in Kentucky for "any cause in the discretion of the court." In Maine, before the repeal of the statute when the court thinks it "conducive to domestic harmony, and consistent with the peace and morality of society," a divorce could be decreed. But this confidence in the sense and purity of the courts of that State was withdrawn by the legislature in an act passed in 1883. In Washington there was in effect a statute under which a decree might be granted for "any cause deemed sufficient by the court."8 And so it was in other States. The legislative body being charged with the duty of either exercising this authority directly or by statute transmitting it to the courts, invariably chose the latter. And in many cases gave to the courts of competent jurisdiction large discretionary power over the domestic relation of its subjects. Latterly the tendency has been to curtail this discretionary power of the courts in permitting divorce for causes other than those enumerated specially. Why this is so it is difficult to say. It may hardly be successfully claimed that it is the growth of a more puritanical spirit in the social fabrication. We should be slow to believe the reason could be found in the growth of a lack of confidence on the part of the people in the purity and sense of the courts. We hear much said nowadays both in the pulpit and by the press about the laxity of the divorce laws. A great outcry is heard over the large percentage of divorce decrees to marriage certificates, and the want of uniformity of State laws. And as no tragedy is quite complete without a little comedy, so it is that the rediculous spectacle of a man married in New York and divorced in New Jersey is paraded before the foot lights of "all the world's a stage" as a sarcastic reminder of the claim made by the classical Coke that "the law is reason itself." The law and practice in some parts of the west have given rise to most of the slurs to which the matter of divorce has been subjected; aside from the foolish liberality in this direction and the want of uniformity as between States there is little cause for complaint. Without doubt divorces have increased. But there need not necessarily be any menace to society in this. It might be interesting to observe how far the changing of the social status demands this as a safeguard had we time or space allowed to go into this. Those persons who are constantly inveighing so strongly against the laxity of divorce law, should not forget that social conditions are as changeable as the sands upon the sea-shore. There are being brought to the surface of the social whirlpool every hour different conditions. Different standards of morality are needed to correctly measure the changes of hour. There is no stability about society upon questions of social morality. The same measure cannot be made to apply to different grades or sexes. There are unknown pos-

¹ Gen. St. Conn. 1875; Trubee v. Trubee, 41 Conn. 36.

Rev. St. 1871, p. 488.
 Wash. Ter. Rev. St. 1881.

sibilities which may occur to change opinion. The representatives of the people who make the laws to govern society simply echo the opinions and sentiments of that portion of society represented by them. Their action may be salutary, or it may be not. It is not salutary when the discretionary power is withheld from the courts by the legislature. The only just determination in any case for divorce, is had from a knowledge of the circumstances of each particular case. This the court who hears the case always has. In many cases the facts disclosed to the judge convince him that the parties cannot live together as man and wife, and be happy; that the bond that binds them together, perhaps through no great fault of either party, has become galling and oppressive. Instead of a love and affection for each other their feelings were changed to dislike and perhaps to disgust. Still they must live together as man and wife so far as the world is concerned because of some special provision of the legislature which undertook to fix a rule without knowledge of its effect. What is the benefit to society at large for this sacrifice of individuality? A man and woman joined together even by the "divinely sanctioned institution of matrimony," who have found that they have no affinity for each other, that there is absolute incompatibility of temperament so far as they are concerned, in the union, cannot, and do not, disguise their trouble from the world, even though they bring into practice that kind of philosophical acceptance of a bad job which is portrayed in the characters of those people in the first book of "The Heavenly Twins." When Coleridge wrote in his time that "when people understand that they must live together, except for a few reasons known to the law, they learn to suffer by mutual accommodation that yoke which they know they cannot shake off. become good husbands and good wives from the necessity of remaining busbands and wives; for necessity is a powerful master in teaching the duties which it imposes." Modern society will hardly accept this as the correct rule to go by. The days of martyrdom have passed out and are gone. Science has taught us much along the social line since the days of Coleridge. Eternal punishment and the Spanish Inquisition could not exist in these days. Man lives his life

more in consonance with science. There can be no such sacrifice demanded by the needs of society. The spectacle of man and woman living together under the sanction of divine or human law with nothing but dislike and disgust for each other, although they may be sphynx-like in silence, is not a spectacle which will conduce to social ele-The relation is paraded as public scandal, and is in the mouth of every mischievous purveyor of social rottenness. Would it not conduce to the welfare of society to permit the court on the application of either of these parties to dissolve this unnatural relation and permit these parties to find a place in the social fabrication where they may be happy themselves and make others happy as intended by their Creator. In giving the court discretionary power over such cases it seems as if the most good could be accomplished. This is permitted in some States; it should be in all. The church is too bigoted and impracticable for a guide in this matter. attitude of the Roman Catholic church in opposing all divorce is an illustration of this. Because some evil has grown up in any system of social economy is not a reason for condemning the whole system. The church is not the only institution working for the welfare of society. If it were we might be in serious danger of a retrograde. Distinctly, there is no intention on the part of the writer to argue against the old-fashioned, but good ideas of the sacredness of the relation of marriage. But the changing status of society to meet modern requirements, necessitates an advance in ideas along this line as along other lines. The divorce laws of the several States should not be used as a sort of boom to populate growing sections of the country. There should at least be uniformity of the laws concerning domicile of the par-We may well take a lesson from our English cousins in legislation on this question of domicile. Beginning with the agitation of Mr. Gladstone of the subject in 1857 down to the recent case of Le Mesurier v. Le Mesurier, decided by the privy council, does away with the theory which has existed in England since the decision in Jack v. Jack as to domicile in divorce. The later decisions show a complete evolution in this theory and serve to fix the English rule. It may be difficult to say just how far moral law may influence

judicial action. It is not so difficult to say that public opinion will, in the end, make laws through legislation, in accordance with its idea of right and wrong. The "nickel in the slot" method of divorce in Oklahoma is directly attributive to the acts of its legislature. And the acts of the legislature are dictated by the moral sentiment which prevails in this section. When moral sentiment becomes more elevated, perhaps, the laws will become better. In the meantime if the legislature had fixed a reasonably just rule of domicile and had left more discretion in the hands of the court American jurisprudence might have been spared this incontinence. The courts are not to be blamed. They do but apply the laws made by the legislature. If these laws are good, the result is good; if bad then the result cannot be good. The Chicago Legal News recently contained this statement: "It is remarkable how rapidly the average Oklahoma judge can dispatch divorce business. The defendants usually know nothing about the proceedings until the papers are served by the successful litigants. As a rule no defense is ever offered in divorce cases in Oklahoma for the reason that defendants are seldom aware of the beginning of the suit." Such statements convey wrong impressions. The conclusion is natural that the courts are the blameworthy factors. This is not true. Blame for such abuses is upon the people's representtatives who fix the law, and who pander to the element to which such legislation is acceptable. This mistake or abuse of legislative discretion may be obviated only by the application of a constitutional remedy. And such a remedy would be more effectual and salutary if uniform in all the States. It is the province of judges to determine what the law is under a given act or rule of conduct established by the legislature, under constitutional restrictions. And the distinction between a legislative and judicial act is too well defined for argument. The one prescribes what the law shall be in cases coming within its scope; the other determines what the law is as applied to a certain set of facts.4 Judge Cooley says in his work on Constitutional Limitations: "The legislative power we understand to be the authority under the

4 See Justice Field's dissenting opinion, 99 U.S. p. 761.

constitution to make laws and to alter and * * * On the other hand repeal them. to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar purview of the judicial department." But there can be no question of this functional distinction at this time. ject of this paper, as suggested above, is an appeal for more power in the courts to exercise a discretion independent of statutory particularity. Of course this exercise of discretion should be a sound one. are supposed to be and should be chosen because of their ability and honesty. then it would seem as if no danger should be apprehended in this direction. The discretion is to be exercised only when conducive to domestic harmony, and consistent with the peace and morality of society. What, then, are the cases or the classes of cases which the power can be properly exercised? If the facts involved bring the particular case within a prescribed ground of a statute, in such a case the law gives a right to a divorce, and the court has no discretion over the facts. They are the result of legislative deliberation. But there may be cases for which the statute does not provide; for instance, several of the grounds recognized by the statute may exist, although in a degree less than the statutory requirement. Such cases should be subject to the discretionary power of the court.5 In Illinois, Indiana, Iowa and North Carolina, the courts frequently recognized and applied this authority.6 But the legislatures of those States have seen fit to take this power from the courts and has repealed the statutes by authority of which these courts exercised their discretion. It seems to the writer that this discretionary power of courts in the matter of divorce is a very important one. That next to uniformity of domicile laws, and the effect to be given decrees in the different States, this subject is of first importance, and while we are now about reforming the divorce laws and adopting uniform methods and ideas let us give to the subject above its due consideration. PERCY EDWARDS.

⁵ Bishop on M. & Div. sec. 546.

6 Lloyd v. Lloyd, 66 Ill. 87; Hamaker v. Hamaker, 18 Ill. 187; Ritter v. Ritter, 5 Black. (Ind.) 81; Ruby v. Ruby, 29 Ind. 174; Inskup v. Inskup, 5 Iowa: 204; Borden v. Borden, 8 Dev. (N. Car.) 548; Scroggins v. Scroggins, 3 Ib. 535.

GUARANTEE AND TITLE INSURANCE.

MINNESOTA TITLE INSURANCE & TRUST CO. V. DREXEL.

Circuit Court of Appeals, Eighth Circuit, Sept. 16, 1895.

Plaintiffs loaned \$55,000 on mortgages and further to secure them took defendant's policy of insurance on the title by which defendants agreed to "indemnify, keep harmless and insure" plaintiffs "from all loss or damage · · · by reason of liens or incumbrances affecting" the property. Subsequently mechanic's liens on the property were foreclosed to the amount of \$31,360.00 and held to be a prior lien to the mortgages. Plaintiffs bought in these mechanic's lien judgments for \$31,994.77, and then requested defendants to indemnify them for this sum under the policy of insurance. Such indemnity being refused plaintiffs bring suit. Held,

1st. That the policy would be interpreted in favor of the insured.

2d. That it is a guaranty that the plaintiffs as mortgages should not suffer any loss or damage by reason of defects in the title of property or liens or incumbrances thereon existing on the date of the policy and that plaintiffs could have judgment against defendants for the amount paid out by them upon such mechanic's liens.

3d. That the purchasing of the mortgaged property by the plaintiffs at the foreclosure sale did not cancel the mortgage debt so as to bring the case within the clause of the policy that "payment, discharge or satisfaction of such mortgage indebtedness (except by foreclosure of said mortgage) · · · shall fully terminate and annul this policy and all liability of the company thereunder;" but semble, the case would be otherwise if payment of the mortgage had been made by a stranger.

In error to the Circuit Court of the United States for the District of Minnesota.

This was an action by John R. Drexel, Anthony J. Drexel, George W. Drexel, James W. Paul, Jr., John R. Fall, John Lowbar Welch, and Richard C. Dale, surviving executors and trustees under the will of Anthony J. Drexel, deceased, against the Minnesota Title Insurance & Trust Company, on a policy of title insurance. The plaintiffs recovered judgment in the circuit court. Defendant brings error. Affirmed. The defendants in error, John R. Drexel, et al., on the 7th of March, 1894, filed in the United States Circuit Court for the district of Minnesota, at Minneapolis, their complaint at law against the plaintiff in error, the Minnesota Title Insurance & Trust Company, alleging, in substance, that, on the 1st day of June, 1889, Anthony J. Drexel loaned to Alfred J Condit \$55,000, taking as security therefor seven mortgages on separate parcels of a block of land, and the brick and stone tenements situated thereon, in the city of Minneapolis, which are particularly described in the complaint. That on the 19th of June, 1889, the defendant, the Minnesota Title Insurance & Trust Company, for the consideration of \$126, made and delivered to Drexel, the mortgagee, its policy of insurance which is made part of the complaint and reads as follows: "Capital, \$500,000. Guaranty Fund

with State Auditor, \$200,000. Policy No. 3,151. Amount, \$55,000. Block No.- Minnesota Title Insurance & Trust Company, a corporation duly established by law in Minnesota, by this policy of insurance, in consideration of the sum of one hundred and twenty-six dollars to it paid, doth hereby covenant that it will, for the period of twenty-five years from the date hereof, indemnify, keep harmless, and insure Anthony J. Drexel, the mertgagee named in seven certain mortgages executed by Alfred J. Condit and Nellie D. Condit, his wife, as mortgagors, dated June 1st, 1889, and filed for record in the office of the register of deeds of Hennepin county, Minnesota, June'5th, 1889, at 5 o'clock and-minutes, P. M., and all persons claiming the estate and interest of said mortgagee under said mortgage by descent, or by will, and all other persons to whom said mortgage may be assigned, from all loss or damage not exceeding fifty-five thousand dollars, which the said insured shall, during said period of twenty-five years, sustain by reason of defects of the title of said mortgagors to the real estate or interest described in schedule A, hereto annexed, or by reason of liens or incumbrances affecting the same at the date hereof, excepting only such as are set forth in schedule B; subject to the conditions and stipulations hereto annexed and together with said schedules made a part of this policy. This policy is issued upon an application numbered 1,137 1-2, which application is agreed by all parties claiming hereunder to be a warranty of the facts therein stated. (Signed by the company.)" The conditions of the policy annexed to and made a part of it, which are material to be considered in the decision of this case, read as follows: "(b.) If the interest of the insured shall, by foreclosure and the expiration of the period of redemption, have matured into an ownership in fee-simple, the price to be paid, unless determined by mutual agreement, shall be the amount bid at said foreclosure sale, with interest thereon at legal rate from the date of such foreclosure sale, together with any and all subsequent expenditures by the insured for improvements, taxes, or assessments on said real estate, with interest at the legal rate on each of such expenditures, from the date of the making thereof, less any sum or sums received by said insured from any partial redemption or sales of said real estate. (4) As long as the interest of the insured in said real estate consists of a mortgagee's interest, and subject to redemption, the liability under this policy shall not exceed the amount at any time remaining unpaid on the mortgage indebtedness, and the company may, at its option, at any time, pay the amount then remaining unpaid on said mortgage, and in that case the mortgagee or his assigns shall by proper instrument assign to this company said mortgage, together with said mortgage note and debt, or the portion thereof remaining unpaid. * * * Payment, discharge, or satisfaction of said mortgage indebtedness

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(except by foreclosure of said mortgage), or the passage of title (except by will or descent) acquired by the insured by foreclosure of said mortgage, or assignment of this policy separate from said mortgage, shall fully terminate, annul and avoid this policy, and all liability of the company thereunder. (5) This company will, at its own cost and charge, defend the insured in all acts of ejectment, or other proceedings founded upon a claim of title or incumbrance, prior in date to this policy. * * * In case any such action or proceeding is begun, and the insured shall be made a party thereto, or shall otherwise learn thereof, it shall be the duty of the insured to at once notify the company thereof in writing, and secure to it the right to defend the action or proceeding, and to give all possible assistance therein." At the date of the policy there were mechanic's liens on the premises prior to the lien of the mortgages. When suit was brought to enforce the mechanic's liens the insurance company was notified, and defended the action in the name of the insured. Afterwards the property was sold to satisfy the mechanic's lien judgments for \$31,360; default was made in the payment of the mortgage debt, and the mortgages were foreclosed, the mortgagee becoming the purchaser at foreclosure sale for \$58,551.93. The property was not redeemed and the purchaser (mortgagee) became the owners in fee. They then served the defendant with notice of the foregoing facts, and offered to convey to defendant all their title in the premises upon payment by defendant of the amount paid at the foreclosure sale and interest thereon demanding, if they declined to accept this proposition that defendants redeem the premises from the mechanic's liens. Defendant refused to do either. Then plaintiff redeemed the property from the mechanic's liens paving therefor \$31,994.77, and the complainant prays for judgment for this sum and interest. Demurrer was overruled and error to the circuit court of appeals was brought.

CALDWELL, C. J.: The only error assigned is the overruling of the demurrer to the complaint. The contention of the learned counsel for the plaintiff in error is that the foreclosure of the mortgages by notice and sale and the purchase of the mortgaged premises by the mortgagee for the full amount of the mortgage debt, "cancelled the mortgage debt as completely as though it had been paid in cash," and that such satisfaction of the mortgage debt inures to the benefit of the insurer, and absolves it from liability on its policy as fully as if the mortgage debt had been extinguished by a cash payment made by the mortgagor. The contention is not sound. cases cited by counsel to support this contention have no application to this case. The case at bar depends upon the construction of the policy of insurance, and the same liberal rules of interpretation that apply to fire and other policies of insurance are applicable to the policy in suit. The policy in suit, on the point in question, is

not ambiguous, nor its meaning doubtful; but if there was room to doubt as to its proper interpretation, the doubt would have to be resolved in favor of the insured, according to the settled canon of construction applicable to such contracts. National Bank v. Insurance Co., 95 U.S. 673, 678; Thompson v. Insurance Co., 136 U.S. 287, 297, 10 Sup. Ct. Rep. 1019; 2 Whart. Cont. 670; Kahnweiler v. Insurance Co., 14 C. C. A. 485, 67 Fed. Rep. 483. The insurer is not a surety. The defendant company, for an adequate consideration, agreed to "indemnify, keep harmless, and insure" Drexel, the mortgagee, "from all loss or damage, not exceeding \$55,000," the amount of the mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens or incumbrances thereon existing at the date of the policy. The contract is plain and explicit on this point. In a word, it is a guaranty that the mortgagee should not suffer any loss or damage by reason of defects in the title to the property, or liens or incumbrances thereon, existing at the date of the policy. Under this guaranty, if the mortgaged property, with a clear title and free from incumbrances, was worth the amount of the mortgage debt, the mortgagee could confidently rely upon the sufficiency of his security. The mechanic's liens upon which the mortgaged property was sold were liens upon the property at the date of the policy. The defendant company, nevertheless, refused either to pay these prior liens, or to pay the insured the amount bid for the property at the foreclosure sale, which was the amount of his mortgage debt, thus forcing the insured, in order to protect his security and his title, to redeem the property from the sale on the mechanic's liens. The policy provides that, where by foreclosure the insured has acquired the title to the property, the price to be paid by the insurer "shall be the amount bid at said foreclosure sale." The defendant was obligated, by the terms of the policy, either to pay this amount, or to relieve the property from all liens existing thereon at date of the policy. It refuses to do either, and seeks to escape all liability by putting the burden of freeing the property from the liens existing thereon at the date of the policy upon the mortgagee, on the ground that, at the sale of the property under the mortgages, the mortgagee bid the full amount of his mortgage debt, and thereby himself assumed the burden of paying off the mechanic's liens. Under the terms of the policy, the mortgagee had a right to look to the defendant for the extinguishment of all liens upon the property which existed at the date of the policy, and to gauge his bid on the assumption that the defendant would discharge its obligation in this regard. The contention of the defendant is in the teeth of a very plain provision of the policy which declares: "Payment, discharge, or satisfaction of said mortgage indebtedness (except by foreclosure of said mortgage) *

fully terminate, annul and avoid this policy, and all liability of the company thereunder." The case at bar falls directly within this exception. We need not consider what effect this provision would have where the property was purchased by a stranger at the foreclosure sale. Beyond controversy, it includes and binds the parties to the contract, and is applicable to every case where the mortgagee, insured, becomes the purchaser of the property at the foreclosure sale for the amount of his mortgage debt. The judgment of the circuit court is affirmed.

NOTE.—Guarantee and Title Insurance.—The majority of the companies now in existence under the laws of the State of Illinois, as well as most of the other States, engaged in the business of insuring titles to real property are organized under statutes enabling them to become sureties and to accept and execute trusts. The purpose of this note is to collate the few authorities with reference to the insurance of land titles and guarantee insurance. The duties of these companies as trustees are too extensive for treatment in this paper. The guarantee insurance done by these companies is in its practical sense, "an insurance against loss in case a person named shall make a designated default or be guilty of specified conduct." It is usually against misconduct or dishonesty of an employee or officer; but is sometimes against the breach of a contract. This branch of insurance. like title insurance, is so much more modern in origin and development than fire, life, marine and accident insurance that there are few decisions upon the subject; but the business is gradually increasing and is destined to fill an important place in the commercial world. Am. & Eng. Ency. of Law p. 65. It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. The general doctrines of warranty, representation and concealment, as applied to fire, life and marine insurance are applicable also to guarantee and title insurance. Towle v. Nat. Guardian Life Ins. Co., 7 Jur. (N. S.) 1109; Board of Education v. Citizens Ins. Co., 30 U. C. (C. P.) 182; Bernham v. United Guarantee & Life Ins. Co., 7 Exch. 744. Thus, as affecting a policy of guarantee insurance, a representation that the person whose conduct is insured has never been in default in his accounts extends to defaults prior to the time when he entered the service of the insured. Ottawa Agr. Ins. Co. v. Canada Guarantee Ins. Co., 30 U. C. (C. P.) 360. Where the faithful and diligent performance of the duty of a clerk was guaranteed and he went to lunch leaving a large sum of money in open bags in his room, which money disappeared while he was gone, it was held that the company was liable. Re Citizens Ins. Co., etc. (Q. B. Quebec), 16 Can. L. J. 334. A guarantee policy may be assigned, presumably with notice to the company, and where the payment of a promissory note was insured it was held the policy was available in the hands of a third party. Ellicott v. U. S. Ins. Co., 8 Gill. & Johns. (Md.) 166. The principles applicable to the renewal of policies of insurance generally, are undoubtedly in the main applicable here. Solvency Mut. Guarantee Co. v. Froane, 7 H. & N. 5; Sol. Mut. Guarantee Co. v. York, 3 H. & N. 588; Towle v. Nat. Guardian Ins. Co., 7 Jur. (N. S.) 1109. As in fire and other cases of insurance if any conditions are re. quired by the policy to be performed subsequent to loss and prior to recovery they must be substantially

complied with before the policy can be enforced. For example, if one of the requirements of the policy is that insured prosecute the party against whose act he is insured, as a condition precedent to recovery, such requirement must be satisfied before recovery can be had even though to conform thereto would subject the insured to action for damages. Sup. Ct. of Judicature (Ireland), 9 Ins. L. J. 160. In a case of guarantee insurance where the transaction is in the nature of a suretyship the doctrine of subrogation undoubtedly applies. That is to say the insurers after payment of loss, will be subrogated to the rights of the insured and entitled to the securities which he holds in respect of the matter of the insurance. Montague v. Tidcombe, 2 Vt. 578. But in a recent case, not yet reported, in the appellate court of the third district of Illinois, against ten Chicago bankers who became sureties for one Ramsay a county treasurer, and then conspired with themselves and Ramsay to hold the county moneys, it was held that since the parties were all engaged in a criminal conspiracy, there was no right of subrogation in favor of the bankers against Ramsay's property, he having defaulted. As guarantee insurance refers to persons or contracts, so title insurance refers to land or interest therein. A contract of title insurance is one whereby the title of real estate is insured. The practice of the companies engaged in this business is substantially as follows: To have an abstract of title prepared (the correctness of which is guaranteed), and the title examined on application of the purchaser whereupon a policy is issued to such purchaser stipulating that he shall be indemnified for any loss that may arise to him by reason of defect in the title. Like guarantee insurance, the organization of title insurance companies is of such recent date that decisions bearing upon their rights and liabilities are as yet rare. Probably Pennsylvania was the first State to provide for the incorporation of companies to insure titles. In the year 1874, a statute was there passed, and since then it has been amended at different periods. The last act passed in 1889 grants additional powers to these companies. Penn. Session Laws, 1874, Sec. 29, p. 84; 1881, Act 26, p. 22; 1889, Act 179, p. 15. Under the act of 1886 the companies are not empowered to engage in the business of conveyancing and engaging in such business is ultra vires. To an action on a title insurance policy it is no defense that the conveyancing was done by the conveyancer of the plaintiff. Gauler v. Solicitors, L. & T. Co., 9 Pa. Co. Ct. Rep. 634. It may be well to state in this connection that an examiner of titles is liable only to the person employing him for want of skill or ordinary diligence and not to a third person who acts on his certificate. There must be privity of contract to create liability. Zweigardt v. Birdseye, 57 Mo. App. 462; Houseman v. Girard, 81 Pa. St. 256; Page v. Trutch, 8 Chic. Leg. N. 385. And there must be actual damage shown before an action can be maintained. Kimball v. Connolly, 42 N. Y. 52. Upon an application for a policy of insurance of title to land if an untrue answer is given to a question concerning the last price paid for certain property and the policy provides that an untrue answer would avoid the same such answer amounts to warranty. Stensyard v. St. Paul Real Estate Title Ins. Co. (Minn. 1892), 52 N. W. Rep. 910. But if it appear from recitals in the policy that the company have full knowledge of the existence of any liens or unpaid claims when it issued the policy, it will be held to have waived the false warranty. Brandup v. Ins. Co., 27 Minn. 893; Wilson v. Ins. Co., 36 Minn. 112. A title insurance company is

liable for negligence not only for the amount of insurance specified in the policy but for full amount of loss occasioned by such negligence. Where an insurer by a policy of title insurance agrees to indemnify a mortgagee against loss not exceeding \$2,200, by reason of incumbrances and to defend the land against such laims, a loss occurring by reason of the negligence of the insurer, is not limited to \$2,200. Quigley v. St. Paul Title Ins. & Trust Co. (Minn.), 62 N. W. Rep. 287. In the case cited above the company failed to satisfy a lien affecting plaintiff's title, and also failed to redeem before expiration of necessary time. In the provisions of the policy in this case the company agreed to indemnify, save harmless and insure the plaintiff, Quigley, against loss from three different causes: (1) "Defects in the present title;" (2) "Liens or incumbrances affecting the same at the date hereof;" (8) "Any defect apparent of record in the execution of filing for record of said mortgage." Justice Canty in his opinion says: "Its (the company's) liability for loss from these three causes is expressly limited to \$2,200, and the insured has a right to recover that amount of loss arising from any or all of these three causes alone, and this fairly implies that, if his loss arises from some other cause besides these three, this limitation does not cover it also. In this case it is alleged the loss does not arise from some other cause, to-wit: that of the negligence of the defendant." It would seem that where a policy insures against loss through liens, the liens must be incipient at date of policy. A policy on a mortgage against loss by defects or unmarketableness of the title or mortgage interest, or because of liens or in. cumbrances charging the same at date of policy "saving defects" or objections to title "which do or may now exist" including "unmarketability by reason of the possibility of mechanics' liens and municipal iens," but not "actual losses by reason of such liens" nsures only against liens the rights to which are already inchoate at the date of the policy. Wheeler v. R. E. Title Ins. & Trust Co. (Pa. Sup.), 28 Atl. Rep. 849, 160 Pa. St. 408, 84 W. N. C. 325. An action against a title insurance company for damages by reason of there being less land conveyed than the description called for, the declaration should set out a copy of the application for the insurance and a failure to do so would be fatal on demurrer. Hankey v. R. E. Title Co., 11 C. C. 820. These few cases may be of benefit as tending to show to what extent the title insurance and guarantee companies are liable on their policies. As has been stated the general principles applicable to other and more familiar classes of insurance are, as a rule, applicable to title and guarantee insurance, and in the absence of others the rules laid down herein may be safely followed.

Chicago, Ill. MORTON JOHN STEVENSON.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last-Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recourt Decisions.

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- 1. ADJOINING LANDOWNERS Lateral Support.—An owner of land, who excavates to a depth lower than the foundation of a building on the adjoining lot, having falled to notify the owner of the building to protect his property, will be liable for the fall of the foundation wall if it is caused by failure to do anything which ordinary care and diligence in such eperations point out as necessary to protect it, but will not be liable if the fall is caused by the wall's own insufficiency.—5FOHN V. DIVES, Penn., 24 Atl. Rep. 192.
- 2. ADMINISTRATION—Executors and Administrators—Appointment.—On an application for letters of administration of the estate of a decedent, it is not within the province of the court to determine the question of the title to real property, as between the estate and persons claiming adversely to it; but if it appears that decedent left any estate, and the same has not been administered, letters should be granted.—Pina's Estate, Cal., 44 Pac. Rep. 882.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—That an insolvent debtor, at the time he confessed judgments in favor of attaching creditors, did so in contemplation of making an assignment, does not render the preferences thereby secured to such judgment creditors void, they themselves being unaware of such intention on the part of the debtor.—O'CONMELL V. HANSEN, Oreg., 44 Pag. Rep. 887.

4. ASSIGNMENTS FOR CREDITORS.—A debtor of one who has made an assignment for the benefit of creditors cannot dispute the validity of the assignment upon every ground which would render it voidable as against a creditor who should object to it on such ground.—MISSOURI, K. & T. RY. CO. V. FULLER, U. S. C. C. of App., 72 Fed. Rep. 467.

5. ASSUMPSIT.—An action for money had and received can always be maintained wherever one has received money which, in equity and good conscience, he ought to pay over to another, even though there is no privity between the parties, and no express promise to pay.—PH. ZANG BREWING CO. V. BERNHEIN, Colo., 44 Pac. Rep. 380.

6. ATTACHMENT AFFIDAVIT.—An attachment affidavit which alleges that the payment of the indebtedness has not been secured by any mortgage or lien upon real or personal property is sufficient, without adding the other statutory clause, "or any pledge of personal property," since the declaration of affiant that he has no lien negatives the possibility of his having a pledge.—O'CONOR V. WITHERBY, Cal., 44 Pac. Rep. 340.

7. ATTACHMENT BOND—Action on.—To entitle an attachment defendant to recover against the obligors on an attachment bond, conditioned on the payment of all damages sustained by any person by reason of the attachment, defendant must show that the attachment was sued out without sufficient cause. That the attachment was dissolved for failure of the officer to perform his duty is insufficient.—OFTERDINGER V. FORD, Va., 24 S. E. Rep. 246.

8. ATTACHMENT—Mingling of Goods.—The fact that goods of an attachment defendant are in the possession of a third person, who has mingled them with his own goods, and refuses to point them out, but claims ownership of all, does not warrant the seisure of goods, his title to which is unquestioned, and which are readily distinguishable from those of the attach-

ment defendant.—SUSSKIND v. Hall, Cal., 44 Pac. Rep. 828.

- 9. BROKER—Authority to Sign Contract.—A real estate broker authorized to "list" and "place" property on commission has no authority to sign a contract of sale.—HALSEY V. MONTERO, Va., 24 S. E. Rep. 258.
- 10. CARRIBES—Ejectment of Passengers—Damages.—Where a conductor takes up a passenger's ticket without giving him any check or other evidence of his right to ride, whereby he is expelled by another conductor after changing cars, his right of action will not be limited to the breach of the company's contract, though no force was used in his expulsion, but will include all damages sustained through the company's violation of the duties it assumed in entering into such contract.—Sloane v. Southern Cal. Ry. Co., Cal., 44 Pac. Rep. 829.
- 11. CARRIERS—Stock.—A charge in an action by a shipper to recover from a carrier for injuries to cattle in shipment, which states it to have been the duty of the carrier to feed and water the cattle en route, or to give the shipper an opportunity to do so, is erroneous as not applicable to the evidence, where the shipment required but about three hours' time, and no request to stop for feed or water was made by the shipper.—TEXAS & P. RY. CO. v. STRIBLING, Tex., 34 S. W. Rep. 1002.
- 12. COMPLICT OF LAWS Insolvency Fraudulent Preferences.—Act Tenn. May 11, 1895, providing that the sale, etc., of an insolvent debtor's property for the purpose of preferring a creditor shall be "illegal and void," and all of such property shall be divided among all the creditors of the debtor, the enforcement of which latter provision is provided for by the act, does not render such a sale between citizens of Tennessee of property situated in Mississippi absolutely void, so as to subject the property to attachment in Mississippi at the instance of other creditors.—Toof v. MILLER, Miss., 19 South. Rep. 577.
- 18. CONSTITUTIONAL LAW—Municipal Corporations—Licenses.—A city ordinance prohibiting persons temporarily residing in the city from selling goods at auction without a license, thereby discriminating between temporary and permanent residents, is unconstitutional.—CITY OF CARROLLTON V. BAZETTE, Ill., 42 N. E. Rep. 887.
- 14. CONSTITUTIONAL LAW—Regulation of Commerce.—Code, § 1295, providing that a common carrier accepting anything for transportation directed to a destination beyond its line shall be deemed to assume obligation for its safe carriage to such destination, unless, at the time of such acceptance, it be released from such liability by contract in writing, signed by the owner, is not a regulation of commerce, in violation of Const. U. S. art. 1, § 8, cl. 8.—RICHMOND & A. R. CO. v. R. A. PATTERSON TOBACCO CO., Va., 24 S. E. Rep. 261.
- 15. CONTEMPT*Power of Court to Commit.—A court can legally imprison a person for contempt only after a finding of the matter of contempt, and upon a warrant stating the cause of commitment and its term, though it may detain the person in custody until such finding and warrant can be prepared.—Ex PARTE KEARBY, Tex., 34 S. W. Rep. 982.
- 16. CONTRACT BETWEEN FIRMS HAVING MEMBERS IN COMMON.—Under Code, § 2860, providing that the assignee of a non-negotiable chose in action may maintain any action thereon which the original obligee, payee, or contracting party could have maintained, one to whom an open account between two firms having some members in common was assigned in trust cannot sue the debtor firm at law on the account.—AYLETT V. WALKER, Va., 24 S. E. Rep. 226.
- 17. CONTRACT—Parol Evidence.—B, who had delivered personal property to certain persons under a written agreement to give them a bill of sale when their note for the price was fully paid, assigned the contract, giving the assignee authority to complete the same and collect the money; but the assignment did not purport to transfer title to the property, and B

- thereafter received from C, one of the buyers, the latter's share of the note. Plaintiff, who claimed under a bill of sale from B's assignee, sought to recover the property from defendants, who had purchased the same from C: Held, that evidence was admissible to show an oral agreement between B and C that the latter should have title to one-third of the property on payment of his share of the price, since Code Civ. Proc. § 1856, makes parol evidence incompetent for the purpose of varying the terms of a written instrument only as between the parties thereto and their representatives or successors in interest, and plaintiff was neither.—DUNN v. PRICE, Cal., 44 Pac. Rep. 354.
- 18. CONTRACTS—Interpretation.—The reasonable intention of the parties te a contract is to be sought in the words of such contract, not assumed; and it is not the duty of a court to bend the meaning of some of the words of a contract into harmony with a supposed reasonable intention of the parties.—CRIMP V. MCOORMICK CONST. CO., U. S. C. C. of App., 72 Fed. Rep. 866.
- 19. CONTRACTS—Time as Essence.—Where an indorsement on a note payable in five years, with interest, secured by mortgage, given for money loaned, provides that the maker at the end of three years, may pay the whole or a part of the note, time is of the essence of the contract; and the maker is not entitled to the right to pay the note, with interest to time of payment, before the expiration of the three years.—Goodnight v. Texas Land & Mortgage Co., Tex., & 5. W. Rep. 974.
- 20. CONTRACT TO CONVEY—Breach.—A complaint for damages for breach of a contract to convey, alleging that the vendor, after contracting to convey the land, mortgaged it to another, and afterwards suffered the mortgage thereon to be foreclosed, and the tenant to be evicted, sufficiently shows a breach.—HAWKINS V. MERRITT, Ala., 19 South. Rep. 589.
- 21. CONTRACTS—Unreasonable Restraint of Trade.—
 F and his wife sold a newspaper owned by them in D county, and agreed that F "would not edit, print or conduct a newspaper, nor be in anywise connected with one, printed anywhere in the State of North Carolina, and that, for a like period, Mrs. F shall not edit, print or conduct a newspaper or magazine, nor be in anywise connected with one, anywhere in the county of D, said State, without the consent of said purchaser or his assignees:" Held, that such contract was not void as an unreasonable restraint of trade.—COWAN V. FAIRBEOTHER, N. Car., 24 S. E. Rep. 212.
- 22. CONVERSION—Res Judicata.—The personal liability arising out of the act of converting another's property, or property on which he had a lien, cannot be avoided and frustrated by the fact itself of the conversion.—HEWITT V. WILLIAMS, La., 19 South. Rep. 604.
- 23. COUNTIES—Warrants—Presumptions.—In a suit against the board of county commissioners on warrants issued by their order, if the warrants are valid on their face the presumption is that they were lawfully issued, and the burden of establishing their invalidity is on defendants.—BOARD OF COM'RS OF SAW JUAN COUNTY V. OLIVER, Colo., 44 Pac. Rep. 362.
- 24. CORPORATIONS Agent's Agreement for Arbitration—Ratification. If an English corporation, controlled by a board of directors in England, objects to an agreement made by its general manager in this country to submit to arbitration a claim against the company for a trespass in cutting timber from the lands of another, it is its duty, within a reasonable time of receiving notice of the agreement, to notify the other party of its disapproval; and, in the absence thereof, a ratification may be presumed. The assertion of counterclaims by it is not a disaffirmance, but rather justifies a presumption of an affirmance.—CENTRAL TRUST CO. OF NEW YORK V. ASHVILLE LAND CO., U. S. C. C. of App., 72 Fed. Rep. 361.
- 25. CORPORATIONS—Contracts. That a majority of the directors in one corporation were also directors of another corporation does not render a contract between the two corporations, entered into through the



directors, absolutely void.—San Diego, O. T. & P. B. R. Co. v. PACIFIC BEACH Co., Cal., 44 Pac. Rep. 888.

- 26. CORPORATIONS—Contracts. In an action on a note, against a corporation, alleged to have been executed in "behalf of" the corporation, by persons "duly" authorized, for money loaned the corporation an affidavit of defense merely alleging that the note does not on its face purport to be the note of the corporation is 'Insufficient. Wanner v. Emanuel's Church of the Evangelical Ass'n., Pa., 84 Atl. Rep. 186.
- 27. CORPORATIONS Contracts. The domicile and citizenship of a corporation belong to the State under whose laws it is created. It exists only in contemplation of law and by force of the law, and where that law ceases to operate the corporation can have no existence. Hence a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty.—Duke v. Taylor, Fla., 19 South. Rep. 172.
- 28. CORPORATIONS-Foreign Insurance Companies .-Civ. Code 1895, pt. 4, c. 1, art. 1, relating to the organization of corporations under the State laws, provides that the instrument by which a private corporation is formed is called "articles of incorporation," and that, on filing a copy, certified by the county clerk, with the secretary of state, the secretary must issue to the corporation a certificate, and thereupon the persons signing the articles, and their associates and successors, shall be a body corporate. Pol. Code 1895, § 410, subd. 3, provides that the secretary of state must charge and collect, for receiving and filing each certificate of incorporation, the sum of 50 cents on each \$1,000 of the capital stock of the company; Held, that a foreign insurance company is not required, on filing its charter as provided by statute, to pay to the secretary of state the fees provided by section 410.-STATE V. ROTWITT, Mont., 44 Pac. Rep. 409.
- 29. CORPORATIONS—Membership.—One who attempted to enter a mutual insurance association which had no legal existence at the time his policy was issued, and did so relying on mistaken misrepresentations of those who held themselves out as agents of the association, is not estopped from denying its corporate existence.—LAGRONE v. TIMMERMAN, S. Car., 24 S. E. Rep. 290.
- 30. CREDITORS' BILL—Issue of Execution.—Where it is alleged in a creditors' bill that the judgment debtor is absolutely insolvent, and that there are no effects subject to execution, or that can be found, the complaint need not show that an execution was issued, and returned nulla bona.—RYAN v. SPIETH, Mont., 44 Pac. Rep. 403.
- 31. CRIMINAL EVIDENCE—Dying Declarations.—It appeared that deceased (entirely rational till death), just after being shot, said that he knew the wound was fatal, and that he could not recover and would never see his gun agair, and, on the day he died, said that he would never see his home agair; that from the time of shooting up to death, two days later, he suffered intense pain, and at no time expressed hope of recovery: Held, that dying declarations that defendant killed him were admissible.—STATE v. GAY, Mont., 44 Pac. Rep. 411.
- 82. CRIMINAL LAW—Attempt to Commit Rape. To convict one of an attempt to commit rape, under Rev. Cr. Code, art. 640, it must be shown that at the time of the alleged attempt it was the intent of the party to use the same degree and character of force as would make him guilty of rape, or of an assault with intent to commit rape, but that in the actual attempt, carried beyond mere preparation, he fell short of such degree of force.—MCADOO V. STATE, Tex., 34 S. W. Rep. 985.
- 33. CRIMINAL LAW—Confession While under Arrest.—Where a person is in custody for a crime, his silence cannot be used against him, as a confession of the truth of statements made in his presence, whether he was cautioned as required by statute, or not.—GARD-NER V. STATE, Tex., 34 S. W. Rep. 945.
- 34. CRIMINAL LAW—Former Jeopardy.—A conviction of an assault with intent to murder bars a prosecution

- for robbery committed at the time of such assault.— HERERA V. STATE, Tex., 34 S. W. Rep. 948.
- 85. CRIMINAL LAW—Homicide. When one person, without legal right, claims or denies to another the right to pass over land, neither is justified in killing the other to prevent the assertion by such other of his alleged right.—PROPLE V. CONKLING, Cal., 44 Pac. Rep. 814.
- 86. CRIMINAL LAW Indictment Amendment.—An allegation in an indictment as to the date of the organization of the grand jury by which the indictment was found, is surplusage, and therefore the allowance of an amendment in regard thereto, after announcement of ready for trial, is not ground for reversal.—Grayson v. State, Tex., 34 S. W. Rep. 961.
- 87. CRIMINAL LAW-Indictment—Election.—In a trial under an indictment, one count of which charges a forgery, and the other the uttering and passing the forged instrument, the State is not required to elect on which count it will rely; but, on a general verdict of guilty, judgment may be entered on either count, both being supported by evidence.—CARR v. STATE, Tex., 34 S. W. Rep. 349.
- 88. CRIMINAL LAW—Robbery—Evidence of Ownership.

 —On an information charging the property stolen to be that of a corporation doing business in the State, and organized under the laws of another State, evidence of a de facto corporation doing business in the State is sufficient.—PEOPLE V. OLDHAM, Cal., 44 Pac. Rep. 812.
- 89. CRIMINAL LAW—Sentence— Statute.— Under Act April 2, 1889, providing that, where a jury shall find a person convicted of a felony to be under 16 years of age, they shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary, where, in such case, the jury fail to designate the place of confinement, a sentence by the court to the reformatory for the term fixed by the verdict is within its jurisdiction, and legal.—Ex Parts Wood, Tex., 34 S. W. Rep. 965.
- 40. CRIMINAL PRACTICE—Indictment for Murder.—An indictment which fails to charge that the homicidal act was perpetrated with a premeditated design to effect the death of the person killed, or of some other person, does not charge the crime of murder as defined in the first subdivision of section 2078, 8t. Oki. 1898.—JEWELL v. TERRITORY, Okla., 48 Pac. Rep. 1075.
- 41. DEED-Construction by the Parties. The assignee in bankruptcy of a grantor who had made a conveyance of realty for the purpose of withdrawing it from his creditors, and without receiving payment therefor, elected to affirm the sale, and received the consideration from the grantee. He afterwards sold at auction, as a part of the assets of the bankrupt, the interest of such bankrupt in the dower fund of his mother, which was charged upon the land conveyed. The grantee was present, and bid at the sale without objection or claim of right in himself: Held, that the action of the parties constituted a construction of the deed, which was not clear in its terms as to a reservation of the grantor's interest in the dower fund, and estopped the grantee to claim, after the death of the dowress, and as against the purchaser at the sale, that the interest of the grantor in the dower fund passed to him by the conveyance .- SCHLEGEL V. HER-BEIN, Penn., 34 Atl. Rep. 118.
- 42. DEED Delivery—Parol Evidence.—An absolute deed takes effect on its delivery to the grantee, without regard to oral conditions agreed upon by the parties in regard thereto.—LAMBERT v. MOLURB, Tex. 34 S. W. Rep. 978.
- 43. DIVORCE—Jurisdiction—Alimony.—In awarding a divorce on substantial service, where defendant and the minor children, though domiciled in the State, are living elsewhere, and defendant makes no appearance, the court has no jurisdiction to allow alimony.—DE LA MONTANYA, Cal., 44 Pag. Rep. 345.



- 44. DOWER-Land Conveyed by Husband under Contract.—A widew has no dower in land which her husband had, before coverture, orally contracted to sell to one who at once took possession, on payment of part of the price, and who received a deed from the husband alone after the marriage.—CHAPMAN v. CHAPMAN'S TRUSTEES, Va., 24 S. E. Rep. 225.
- 45. EMINENT DOMAIN Vacating Street Abutting Owners.—The fact that, after a public alley had been vacated by the city, an abutting owner took possession of all land in his front previously covered by the alley, and of a narrow strip lying between its further side and a newly-opened street, in the mistaken belief that he was entitled to a frontage on such street, will not estop him from claiming damages for the closing of the alley without his consent.—BIGELOW V. BALLERINO, Cal., 44 Pac. Rep. 307.
- 46. EQUITABLE MORTGAGE Trustee.—When an instrument, as shown by its own terms, is designed by the parties thereto as a security for the payment of money, it may be enforced as an equitable mortgage, though wanting in the formal execution of it as a legal mortgage. An equitable mortgage may be created by an unsuccessful effort to make a valid legal mortgage, or by pledging specific property for the payment of a debt.—MARGARUM V. J. S. CHRISTIE ORANGE CO., Fla., 19 South. Rep. 687.
- 47. EQUITI JURISDICTION—Waiver of Objection.—Failure to make, before final hearing, the objection of want of equitable jurisdiction and an adequate remedy at law, is a waiver thereof, and authorizes the court to retain the cause, if the case be one of such a nature that equity might give the relief asked, or any part of it, or if the question of equitable jurisdiction be even a doubtful one.—Waite v. O'Neil, U. S. C. C. (Tenn.), 72 Fed. Rep. 348.
- 48. EXECUTION. SALE—Lien.—A sale of land on execution destroys all liens which are subsequent to the lien of the judgment on which the execution was issued, and, if a judgment creditor whose lien is subsequent to that under which the sale was made redeems and bids in the property for the amount of the redemption money and interest, he takes title discharged from the liens of prior judgment creditors, and subject to no further redemption.—FLOYD v. SELLERS, Colo., 44 Pac. Rep. 878.
- 49. EXTRADITION PROCEEDINGS—Judgment of Magistrate.—Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact; and the judgment of a magistrate, rendered in good faith, that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of the evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law.—Ornelas v. Ruiz, U. S. S. C., 16 S. C. Rep. 689.
- 50. FEDERAL COURTS Form of Pleading.—One purchasing a contract which is the subject of a pending suit in equity may set up his interest, and obtain the benefit of the proceedings already had, by obtaining leave to file an original bill in the nature of a supplemental bill. This is the appropriate form of pleading in such a case, and leave to file such bill cannot be denied, even after final hearing, and the direction of a decree in favor of the original complainant.—HAZLETON TRIPOD-BOILER CO. V. CITIZENS' ST. R. CO., U. S. C. C. (Tenn.), 72 Fed. Rep. 325.
- 51. FRAUDULENT CONVEYANCES Divorce.—A wife, who has a claim for alimony in a suit pending for divorce, is a creditor, within the purview of the statute of frauds, and may maintain a bill to attack a transfer made for the purpose of defeating her claim for alimony.—Hall v. Harrington, Colo., 44 Pac. Rep. 365.
- 52. FRAUDULENT CONVEYANCE—Evidence—Burden of Proof.—In an action against the holder of a note and morgage given in fraud of creditors, to set aside the conveyance, the fraudulent character of the original transaction being shown, the burden of proof is upon the holder to show that he was a bona fide purchaser

- for value before maturity.—HARRINGTON V. JOHNSON, Colo., 44 Pac. Rep. 368.
- 58. GARNISHMENT Production of Account Books.—Where a subpona duces tecum, requiring a defendant to produce account books to be used on hearing of plaintiff's affidavit controverting an answer by a gárnishee, was issued, and defendant appeared, but refused to produce the books, it was error to rule that the witness could not be required to produce the books to be used as evidence against himself.—CULLEBS v. BIRGE, Tex., 34 S. W. Rep. 986.
- 54. GIFT Bond Delivery. Decedent, who had requested a justice of the peace to draw, for him, a deed to his niece for a portion of his farm, to take effect after decedent's death, refrained from doing so on the suggestion of the justice, and, instead, subsequently executed a bond, payable to the niece one year after date, with interest, and delivered it to the justice, to be delivered to the niece after his death, and told the niece to get the bond from the justice. Decedent, at the time of the delivery of the bond to the justice, on being told by the justice that the bond would draw interest during his life, to remedy such defect, directed the justice to mark the interest as paid each year: Held, that there was a sufficient delivery of the bond to render it, as a gift, a valid claim, in favor of the niece, against decedent's estate, from the time of his death.—Wagoner's Estate, Penn., 84 Atl. Rep. 114.
- 55. HOMESTEAD—Incumbrance—Lien.—Under Const. art. 16, § 50, providing that no lien can be created on a homestead except for purchase money, or for work and materials used in constructing improvements thereon, when contracted for as therein required, a lien given, ostensibly for work and materials, but in fact for a loan of money with which such work and materials were paid for, cannot be enforced.—Campbell v. McCampbell, Tex., 84 S. W. Rep. 370.
- 56. Homestead Intention.—The statement of the declarant that at the time of filing her declaration of homestead she actually occupied the premises, with the intention to reside thereon, was not conclusive, where other facts to which she testified were inconsistent with such intention.—Tromans v. Mahlman, Cal., 44 Pac. Rep. 327.
- 57. HOMESTEAD Mortgage for Improvements.—In an action to foreclose a mortgage given by a husband and wife to secure the improvement of their homestead by the erection of a residence thereon, a contract between the mortgagee and a contractor, signed by the contractor, and delivered to the mortgagee, and under which the building was erected and paid for, is admissible, though not signed by the mortgagee.—PIONEER SAVINGS & LOAN CO. v. PASCHALL, Tex., 34 8.

 W. Red. 1001.
- 58. Hubband and Wiff.—Assignment of Wife's Property.—Where a married woman assigns a judgment as a part of her separate estate, and dies solvent, leaving her husband the sole devisee and executor of her estate; and he thereafter ratifies the assignment, and dies pending a settlement of his wife's estate, leaving to beneficiaries a solvent estate consisting largely of the property acquired under the will of his wife, the beneficiaries are estopped from questioning the validity of the assignment.—Hughes' Ex'r v. Wilson, Va., 24 S. E. Rep. 240.
- 59. INSURANCE Notice.—Where an insurance policy is delivered by the agent of the insurer, at the request of the insured, to a person designated by him, the insured is chargeable with notice of its provisions though he did not read it, and though, when so delivered, it was sealed in an envelope.—ÆTNA INS. CO. V. HOLCOMB, Tex., 34 S. W. Rep. 915.
- 60. INSURANCE Rights of Assignee of Fire Policy.—An assignee of a fire policy takes it subject to the rights of the company resulting from the procuring of additional insurance by the assignor without the company's consent being indorsed on the policy as required by the contract.—WILSON v. MOTUAL FIRE INS. CO. OF MONTGOMBRY COUNTY, Penn., 34 Atl. Rep. 122.

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62. INTOXICATING LIQUOR — Liquor Laws.—One cannot be convicted of selling liquors, contrary to a local option law, on evidence that any sale made was by his clerk, unknown to him, against his express orders, and in his absence.—WADSWORTH V. STATE, Tex., 84 S. W. Red. 934.

68. INTOXICATING LIQUORS — Sale.—One who buys whisky for a friend, with money furnished by the latter, is not guilty of selling intoxicating liquor, if he is not personally interested in the sale, nor acting as the seller's agent.—HOOD v. STATE, Tex., 34 S. W. Rep. 986.

64. INTOXICATING LIQUOR—Sale — Local Option Law. —Courts cannot take judicial notice that the sale of liquor has been rendered illegal in a county by vote at an election under the local option law; and an indictment charging a sale of liquor without averment of the facts rendering it unlawful is fatally defective. — LOWERT V. STATE, Tex., 84 S. W. Rep. 967.

65. JUDGMENT—Res Judicata.—A vendor, after delivery of part and tender of the balance of goods sold, divided the balance due on the price into several amounts within the jurisdiction of a justice, and commenced actions thereon, and the vendee counterclaimed in damages for shortage. Plaintiff obtained judgment, from which defendant failed to perfect an appeal: Held, that defendant was estopped by the judgments from subsequently claiming damages for shortage, except as to the balance of the goods tendered, which were not delivered till after the judgments.—EVANS v. CUMBERLAND MILLS, N. Car., 24 S. E. Rep. 215.

66. JUDGMENT—Revival.—A judgment creditor may bring suit in equity against the personal representative and heirs or devisees of his deceased judgment debtor without first reviving his judgment.—JAMES V. LIFE, Va., 24 S. E. Rep. 275.

67. JUDGMENT—Supplemental Bill to Amend.—A vendor, after recovering a final judgment in an action on the first maturing purchase note of a series foreclosing his lien, cannot, by supplemental proceeding, obtain an amendment of the judgment so as to reserve and fix the lien of the other notes on the surplus remaining after its satisfaction.—Holland v. Preston, Tex., 34 S. W. Rep. 975.

68. JUDGMENT—Validity.—The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein.—ANDERSON v. HYGEIA HOTEL Co., Va., 24 S. E. Rep. 269.

69. LIBEL—Evidence—Identification of Plaintifi.—In an action for libel, an acquaintance of plaintifi may testify that, upon reading the libelous publication, he understood it to refer to plaintifi.—ENQUIRER CO. v. JOHNSTON, U. S. C. C. of App., 72 Fed. Rep. 443.

70. LIFE INSURANCE—Parties—Pleading.—Either the administrator of insured, or the beneficiary in the policy taken out by insured upon his life, may sue thereon.—MUNROE V. PROVIDENCE PERMANENT FIREMEN'S RELIEF ASS'N., R. I., 34 Atl. Rep. 149.

71. LIFE INSURANCE—Payment of Premiums.—In case an insurer and insured agree that the latter may give, and the former will accept, notes for the first annual premium on a policy of life insurance, payable in installments, and that the default of the maker in paying any one of them at maturity should operate as a

revocation of the policy, default on the part of the insured revokes the contract, ipso facto, both as to the insured and the beneificiary.—Fenn v. Union Cent. Life Ins. Co., La., 19 South. Rep. 628.

72. LIMITATIONS-Accruing of Right-Money had and Received .- The town of M issued certain bonds, which were placed in the hands of an agent to negotiate. The agent sold the bonds, and absconded with the proceeds. A purchaser of part of the bonds afterwards brought suit on them against the town, which defended the suit on the ground that the bonds were is sued without authority of law, and this defense was anstained. The bondholder then made a demand upon the town for the money paid its agent for the bonds, or for a sum which the town had recovered from the defaulting agent, in case its liability were held to be limited to the amount it had actually received, and, such demand being refused, filed a bill against the town to obtain the same relief: Held, that the accruing of plaintiff's right of action was not postponed until the making of his demand, but the same arose at least as soon as the town, by interposing its answer in the action on the bonds, denied its liability, and more than six years having elapsed since that time, during which plaintiff was at liberty to assert his claim in his action at law, his right was barred.—MERRILL V. Town OF MONTICELLO, U. S. C. C. of App., 72 Fed. Rep. 462.

78. LIMITATIONS — Non-resident. — Under Code Civ. Proc. § 162, providing that if, after a cause of action accrues against any person, he shall "depart from and reside out of the State," or remain continuously absent from the State for one year or more, limitations shall be suspended during his absence, the statute is not put in motion by a casual visit to the State, but only by a return with a view to residence.—LEE v. McKot, N. Car., 24 S. E. Rep. 210.

74. LOST DEED—Proof.—To establish title to land under an alleged lost deed, on parol testimony, proof that it existed, and of its contents, must be clear and conclusive.—THOMAS V. RIBBLE, Va., 24 S. E. Rep. 241.

75. MASTER AND SERVANT — Fellow-servants. — The foreman of a stone quarry owned by a corporation, whose duties require him to exercise a general superintendence over the men, and to make and abrogate rules for their guidance, is not a fellow-servant of one of such men.—RICHMOND GRANITE CO. v. BAILEY, Va., 24 S. E. Rep. 282.

76. MASTER AND SERVANT—Fellow-servants—Common Employment.—The foreman of a section on a railroad and the conductor of a work train, both of whom were engaged in clearing the track of a wreck on the section of the former, under a common superior, ware fellow-servants, and the foreman cannot recover from the railroad company for an injury resulting from the negligence of the conductor while riding on his train from the place of work.—Southern Pac. Co. v. McGill, Ariz., 44 Pac. Rep. 302.

77. MECHANICS' LIENS—Elevator Part of Building.—Where the original plans for a large building provided for an elevator, and the contract for the construction of the elevator was let when contracts for other work were let, the elevator was a substantial part of the building, and the building not completed, so that limitations for filing mechanics' liens would run, until it was finished.—Coss v. McDonough, Cal., 44 Pac. Rep. 825.

78. MORTGAGE BOND—Conditions—Waiver of Breach—Where the payment of the principal of a bond severed by a mortgage is postponed for several years, conditioned upon the payment of the interest semi-annually, and, in default of the payment of the interest for 30 days, the principal shall become due, at the option of the mortgagee, such mortgagee will be suffilled to a decree foreclosing the mortgage, and declaring the whole amount of principal and interest due, upon default in any of the payments of interest according to the condition, in case of no responsibility for such defaults upon the part of the mortgagee, notwithstanding he waived one previous default by sc-

espting the interest the non-payment of which had occasioned such default.—POST v. INDUSTRIAL LAND DEVELOPMENT Co., N. J., 34 Atl. Rep. 187.

- 79. MORTGAGE Removal of Buildings from Mortgaged Premises.—A mortgagee may sue a grantor of the mortgagor for impairing the security by removing a building therefrom, by whomsoever erected.—HEATH V. HAILE, S. Car., 24 S. E. Rep. 300.
- 80. Mortgage—Subrogation—Payment.—Where a mortgage is taken upon land with the understanding that it shall be a first lien thereon, and that the money to be loaned on the same is to be applied by the mortgage to the payment and discharge of a prior incumbrance on the same land, and it is so applied, such mortgagee will be subrogated to the rights of the prior incumbrancer whose debt was so discharged, when it is equitable to do so, although there was, before the discharge of such prior incumbrance, a second mortgage on the land, of which the subsequent mortgage had no actual knowledge or notice.—Traders, Bank v. Meyers, Kan., 44 Pac. Rep. 392.
- 81. MORTGAGES—Res Judicata. In foreclosure, defendant pleaded that the action was prematurely brought and other equitable defenses. The jury were instructed that, if the action was prematurely brought, they would go no further in the consideration of the case. They so found, and returned a general verdict for defendant, without passing on other issues. After the maturity of the mortgage, a second action was brought to foreclose, and defendant, admitting its maturity, pleaded the same equitable defenses to the mortgage: Held that, as to the equitable issues, the first action was not res judicata.—GASSERT v. BLACK, Mont., 44 Pac. Rep. 401.
- 82. MUNICIPAL CORPORATIONS—Change of Grade.—A complaint against a city for damages caused by a change of grade, which alleges that the city authorities, under charter powers, voted to change a designated grade, and did cause the grade to be changed, and that plaintiff was damaged thereby, and which sets out facts showing special damage, though not alleging that plaintiff sustained special damage from them, is sufficient.—COOK v. CITY OF ANSONIA, Conn., 34 Atl. Rep. 183.
- 83. MUNICIPAL CORPORATIONS—Payment of Claims.—Money in the sewer fund of a city for a certain year cannot be used, after the expiration of such year, in paying claims for a subsequent year, while suit is pending against the city to recover on a claim against such fund, arising in such prior year, on a contract which the city had for previous years recognized as valid.—BILBY V. MCKENZIE, Cal., 44 Pac. Rep. 341.
- 84. MUNICIPAL CORPORATIONS—Street Railroads—Ordinance. An ordinance prohibiting the placing of salt of any kind on any street railway track, or other part of the street within a city, except on curves of railways leading from one street into another running at right angles therewith, is a reasonable regulation for the common use of the street for a street railway and for ordinary travel.—STATE CONSOLIDATED TRACTION CO. V. CITY OF ELIZABETH, N. J., 34 Atl. Rep. 146.
- 85. NATIONAL BANKS Subscriptions and Capital.— The capital, the unpaid subscriptions to the capital stock, and the liability of the holders of the paid-up stock to pay an additional amount equal to the par value of their stock under section 5151, Rev. St., constitute a trust estate sacredly piedged for the security of the creditors of a national banking association.—STU-ART V. HAYDEN, U. S. C. C. of App., 72 Fed. Rep. 402.
- 86. NEGLIGENCE—Burden of Proof.—Where plaintiff, who was blind, and was on the streets unattended, fell into an open water drain, of the existence of which he had full knowledge, he must affirmatively show that he exercised due care, in an action against the city for personal injuries.—Stewart v. Mayor, ETC. OF CITY OF NASHVILLE, Tenn., 34 S. W. Rep. 618.
- 87. NEGOTIABLE INSTRUMENT Action Against Indorser.—Under Act May 25, 1887 (Procedure Act, P. L.

- 271), relating to the filing of affidavits of defense, and entering judgments for default thereof, plaintiff's statement in an action against an indorser must contain averments of presentation, demand, and notice in order to entitle him to judgment for want of a sufficient affidavit of defense.—PEALE V. ADDICKS, Penn., 34 Atl. Rep. 201.
- 88. NEGOTIABLE INSTRUMENTS Accommodation Indorser.—An indorsee taking the note from the payee after maturity cannot recover thereon from an indorser for the accommodation of the payee.—PEALE v. ADDICKS, Penn., 34 Atl. Rep. 203.
- 89. NEGOTIABLE INSTRUMENT—Promissery Note—Collateral.—Where the maker of a note gives to the bank which discounts it a mortgage as collateral security, on the express condition that it shall not be recorded unless the bank shall thereafter consider it necessary, the failure of the bank to record the mortgage until too late to realize anything thereon will not discharge the accommodation indorser from liability on the note.—ALLENTOWN NAT. BANK V. TREXLER, Penn., 34 Atl. Rep. 195.
- 90. PARTNERSHIP. Where one partner purchases real property with partnership assets, and takes the title thereto in the name of his wife, without the consent of the other partner, a trust results to the partnership and its creditors.—CLAFLIN V. AMBROSE, Fla., 19 South. Rep. 628.
- 91. PRINCIPAL AND SURETY—Release of Surety.—In an action against B and two others on a note, it appeared that such note was held by plaintiff as collateral security, and that B paid one-third of the amount for which it was security, and offered to pay the balance; but plaintiff refused to accept it, because he did not want the comakers sued: Held that B was released from liability to plaintiff on such comakers subsequently becoming insolvent.—O'CONOR v. MORSE, Cal., 44 Pac. Rep. 305.
- 92. PRINCIPAL AND SURBITY—Sureties on Official Bond.

 —Under Rev. St. pars. 3078, 3081, providing that all official bonds shall be joint and several, and authorizing suit thereon against all or any of the obligors, the liability of the sureties on a bond given by a county treasurer for the faithful performance of his duties being several, and the liability of the treasurer being fixed by operation of law, the mere failure of the treasurer to sign the bond as principal does not relieve the sureties from liability.—PIMA COUNTY V. SNYDER, Ariz., 44 Pac. Rep. 297.
- 94. PRINCIPAL AND SURBTY—Sureties Parol Agreement.—A parol agreement between two sureties on an official bond that one should be liable for one-third, and the other for two-thirds, of the penalty, in case of default by the principal, is an original undertaking, not within the statutes of frauds.—Rose v. Wollenberg, Oreg., 44 Pac. Rep. 382.
- 94. PUBLIC LANDS—Railroad Right of Way.—A license by a railroad company to cultivate a portion of a grant for its right of way, on condition that the licensee keep the same clear of combustible materials and maintain lawful fences thereon, is a use of the land by the company.—BURTON V. LAUGHREY, Mont., 44 Pac. Rep. 406.
- 95. RAILEOAD COMPANY—Electric Street Railways.—An electric street railway is not required to have in use the latest improvements devised to prevent collision with vehicles and pedestrians, but only to use reasonable care to avail itself of new inventions and improvements known to it.—RICHMOND RAILWAY & ELECTRIC CO. V. GARTHRIGHT, Va., 24 S. E. Rep. 267.
- 96. RAILROAD COMPANIES Trespasser.—A railroad company was not liable for the death of a trespasser lying on its right of way, near its track, and struck by its train, where the only witnesses of the accident testified that they saw the body at a sufficient distance for the train to be stopped, but thought it was an old tie, or section hand's coat, and the engineer also testified that he did not discover that it was a human be-

ing till so near it that he could not stop the train in time to avoid the accident.—TUCKER'S ADM'R V. NOR-FOLK & W. R. Co., Va., 24 S. E. Rep. 229.

- 97. RAILROAD COMPANY—Liability for Fires.—A railroad company that negligently permits inflammable matter to accumulate on its right of way, which, being ignited from its engines, communicates fires to-adjoining property, is liable for the damages resulting, though it exercised the highest degree of care in the construction and operation of its engines.—New York, P. & N. R. Co. v. Thomas, Va., 24 S. E. Rep. 264.
- 96. RECEIVERS—Injunction.—Where, in a suit on an injunction bond, it appears that defendants, in the name of the State, instituted the original proceedings against plaintiff as receiver, and joined with him, as codefendant, the toil road of which he was receiver; that the undertaking was executed to him as receiver; and that he was enjoined, as such, from collecting moneys due the insolvent estate—defendants cannot question his appointment or qualification.—WASON v. FRANK, Colo., 44 Pac. Rep. 378.
- 99. RELIGIOUS SOCIETIES—Mechanics' Liens.—When trustees holding the legal title to land for the members of a religious society, and having power, with the consent of the society, to charge the property with debts, cause a church to be creeted on the land, it is presumed, in an action to foreclose a mechanic's lien upon the property for material furnished in the creetion of the church, that the society consented to the erection of the building.—Harrisburg Lumber Co. v. Washburn, Oreg., 44 Pac. Rep. 390.
- 100. REVIVOR OF JUDGMENTS—Scire Facias Limitation of Actions.—In Pennsylvania scire facias to revive a judgment is held to be a substitute for an action of debt elsewhere, and the judgment is quod recurperet, instead of mere award of execution: Held, that a judgment so revived in Pennsylvania, without service or appearance, has no binding force as against a defendant who resides in another State.—OWENS v. McCLOSKEY, U. S. S. C., 16 S. C. Rep. 693.
- 101. SALE—Conditional Sales—Warranty.—In the sale of chattels by the manufacturer for specific uses, an implied warranty arises that the article is fit for the use intended. In the sale of chattels without express warranty and without fraud, caveat emptor applies, and there is no implied warranty. If the sale be by description, without opportunity for inspection, the description must be met.—WHITE v. OAKES, Me., 34 Atl. Rep. 175.

102. SALE — Partnership — Rescission.—It is the duty of the owner of a going business, whose value consists in part of good will, who proposes to sell an interest therein to an incoming partner, to make a full, fair, and complete disclosure to the purchaser of all matters tending to effect the value of the good will.—POWELL V. CASH, N. J., 34 Atl. Rep. 131.

103. SLANDER OF TITLE — Evidence.—In an action for slander of title, special findings that plaintiff was negotiating a trade of land worth \$1,000 to a third person for \$1,200; that defendant, on inquiry, falsely and maliciously told such third person that he claimed a lien on the land, and that he would give him trouble if he traded, as he was about to sue for it; that he had no lien; and that such statements prevented the completion of the trade—warrant a recovery of the \$200 lost by the non-completion of the trade.—MAY V. ANDERSON, Ind., 42 N. E. Rep. 946.

104. TELEPHONE COMPANIES — Location of Line in Highway.—Where a telephone company, with right of eminent domain, and authorized by law to maintain its poles and wires through a public highway of a city, is required by a city ordinance to remove its poles and wires from the street, and place them on the sidewalk, it will not be liable in trespass to owners of property abutting on the street for injuries to trees in front of their property, caused by its servants cutting and trimming them in performing the work, though the servants cut and trim them more than is necessary.—

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. V. FRANCIS, Ala., 19 South. Rep. 1.

106. TRUST DEED—Construction.—A deed recited that the conveyance was in trust for D during her life, and at her death to be held in trust for her husband during his life, should he survive her, free from his debts, and at his death to be equally divided among all D's children, and that D should have full control of the land, rents, and profits, to use as she deemed best for her sole benefit, free from all control whatsoever; the trustee "to have and to hold the said premises in trust during the term of the joint lives of said D and" her husband "during their natural lives, then to go absolutely to the children of the said D absolutely, share and share alike:" Held, that D's children took a fee title.—HUNT V. NOLEN, S. Car., 24 S. E. Rep. 310.

106. TRUSTS — Principal or Income.—Land which testator was in possession of as a purchaser at a mortgage sale was devised in trust to pay the income to certain beneficiaries. The mortgagor, after testator's death, obtained a decree entitling him to redeem on payment of a certain sum to the mortgagee. In the adjustment between the trustee and the mortgagee the trustee was paid the purchase price paid by his decedent, with interest: Held, that the interest constituted part of the principal of the trust fund, and not income, so as to entitle the beneficiaries thereto.—SLOCUM V. AMES, R. I., 54 Atl. Rep. 152.

107. VENDOR AND PURCHASER.—Decedent contracted to purchase from the estate of her deceased husband certain land in which she had a dower interest, the contract providing that, on failure of the vendee to pay the balance of the price within a certain time, the purchase money paid should be forfeited, and the vendor should have authority to resell the land, the vendee to be liable for any deficiency on such resale: Held, that the death of the vendee did not relieve her estate from liability for the full amount of the price unpaid.

—IN RE REIGELMAN'S ESTATE, Penn., 34 Atl. Rep. 120.

106. VENDOR AND PURCHASER- Misrepresentations by Vendor.—A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity or in ignorance of its falsity, when from his special means of information he ought to have known it; and thereby induces his vendee to purchase to his damage, is liable in an action at law for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser.—MOLINE PLOW CO. OF KANSAS CITY, MO., V. CARSON, U. S. C. C. of App., 72 Fed. Rep. 387.

109. WATERS — Percolating Waters.—Percolating waters belong absolutely to the owner of the soil, and his title thereto is not affected by the fact that an impervious strata beneath, and on which the porous strata containing the water rests in close contact, diverts the course of percolation, to and over adjoining land, into a natural stream.—GOULD v. EATON, Cal., 44 Pac. Rep. 319.

110. WILLS-Effect as Conveyance—Foreign Probate.

—When a will is executed in a foreign country, and is proven, as required by section 3012 of the Tennessee Code, before a foreign court having the requisite probate jurisdiction, the record of the probate affirmatively showing the probate by such proof, and authenticated as provided in section 4550, it will pass title to real estate in Tennesse, as a common-law conveyance, without registration.—CURRELL V. VILLARS, U.S. C. C. (Tenn.), 72 Fed. Rep. 380.

111. WITNESS — Claim against Decedent's Estate.—Under Code, § 3846, which provides that, where one party to a contract is dead, the other party may testify if any one succeeding to the interest of the deceased testifies adversely in his own interest, plaintiff in an action to enforce against an estate a claim arising under a contract with the deceased is rendered a competent witness by an heir becoming a witness in his own interest.—COPELAND V. COPELAND'S ADM'E., Va., 24 S. E. Rep. 218.

Central Law Journal.

ST. LOUIS, MO., MAY 29, 1896.

Somewhat in line with the question involved in the Durrant murder trial as to the power of the court to control newspaper comments upon judicial proceedings, to which we called attention in our last issue, is the case of In re Hughes recently decided by the Supreme Court of New Mexico. It was there held that the publisher and editor of a newspaper, in which an article is printed expressly attributing improper personal and political motives to a court in the institution of a disbarment proceeding then pending, may be summarily punished for contempt. All the judges concur in the view that the publication of the attack upon the court constituted s contempt. The ground upon which the conclusion of the court is predicated is, as stated by the court, that "parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or popular What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence or control judicial action? Days and sometimes weeks are spent in the endeavor to secure an impartial jury for the trial of a case; and, when selected, it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved, so that the mind of the juror may not, perchance, be unduly biased or prejudiced in reference either to the litigants or to the matters upon trial. But if an editor, a litigant, or those in sympathy with him, should be permitted, through the medium of the press, by promises or threats, invective sarcasm or denunciation. to influence the result of the trial, all the care taken in the selection of the jury, as well as the precaution used to confine their attention at the trial solely to the issues involved, will have been expended in vain." The court call attention to the cases of Myers v. State (Ohio), 22 N. E. Rep. 43 and People v. Stapleton, 33 Pac. Rep. 167.

The question of contempt of courts has lately received attention in the United States

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Senate, a bill having been introduced which defines and regulates the punishment for contempt of the federal courts, doubtless prompted by the agitation in reference to the Pullman strike litigation and what is known as the Debs case. The proposed bill divides contempts into two general classes, respectively known as direct and indirect contempts. It defines direct contempts as those committed during the sitting of a court, or a judge at chambers, in its or his presence, and provides for the immediate and summary punishment of such offenses without written accusation. This would enable a court to enforce order and preserve its dignity from direct assault. All other contempts are classed as indirect contempts. such latter class including disobedience out of court to mandates of the court, as in the Pullman strike cases. The provision for the punishment of indirect contempts is as follows:

"That upon the return of an officer or process or an affidavit duly filed showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person be arrested and brought before the court, and thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt, shall be filed and the accused required to answer the same by an order fixing the time and place for hearing; and the court may on proper showing extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer, or in case of refusal to answer, the court may proceed to hear the accusation upon such testimony as may be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and he shall be confronted with the witnesses against him; but such trial shall be by the court, or in its discretion upon application by the accused, a trial by jury may be had as in any criminal case. If found guilty, judgment shall be entered accordingly prescribing the punishment." Such regulation seems to be entirely reasonable and fair and meets the most serious criticism provoked by the Debs case, by providing for trial by jury and the formalities of procedure and pleading.

NOTES OF RECENT DECISIONS.

ELECTION AND VOTERS — BALLOT — PAROL EVIDENCE.—The Supreme Court of Wisconsin holds, in State v. Steinborn, 66 N. W. Rep. 798, that where there are two men in a town bearing the same name, usually designated "C., Sr.," and "C., Jr.," and both are eligible to a certain office for which the senior was a candidate, parol evidence is inadmissible, in an action to contest the election, to show that certain ballots bearing the name "C., Jr.," were in fact intended for "C., Sr." They say that parol evidence to show the intention of the voter is receivable on the same general ground and for the same general purpose as parol evidence to explain written instruments is received. It is not receivable to explain what is already plain on the face of the instrument, and in no need of explanation; nor to contradict or vary the instrument. To find that these voters whose ballots read for C. H. Cremer, Jr., voted for C. H. Cremer, Sr., is in direct contradiction of the definite and unambiguous evidence of the ballots themselves. These ballots, they conclude, cannot be counted for the relator, unless it can be found, on competent evidence, that it was his name which was on the ballot when it was cast. The intention of the voter cannot be proved to contradict the ballot, nor in opposition to the paper ballot which he has deposited in the ballot box. A ballot which is unambiguous cannot be varied by parol proof, nor can it be proved that the voter intended to vote for one man when his ballot was cast for another. McCrary, Elect. (2d ed.) § 407; Cooley, Const. Lim. 611; People v. Seaman, 5 Denio, 409; People v. Pease, 27 N. Y. 45, 84. It is plain that there was no competent evidence to show that these contested ballots were cast for the relator. They were unambiguous, and it was not competent to vary their plain import by parol evidence; and without them the relator was not elected.

CONTRACT — ILLEGALITY — RECOVERY OF CONSIDERATION — WAGER.—The case of Thornhill v. O'Rear, 19 South. Rep. 382, presents a curious state of facts involving the application of the doctrine as to illegal contracts. It appeared that on a certain Sunday plaintiff said that "he believed he would rafile off his dwelling house and lot."

Defendant said he would take all the chances. and the parties thereupon contracted for the transfer of the property the next day, and put up their watches in the hands of another as a pledge to stand by the proposition. Plaintiff defaulted, and permitted his watch the next day to be delivered to defendant as a forfeit. Held, that the contract became executed by the delivery of the watches, and being void under the Sunday law (Code, § 1749), and the parties being in pari delicto, plaintiff could not recover his watch in detinue, and that in such case the putting up of the watches was only a pledge of the good faith of the parties to abide the terms of the agreement, and was not a wager. The court says:

All the authorities hold, if money or property be placed in the hands of a stakeholder, to abide the result of a bet, or as a forfeit to bind parties to an illegal contract while it remains in his hands, it may be arrested by the bailor before or after the happening of the event upon which the money is to be paid or the forfeiture depends. While in his hands, it is in transitu. He is not a party to the illegal contract, and upon the revocation of his authority, the money or property remains in his hands as a naked trustee for the parties who placed it there. Wood v. Duncan, 9 Port. (Ala.) 227; Shackleford v. Ward, 3 Ala. 87; Lewis v. Bruton, 74 Ala. 317; Ball v. Gilbert, 12 Metc. (Mass.) 403; Fisher v. Hildreth, 117 Mass. 558; Vischer v. Yates, 11 Johns. 25. But, as was announced in Mc-Kee v. Manice, 11 Cush. 358, "the law seems to have been held, by the authorities, that if after the event is determined, the loser pays the money to the winner, or permits by his assent or silence, the stakeholder, into whose hands the same has been placed, to pay it over to the winner, the loser cannot recover back the same. In such case, the principle is applied, that the law will refuse its aid to restore the money to the loser, both parties being in pari delicto." In Vischer v. Yates, 11 Johns. 25, it was said by Kent, C. J.: "If, after the determination of the event against the plaintiff, the money has been actually paid over to the winner with the plaintiff's consent, or perhaps without notice to the defendant to the contrary, the plaintiff could not have sustained an action against the winner to recover back the deposit;" citing Howson v. Hancock, 8 Term R. 575, in which Lord Keynon said, that there is no case to be found where an action has been maintained to recover the money back again. All the decisions of this court are in line with these authorities, holding, as to suits upon executory contracts founded upon immoral or illegal considerations, they may always be defended on the ground of their invalidity; but that when executed, unless controlled by statute to the contrary, the law will not interfere, at the instance of either party to undo that which it was originally unlawful to do, for the reason, that being equally at fault, the law will help neither. Long v. Railway Co., 91 Ala. 522, 8 South. Rep. 706, and authorities there collected.

Section 1742 of our Code provides, that all contracts founded in whole or in part on a gambling consideration are void; and any person who has paid any money or delivered anything of value, lost upon any game or wager, may recover such money, thing or its

value, by action commenced within six months from the time of such payment or delivery. If the case before us falls within the influence of that statute, it would be an exception to the rule as to executed contracts to which we have just referred. Samuels v. Ainsworth, 18 Ala. 366. The facts are, that on Sunday morning, being in the presence of defendant and others, when the subject of raffling came up, the plaintiff stated, that "he believed he would raffle off his dwelling house and lot by chances," stating the proposed scheme, the chances to be 500, at a specified valuation. The defendant said he would take all the chances, to which plaintiff assented, and said he would make out a deed to the house and lot the next day, and deliver it to defendant, when he could pay him the money for it. Both parties agreed at the same time, to put up their watches in the hands of a stakeholder, as a forfeit, to stand by the proposition as made and accepted, which was done. This statement of facts shows that all the elements of chance were eliminated from the contract, which resulted in being nothing more than an offer by the one party to sell the house and lot at a certain price, to be arrived at by calculation, and the acceptance of the offer by the other. There was nothing unlawful in this offer, as made and accepted, if it had been done on any other day than Sunday, but having been made on that day, it was void, and incapable of enforcement. Code, \$ 1749.

But this suit arises outside the contract of the sale and purchase of the house and lot, namely, out of the transaction of putting up the watches to secure the fulfillment of this contract. It is said this was a bet or wager, which brings the case under the influence of said section 1742 of the Code. As to this, let us see. A wager is nothing more than a bet, "by which two parties agree that a certain sum of money, or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." 2 Bouy. Dict. "Wager." The transaction of putting up the watches was not a wager. It was only a pledge of the good faith of the parties to abide the terms of the agreement, in the shape of liquidated damages for failure of either to perform his agreement. Keeble v. Keeble, 85 Ala. 552, 5 South. Rep. 149. If the transaction had occurred on any day but Sunday, the idea of gambling, perhaps, would not have occurred to any one. This suit, it will be borne in mind, is not on the contract. It is in detinue by the plaintiff, who receded from the bargain, against the defendant, who stood by it, and to whom plaintiff's watch, put up as a forfeit, had been delivered. The evidence of plaintiff tended to show, that on Sunday, the day of the transaction, shortly after it occurred, he notified the stakeholder, that he would not stand by the proposition, and not to deliver the watch to defendant; that he demanded the watch from the stakeholder, before he delivered it to defendant, and did not authorize him to deliver it to him; and that on Monday or Tuesday following, plaintiff told defendant he would not abide the proposition made on Sunday before, and wanted his watch, which defendant refused to deliver to him. On the part of defendant it was shown, that plaintiff did not notify him of his intention not to abide the transaction of Sunday, until after the watch had been delivered to him by the stakeholder, and further, that the next day, Monday, plaintiff told the stakeholder, it was defendant's watch, and to turn it over to him, which he accordingly did, and that after he had turned it over to de. fendant, plaintiff told the stakeholder not to give it to defendant, when he notified him, that he had already

turned it over to him. The attempt of plaintiff here is, to recover this property, because the agreement of forfeiture was entered into on Sunday. It could not, as we have shown, have reference to any illegality growing out of the proposed raffle, which was afterwards abandoned. The condition on which the forfeit was to be delivered to defendant, had taken place. No delivery was made on Sunday, but on Monday or Tuesday following, and thereby, as between the parties to the transaction, it became executed. Whatever element of illegality, if any, there may have been in putting up the forfeiture, in the beginning, on Sunday, the plaintiff was as 'much to blame for, as defendant, and if the watch was delivered according to the terms of the agreement of forfeiture, that agreement became executed, and plaintiff, in a suit in detinue for the property itself, is in no condition to ask the law to reclaim it from the predicament in which he contributed to place it. It is only in suits on contracts, void under the statute for having been made on Sunday, that the defense of invalidity for having been executed on that day, can be made, if the contract remains unexecuted. If one buy a horse on Sunday, and it is delivered and paid for, it could hardly be contended, that either party could sue the other, the one for the horse, or the other for the mouey he paid for it, because the transaction occurred on Sunday. Black v. Oliver, 1 Ala. 450; Windham v. Childress, 7 Ala. 357; Walker v. Gregory, 36 Ala. 184; Morris v. Hall, 41 Ala. 536; Long v. Railway Co., 91 Ala. 522, 8 South. Rep. 706. If this suit had been brought in proper form against the stakeholder, and the proof showed that he was notified not to deliver the watch before he did so, a case different from the one we now have, would be presented.

It follows from what we have said, that under the evidence in this case, the plaintiff was not entitled to the general charge as requested. Nor was there any error, of which plaintiff can complain, in giving those charges requested for defendant. Affirmed.

PRINCIPAL AND SURETY-RIGHTS OF SURE-TIES-IMPLIED PROMISE.-The Supreme Court of Missouri decides, in Gay v. Murphy, 34 S. W. Rep. 1091, that the recital in a bond 91%. /. given by a contractor to secure the perform- 47 C. L.E. 69. ance of a contract, that the bond is executed by him as principal and others as sureties, is an implied promise that the principal will sign the bond before delivery to the obligee: and in default of such signature the bond is void as to the sureties, though by its terms it is joint and several. The court says:

At the hearing before the referee, defendants admitted signing the bond, but denied its delivery, or that any person was authorized to deliver it for them until it had been signed by the principal therein

It is contended by plaintiff that the bond is prima facie valid and binding on those who signed it, though not signed by the principal, and as it is found in the possession of the obligees, if for any reason defendants are not bound, the burden of showing that they are not rests upon them. Upon these questions the authorities are in much conflict and irreconcilable. The following authorities hold that an official bond, or a bond required by statute, not signed by the prin-



cipal, when purporting to be executed by him, is prima facie invalid as to the sureties: Bunn v. Jetmore, 70 Mo. 228; City and County of Sacramento v. Dunlap, 14 Cal. 421; Johnston v. Kimball Tp., 89 Mich. 187; Wood v. Washburn, 2 Pick. 24; Russell v. Annable, 109 Mass. 72; Vulcanite Co. v. Bacon, 151 Mass. 460, 24 N. E. Rep. 404; Green v. Kindy, 43 Mich. 279, 5 N. W. Rep. 297; Ferry v. Burchard, 21 Conn. 597; Curtis v. Moss, 2 Rob. (La.) 367; State v. Austin, 35 Minn. 51, 26 N. W. Rep. 906; Board v. Sweeney (S. D.), 48 N. W. Rep. 302; Bean v. Parker, 17 Mass. 591; State v. Austin, 35 Minn. 51, 26 N. W. Rep. 906; Martin v. Hornsby (Minn.), 56 N. W. Rep. 751. Under such circumstances the presumption is that each one of the sureties signed the bond upon the understanding that the others named as obligors, and especially the principal, would also sign it. Johnston v. Kimball Tp., supra; Wells v. Dill, 1 Mart. (N. S.) 592. In City and County of Sacramento v. Dunlap, supra, the court, speaking through Justice Field, said: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports, on its face, to be the bond of the three. Some one must have written his signature first, but it is to be presumed upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete, and without binding obligation on either." It is also said in that case that "the instrument in this case is, in form, a joint bond only, and not joint and several, and in this respect differs materially from the bonds in the cases of Parker v. Bradley, 2 Hill, 584; Cutter v. Whittemore, 10 Mass. 450; and State v. Bowman, 10 Ohio, 445." But in People v. Hartley, 21 Cal. 585, which was also a suit on a joint bond, the court cites with approval Bean v. Parker, supra, and Wood v. Washburn, supra. The bond under consideration is, like the bonds in Bunn v. Jetmore, supra, and Russell v. Annable, supra, joint and several; but as was said in Board v. Sweeney, supra, "the decisions are placed upon the broad doctrine that the instrument, as delivered, is an incomplete and imperfect instrument, and is not the contract contemplated by the parties, or that the sureties understood they were making when they affixed their signatures to the instrument." It was said in Wood v. Washburn, supra: "The instrument is incomplete without the signature of each partner, or proof that the signature affixed [firm name] had the assent and sanction of each of them. The sureties on a bond are not holden if the instrument is not executed by the person whose name is stated as principal therein. It should be executed by all the intended parties." It is held in Ward v. Churn, 18 Grat. 801; Williams v. Springs, 7 Ired. 384; Blume v. Bowman, 2 Ired. 338; Chandler v. Temple, 4 Cush. 285; Grim v. School Directors, 51 Pa. St. 220that the possession of such a bond by the obligee is prima facie evidence of its delivery by the persons who have signed it, and the burden is on them to show that it was not to be delivered until signed by the principal. As holding that such a bond, when joint and several, is binding on all who sign it, may be cited Loew v. Stocker, 68 Pa. St. 226; Woodman v. Calkins (Mont.), 34 Pac. Rep. 187; Miller v. Tunis, 10 U. C. C. P. 423; State v. Bowman, 10 Ohio, 445; Johnson v. Johnson, 31 Ohio St. 131; Douglass Co. v. Bardon, 79 Wis. 641, 48 N. W. Rep. 969; Trustees v. Sheik, 119 Ill. 579, 8 N. E. Rep. 189; State v. Peck, 53 Me. 284; Wild Cat Branch v. Ball, 45 Ind. 213; Cooper

v. Evans, 36 Law J. Ch. 431. With respect to official and other statutory bonds, which are in the one instance required by statute to be executed by the officer, and in the other to be given by the principal in the bond, the weight of authority is in accord with the ruling of this court in the Jetmore Case; that is, if the name of the principal is called for in the bond, and it is not signed by him, it is not only void as to him, but as to all who sign it as sureties, and it makes no difference whether it be in form joint or several; and, if the obligee would hold them liable on it, he must show that they consented to be bound without the signature of the principal. When there is no principal, in such case, there is no surety. The rule is different when the bond is signed by the principal, and is not signed by one of the sureties named in the bond. In such circumstances the bond is prima facie binding on all who sign it. And, if those who sign it would avoid responsibility thereon, the burden rests upon them of showing that at the time of its execution it was agreed that the bond should not be delivered as their deed until all persons named in the bond as sureties had executed it. State v. Sandusky, 46 Mo. 377; Grim v. School Directors, 51 Pa. St. 219; Blume v. Bowman, 2 Ired. 338; Ward v. Churn, supra; Towns v. Kellett, 11 Ga. 286; Chandler v. Temple, supra; Bank v. Ridgely, 1 Har. & G. 324; Pawling v. U. S., 4 Cranch. 219; Fletcher v. Austin, 11 Vt. 447; Whitaker v. Richards, 134 Pa. St. 191, 19 Atl. Rep. 501. In State v. Potter, 63 Mo. 212, after an able and elaborate review of all the authorities, Sherwood, J., writing the opinion of the court, held that an agreement of a surety with his principal that the latter shall not deliver a bond till the signature of another is procured as a cosurety will not relieve the surety of his liability on the bond, although the cosurety is not obtained, where there is nothing on the face of the bond, or in attending circumstances, to apprise the taker that such further signature was called for in order to complete the instrument. See, also, Dair v. U. S., 16 Wall. 1; State v. Baker, 64 Mo. 167; State v. Modrel, 69 Mo. 152; State v. Hewitt, 72 Mo. 603; Wolff v. Schaeffer, 74 Mo. 154. If, then, the bond sued on, being, as we hold, a common-law bond (State v. Thompson, 49 Mo. 188), is to be governed by the same rules of law that official and statutory bonds are, it is prima facie invalid, and the referee did not err in sustaining the objection to its admission in evidence. And it makes no possible difference, we think, that it is a joint and several bond, as, under the Missouri statute (section 2384, Rev. St. 1889), all contracts which by the common law are joint, only, are to be construed to be joint and several; and, while such a distinction has been made by courts of high authority (City and County of Sacramento v. Dunlap, supra; Parker v. Bradley, supra; Cutter v. Whittemore, supra; State v. Bowman, supra; Kurtz v. Forquer, 94 Cal. 91, 29 Pac. Rep. 413), it has never been made by this court. The authorities cited on the question of the invalidity of an official or statutory bond not signed by the principal named in such a bond make no distinction between that class of bonds and a common-law bond, but there are authorities which make such a distinction (State v. Bowman, supra); a principal which we do not controvert when the bond shows that it is the intention of the sureties to bind themselves regardless of the fact whether the principal signs it or not. Nothing of the kind appears from the bond in this case. On the contrary, it plainly shows that it was to be signed by the principal in order to make it a complete instrument. By the insertion of his name in the bond as principal, there

was an implied promise to the sureties that this would be done before it was delivered; and the obligees could not shut their eyes to its imperfect execution, thus patent, and hold the sureties liable on the bond, without showing by evidence that they intended to be bound in the condition that it was in when they signed it, in any event, whether signed by the principal or not. As it logically follows from the conclusion reached that the judgment must be affirmed, it becomes unnecessary to pass upon other questions raised by defendants. The judgment is affirmed.

DEATH BY WRONGFUL ACT—BASTARD—"CHILD."—The Supreme Court of Indiana decides, in McDonald v. Pittsburg, C. C. & St. L. Ry. Co., that a bastard is not a child, within the meaning of statute providing that a father may maintain an action for the death of a child. The court says:

Section 266. Rev. St. 1881 (section 267, Rev. St. 1894), upon which this action is predicated, is as follows: "A father or in case of his death or desertion of his family or imprisonment, the mother may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward." As the right to recover damages for the death of a human being is purely statutory, the statute must be strictly construed; and, before appellant can recover, he must bring himself clearly within its terms. When the statute specifies who may bring such action, only those persons named can maintain it. If no such person exists, then no recovery can be had. Thornburg v. Strawboard Co. (Ind. Sup.), 40 N. E. Rep. 1062, and cases cited. At common law a bastard has no father, and was considered the son of nobody. He was sometimes called "filius nillius" and sometimes "filius populi." 1 Bl. Comm. 458, 459; 2 Kent. Comm. 212; Simmons v. Bull, 21 Ala., 501, 56 Am. Dec. 257, and note 258; Blacklaws v. Milne, 82 Ill. 505; Marshall v. Railroad Co. (Mo. Sup.), 25 S. W. Rep. 179. It is said in Bl. Comm. 459: "A bastard cannot be heir to any one, neither can he have heirs, but of his own body; for, being nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived." It is a rule of construction that prima facie the word "child" or "children" when used either in a statute or will, means legitimate child or children; that is, that bastards are not within the meaning of the term "child" or "children." Thornburg v. Strawboard Co., supra; Marshall v. Railroad Co., supra; Id. 46 Fed. Rep. 269, 273; Dickinson v. Railway Co., 2 Hurl. & C. 735; Harkins v. Railroad Co., 15 Phila. 286; Gibson v. Railway Co., 2 Ont. 658; Good v. Towns, 56 Vt. 410; Blacklaws v. Milne, supra; Dorin v. Dorin, 13 Moak, Eng. R. 90 L. R. 7 H. L. 568; Hill v. Crook, 7 Mo 1k, Eng. R. 1 L. R. 6 H. L. 265; Barnes v. Greenzebach, 1 Edw. Ch. 41; Wait, Act. & Def. 49; 3 Am. & Eng. Enc. Law, 229, and notes on pages 230-233; 11 Am. & Eng. Enc. Law, 770; 1 Beven, Neg. 250; Patt. Ry. Acc. Law, p. 492, § 400; Tiff. Death Wrong. Act, § 85; 1 Shear. & R. Neg., § 13. Dickinson v. Railway Co., supra, was an action brought under St. 9 & 10 Vict. ch. 93, known as "Lord Campbell's Act," passed in 1846. That act provides "that every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been caused." Pollock, C. B., said: "But, beyond all doubt, in the construction of the act of parliament the word 'child' means legitimate child only." This case is cited and approved in Gibson v. Railway Co., supra. Marshall v. Railroad Co., supra, was an action brought to recover damages for the death of another, under section 4425, Rev. St. Mo. 1889. That part of the statute providing who should sue and recover when the deceased was a minor was as follows: "Third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, . . . then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor." The court held that the father of an illegitimate child did not come within the meaning of the act, and could not maintain such action. In Harkins v. Railroad Co., supra, it was held, under the statute of Pennsylvania which enacts that the persons entitled to recover damages for any injury causing death "shall be the husband, widow, children or parents of the deceased and no other relative," did not give any one the right to recover damages for the death of an illegitimate child. The court said "that 'the words 'husband, widow, children or parents of the deceased and no other relative,' had in view the family relation, as constituted and recognized by the law, and that it was not intended to extend the benefits of the act to persons not falling within the legal definition of the enumerated relationships." We think it clear, both upon principle and the authorities cited, that the father of an illegitimate child cannot recover damages for the death of such child, under the provisions of section 266, Rev. St. 1881 (section 267, Rev. St. 1894). The court did not err, therefore, in overruling appellant's demurrer to the answer, or in sustaining appellee's demurrer to the reply. Judgment affirmed.

LIABILITY FOR DEFECTIVE PREM-ISES RESULTING IN INJURIES TO CHILDREN.

I. The General Doctrine Stated.—The owners and occupiers of real property are held by the law, in some respects, to a different standard of liability in respect of injuries to children coming upon their premises, from that under which they stand with respect to adult persons. It is believed that the following propositions may safely be stated to be the law: 1. The owner or occupier of real property stands under the same duty towards children who are expressly or impliedly invited to come upon his premises, in respect of keeping such premises safe, to the end that they will not be injured in so coming, under which he stands toward adult persons. 1 2.

1 Hargreaves v. Deacon, 25 Mich. 1; Gautret v. Egerton, L. R. 2 C. P. 371, 36 L. J. (C. P.) 191, 155 Week. Rep. 638, 16 L. T. (N. S.) 17; Stone v. Jackson, 16 C. B. 199, 32 Eng. Law & Eq. 349; Roulston v. Clark, 3 E. D. Smith, 366; Zoebisch v. Tarbeil, 10 Allen (Mass.), 385; Frost v. Grand Trunk R. Co., 10 Allen (Mass.), 387; Hounsell v. Smyth, 7 C. B. (N. S.) 731, 29 L. J. (C. P.) 203, 8 Week. Rep. 227; Bolch v.

As a general rule, he is not bound to keep his premises safe for the benefit of the trespassing children of his neighbors, or for the benefit of children who occupy no more favorable position than that of bare licensees.2 3. A well grounded exception to the foregoing principles is that one who artificially brings or creates upon his own premises any dangerous thing which from its nature has a tendency to attract the childish instincts of children to play with it, is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they be protected from injury while so playing with it or coming in its vicinity. Things of this kind frequently pass under the designation of attractive nuisances.8

II. General Rule which Exonerates the Landowner.—The general rule undoubtedly is, that the owner or occupier of land is not bound to take pains to prepare his premises in any particular way, to the end of promoting the safety of children who may come thereon as trespassers or as bare licensees; but that, as in the case of adults, they take the premises as they find them, and if they

Smith, 7 Hurl. & N. 736, 8 Jur. (N. S.) 197, 31 L. J. (Exch.) 201, 10 Week. Rep. 387, 6 L. T. (N. S.) 158; Larmore v. Crown Point Iron Co., 101 N. Y. 397, 54 Am. Rep. 718; Ratte v. Dawson, 50 Minn. 450, 52 N. W. Rep. 965; Stevens v. Nichols, 155 Mass. 452, 15 L. R. A. 459, 29 N. E. Rep. 1150; Sterger v. Van Sicklen, 132 N. Y. 499, 44 N. Y. St. Rep. 863, 45 Alb. L. J. 494, 30 N. E. Rep. 987; Oyshterbank v. Gardner, 45 N. Y. Super. 265; Frost v. Eastern R. Co., 64 N. H. 220, 9 Atl. Rep. 790, 4 N. Eug. Rep. 527; Morgan v. Penusylvania R. Co., 19 Blatchf. (U. S.) 239; Reardon v. Thompson, 149 Mass. 267, 21 N. E. Rep. 369; Trash v. Shotwell, 41 Minn. 66, 42 N. W. Rep. 699; Cusick v. Adams, 115 N. Y. 55, 40 Alb. L. J. 48, 23 N. Y. St. Rep. 548, 21 N. E. Rep. 673; Campbell v. Lungsford, 83 Ala. 512, 3 South. Rep. 522; Schmidt v. Bauer, 80 Cal. 565, 5 L. R. A. 580, 22 Pac. Rep. 256; Bedell v. Berkley, 76 Mich. 435, 43 N. W. Rep. 308; Latry v. Columbus, etc. R. Co., 79 Ind. 323, 41 Am. Rep. 572; Lackat v. Lutz, 94 Ky. 287, 15 Ky. L. Rep. 75, 22 S. W. Rep. 218; Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. Rep. 973, 20 L. R. A. 714, 37 Cent. L. J. 216; Plummer v. Dill, 156 Mass. 426, 81 N. E. Rep. 128; Johnson v. Ramberg, 49 Minn. 341, 51 N. W. Rep. 1043; Flannigan v. American Glucose Co., 11 N. Y. Supp. 688, 33 N. Y. S. R. 867; Matthews v. Bonsell, 21 N. J. L. 30, 16 Atl. Rep. 195; Manning v. Chesapeake, etc., R. Co. (W. Va.), 15 S. E. Rep. 81, 16 L. R. A. 271, 12 Rail. & Corp. L. J. 21; Cusick v. Adams, 115 N. Y. 55; Evansville, etc. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783.

² See the preceding cases, and also the next paragraph.

are hurt by reason of the condition in which they find them, this does not give a right to an action for damages. It was so held where the custodian of a child took it upon a vacant residence lot of the defendant for its recreation and pleasure, and when there it was killed by the accidental caving in of an unfenced sand pit;5 where a boy nine years old was killed by the caving in of a sand pit, which the defendant dug near a school house and partly within the public highway; where a boy of eight years was drowned in an unguarded pool of water, left after a heavy storm on the right of way of a railway company in a corner of its embankment, while climbing over the embankment without right or permission; where a boy eight years old was drowned in an unguarded well, left upon an abandoned and uninclosed brick yard at a considerable distance from the public highway, while fishing in it by daylight;8 where a boy nine years of age fell into an unfenced and unguarded pond of water existing on the premises of the defendant and was drowned; where a boy of tender years fell into a cistern which had been left uncovered on the premises of the defendant, not immediately adjoining the highway, and was drowned;10 where a street car company left its cars standing for several days in the public street of a city, and a child, while playing about them with other children, was injured by an unfastened brake; 11 where a railway company left a number of unfastened dump cars upon a side track, in a place frequented by the children of the neighborhood, and a boy. pushing the cars with other children, fell off and was run over;12 where, in like manner, a boy was injured while playing with other boys upon an unguarded and unfastened rail-

⁶ Fay v. Kent, 55 Vt. 557. The writer believes that this case was not well decided.

⁸ Post, pars. 3, 4, 5.

⁴ Cases first above cited.

⁵ Ratte v. Dawson, 50 Minn. 450, 52 N. W. Rep. 965. See, also, Fink v. Missouri Furnace Co., 83 Mo. 276. reversing 10 Mo. App. 61.

⁷ Charlebois v. Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. Rep. 812.

⁸ Gillespie v. McGowan, 100 Pa. St. 144, 45 Am. Rep. 365.

⁹ Klix v. Nieman, 68 Wis. 271, 82 N. W. Rep. 223.

¹⁰ Hargraves v. Deacon, 25 Mich. 1. See, also. Gramlich v. Wurst, 86 Pa. St. 74.

¹¹ Gay v. Essex Electric Street R. S. Co., 159 Mass. 238, 34 N. E. Rep. 186.

¹² O'Connors v. Illinois C. R. Co, 44 La. Ann. 889, 10 South. Rep. 678.

way hand car;18 where a railroad company had been accustomed for several years to leave cars fastened by brakes, on a side track of somewhat steep grades, and a boy, five vears old, unloosened the brakes, fell or jumped off, and was killed; 14 where a boy six or seven years old got upon a hoisting apparatus hanging over the street from the side of a mill, for the purpose of riding upon it, against the warning of a companion, and fell off, and was killed; 15 where a child lost its life by falling into a pool of hot water on the premises of a distilling company, it not appearing that the place was especially attractive to children or that they were in the habit of resorting there to play.16 For stronger reasons, no liability will be incurred by any one from the mere fact that he fails to drive children away from vacant grounds, of which it is not shown that he is either the owner, the occupier, or the care-taker.17

III. Decisions Holding the Landowner Liable.—We now come to a class of decisions which hold the landowner liable in damages, in the case of children injured by dangerous things suffered to exist unguarded on his premises, where they are accustomed to come with or without license. These decisions proceed on one or the other of two grounds: 1. That where the owner or occupier of grounds brings or artificially creates something thereon which, from its nature, is especially attractive to children, and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take

reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. 2. That, although the dangerous thing may not be what is termed an attractive nuisance -that is to say, may not have a special attraction for children by reason of their childish instincts, yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it so as to prevent injury.18 In respect of the first class of cases, that of attractive nuisances, it is to be observed that it would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, 19 and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life.²⁰ In view of what has preceded, the author regrets that he cannot say, as he said in the first edition of his work on "Negligence," that such is not the law. He limits himself to expressing the opinion that it ought to be the law, and to citing with approval those decisions which hold that it is the law. In a case where this view was taken, it appeared that there was, adjoining a factory, a private alley, which communicated with a public street by a gate which was frequently left open by

employees, though contrary to orders. In

Robinson v. Oregon, etc. R. Co., 7 Utah, 493, 13
 L. R. A. 765, 27 Pac. Rep. 689.

¹⁴ Central Branch Union P. R. Co. v. Henign, 28 Kan. 347.

B Rodgers v. Lees, 12 L. R. A. 216, 140 Pa. 475, 27
 W. N. C. 441, 21 Atl. Rep. 399, 22 Pitts. L. J. (N. S.)
 44 Phila. Leg. Int. 329. Compare Hestonville R. Co.
 v. Connell, 88 Pa. St. 520. And see Moore v. R. Co.
 99 Pa. St. 301, and Oil City, etc. Bridge Co. v. Jackson. 114 Pa. St. 321.

¹⁶ Schmidt v. Kansas City Distilling Co., 90 Mo. 284.

17 Galligan v. Metacomet Man. Co., 143 Mass. 527.

Other similar cases where the defendant has been exonerated are: Gernau v. Oceanic Steam Nav. Co., 50 N. Y. St. Rep. 156, 21 N. Y. Supp. 371. Brechenridge v. Bennett (Pa. C. P.), 7 Kulp, 95. Union Stock Yards, etc. Co. v. Rourke, 10 Ill. App. 474. In a suit for the death of a child drowned in a pond formed in defendant's lot, an ordinance requiring excavations within the city to be inclosed, which appeared to relate to highways, has been held not admissible in evidence. Overholt v. Vieths, 93 Mo. 422, 12 West. 95, 6 S. W. Rep. 74.

¹⁸ Cases proceeding on one or the other of these grounds are Hydraulic Works Co. v. Orr, 83 Pa. St. 332; Birge v. Gardiner, 19 Conn. 507; Railroad Co. v. Stout, 17 Wall. 657, 2 Dill. 294, 1 Cent. L. J. 202, 17 Am. L. Reg. 226; Keffe v. Milwaukee, etc. R. Co., 21 Minn. 207, 2 Cent. L. J. 170; Whirley v. Whitman, 1 Head (Tenn.), 610; Mullaney v. Spence, 15 Abb. Pr. 319. Contra, Hughes v. Macfie, 2 Hurl. & Colt. 744, 10 Jur. (N. S.) 682, 33 L. J. (Exch.) 177, 12 Week. Rep. 315; Mangan v. Attorton, L. R. 1 Exch. 239, 4 Hurl. & Colt. 388.

¹⁹ Townsend v. Wathen, 9 East, 277.

^{20 1} Thomp. Neg. 305, note. And see Union Pac. R. Co. v. McDonald, 152 U. S. 262, 280, where this observation is approved.

this alley, twenty-four feet from the street, was a platform, to be raised and lowered in receiving and shipping goods. This platform, when raised, rested against the wall, and was held up only by its own slight inclination, having no fastening. A child six years old, playing in the street, strayed into the alley, and was killed by the fall of the platform. The lessees of the factory were held liable, the court saying: "Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often left open and exposed to the entries of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind (as well as the maxim, sic utere tuo ut alienum non lædas) must say this cannot be true—that this spot is not so private and secluded as that a man may keep dangerous pits or dead-falls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one (probably a thoughtless boy, in the buoyancy of play) would be led there, and injury would follow; especially, too, when prompted by knowledge that a fastening was needed."21 In another such case, the proprietors of a paper mill propelled by steam, in a sparsely settled portion of the city of Nashville, left two cogwheels geared together outside the wall, twenty inches from the ground, and twenty feet from the street, exposed, unprotected, and constantly in motion. A boy three years of age, playing near this gearing, was caught in it and his leg taken off. Eighteen years afterward, on coming of age, he brought an action for the damages. The jury found for the defendants; but the supreme court reversed the judgment, on the ground that the verdict was against the evidence.22 In still another, the owner of a coal yard had an elevator worked by steam close to the sidewalk. During an intermission of work the sliding door, by which it was commonly shut off from the street, was left open and unguarded, in consequence of which a child

22 Whirley v. Whitman, 1 Head (Tenn.), 610.

got under it and was crushed by the descending car. The question of the defendant's negligence was held to be for a jury.23 In vet another case, which has been much cited, and which goes further than any of the preceding, the defendant set up a gate on his own land, by the side of a lane through which children were accustomed to pass. A child of six or seven years of age, while passing through this lane, took hold of the gate, without the liberty of any one, and shook it, in consequence of which it fell on him, breaking his leg. This case went to a jury, and a verdict for the plaintiff was sustained. In another, the defendants, in possession and control of an unfenced lot, adjoining a public street in a city, stacked a large quantity of lumber in one large and irregular pile, so negligently, that an infant, while playing near it, was killed by one of the timbers falling upon him. It was held that the defendants were liable.25 In another, a complaint which alleged that defendant, by its agents and servants, negligently removed the fences inclosing the premises, and left a privy vault unguarded and uncovered, within ten feet from the sidewalk of a public, traveled street, in consequence of which plaintiff's child, three years and ten months old, lost its life by falling into such vault—was held to state a sufficient cause of action.26 In another case, a mining company left a pile of coal slack, dumped from its mine, near a town where children were in the habit of going, which took fire by spontaneous combustion but which emitted no smoke or steam showing that it was a fire. A child frightened by one of the workmen, having no knowledge of the fire, attempted to run across it and was severely burned. It was held a case for a iurv.27

28 Mullaney v. Spence, 15 App. Pr. (N. S.) 819.

²⁵ Bransom v. Labrot, 81 Ky. 688, 50 Am. Rep. 193.
 Malloy v. Hibernian Sav. & Loan Soc., 79 Cal. 320,

21 Pac. Rep. 525.

"Union Pac. R. Co. v. McDonald, 152 U. S. 25, affirming sub nom; McDonald v. Union P. R. Co., 43
Fed. Rep. 579. Compare McDonald v. Union Pac. R.

³¹ Hydraulic Works Co. v. Orr, 83 Pa. St. 382. Compare Gramlich v. Wurst, 86 Pa. St. 74, where this case is approved.

²⁴ Birge v. Gardiner, 19 Conn. 507. There is, however, an infirmity in this case, consisting in the fact that there was no natural and probable connection between the act of setting a gate in an upright position without firmly securing it from falling, and the injury which actually happened. It would put the proprietors of real estate under an oppressive burdes to make them insurers against remote and improbable injuries to children which may happen while trespassing thereon.

IV. Liability Where the Nuisances are Especially Attractive to Children.—Somewhat outside of the foregoing decisions, is a doctrine to which enlightened and humane courts are more or less tending, to the effect that the owner of any machine or other thing which from its nature is especially attractive to children, who are likely to attempt to play with it in obedience to their childish instincts, and yet which is especially dangerous to them, is under the duty of exercising reasonable care to the end of keeping it fastened, guarded, or protected, so as to prevent them from injuring themselves while playing or coming in contact with it.28 Such machines and dangerous things are often described in the books as attractive nuisances. In the leading case promulgating this doctrine the defendant's servant left his horse and cart unattended in a populous street. The plaintiff, a child seven years old, got upon the cart, in play, and another child made the horse move on while the plaintiff was in the act of getting down from it, in consequence of which the plaintiff was thrown down and had his leg broken. The defendant was held liable, in an action on the case, although the plaintiff was a trespasser, and contributed to the mischief by his own act. It was properly left to the jury to find whether the defendant's servant was guilty of negligence, and if so, whether that negligence caused the injury in question.29 A slight examination of many of the cases cited in a preceding section³⁰ will show that the modern courts have departed from it in numerous instances, especially in favor of railroad companies and other corporations. A moddecision supporting and upholding the doctrine, is to the effect that mill owners who have permitted their uninclosed mill yard, situated in a public place, to be used as a playground by children, who have been accustomed to play upon the pile of furnace ashes which have been for months Co., 35 Fed. Rep. 38, which was the same case on demurrer to the complaint.

28 Lynch v. Nurdin, 1 Ad. & L. (N. S.) 29, 4 Per. & Dav. 672, 5 Jur. 707, printed in full in 2 Thomp. Neg. (1st ed.) p. 1140; O'Malley v. St. Paul, etc. R. Co., 43 Minp. 289, 45 N. W. Rep. 440; Porter v. Anheuser-Busch Brew. Co., 24 Mo. App. 1; Westerfield v. Levis, 43 La. Ann. 63, 9 South. Rep. 52. See, also, Copner v. Pennsylvania Co., 12 Ill. App. 600.

29 Lynch v. Nurdin, 1 Ad. & L. (N. S.) 29, 4 Per. & Dav. 672, 5 Jur. 797, 2 Thomp. Neg. (1st. ed.) p. 1140.

⁵⁰ Ante, II, and the cases there cited.

cold and devoid of danger, are liable in damages to a child injured by the fact of the mill owners making an excavation in this pile of cold ashes and filling it with hot ashes, leaving no traces of the change and giving no proper notice of it.³¹

V. Liabilities of Railway Companies for Injuries to Children by Unguarded and Unfastened Turn-tables.—The doctrine of the preceding section, relating to attractive nuisances, is, if a sound doctrine, peculiarly applicable to that very numerous class of injuries which have happened to children while playing, in obedience to their childish instincts, with unguarded and unfastened railway turn-tables. The great weight of judicial authority is in favor of the conclusion that, if a railway company leaves such a machine unguarded and unfastened in a place where children are likely to come, so that they are attracted to it by their childish instincts, and attempt for their amusement to make a merry-go-round of it, and, while so playing with it, one of them is killed or injured, the railway company must pay damages. 32 Under this doctrine the railway company is not relieved from liability because the turn-table may have been put in motion by a child other than the one who is injured by it.88 Nor is the company relieved from liability, where the turn-table has been secured merely by a latch easily raised, by the fact that its employees have always ordered away children whom they have seen playing with

81 Penso v. McCormich, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. Rep. 156. And see Union Pac. R. Co. v. McDonald, 152 U. S. 262, decided on somewhat similar facts, with an able opinion by Mr. Justice Harlan.

32 Gulf, etc. R. Co. v. Styron, 66 Tex. 421; Houston, etc. R. Co. v. Simpson, 60 Tex. 103; Evansich v. Gulf, etc. R. Co., 57 Tex. 126, 44 Am. Rep. 586; Gulf, etc. R. Co. v. McWhirter, 77 Tex. 356, 14 S. W. Rep. 26; Barrett v. Southern Pac. R. Co., 91 Cal. 226, 27 Pac. Rep. 666, 48 Am. & Eng. R. Cas. 532, 25 Am. St. Rep. 186; Callahan v. Eel River, etc. R. Co., 92 Cal. 89, 28 Pac. Rep. 104; Ferguson v. Columbus, etc. R. Co., 77 Ga. 102; Ilwaco, etc. R. Co. v. Hedrick, 1 Wash. 446, 25 Pac. Rep. 335; Nagel v. Missouri Pac. R. Co., 75 Mo. 653; Kansas Central R. Co. v. Fitzsimmons, 22 Kan. 476; Bridger v. Asheville, etc. R. Co., 25 S. C. 24. This was the view of some of the subordinate courts of New York: Walsh v. Fitchburg R. Co., 78 Hun (N. Y.), 1, 60 N. Y. St. Rep. 539, 28 N. Y. Supp. 1097, 67 Hun (N. Y.), 604, 51 N. Y. St. Rep. 240, 22 N. Y. Supp. 441.

⁸⁸ Gulf, etc. R. Co. v. WcWhirter, 77 Tex. 356, 14 S.
 W. Rep. 26; Barrett v. Southern Pac. R. Co., 91 Cal.
 296, 48 Am. & Eng. R. Cas., 532, 25 Am. St. Rep. 186

27 Pac. Rep. 666.

it;34 nor by the fact that its agent, having seen children playing with it, tied it with a rope so that it could not be revolved unless the rope were cut or untied; 85 nor, under this doctrine, will a railway company be relieved from liability upon proof of a custom on the part of railroad companies generally to leave their turn-tables unfastened; nor will evidence of such a custom be admissible, because it is deemed in law to be a bad custom:86 nor is the railway company relieved from liability by the fact that it does not own the turn-table, provided it is in the occupation and control of it;37 nor is it at all necessary, in order to make out a case against a railway company leaving a turn-table unfastened and unguarded, to prove a willful intention to inflict an injury thereby.38 The general concensus of the cases cited in this section is to the effect that, for a railway company to leave a turn-table unguarded and unfastened is evidence of negligence to go to a jury, 39 so that it is error to nonsuit the plaintiff or to direct a verdict for the defendant, or to take the question away from the jury by a peremptory instruction, such as an instruction to the effect that the company is not liable for the act of leaving the turn-table unfastened if a child five years of age could not move it.40 Here, as in other cases, the law demands on the part of the railway company the exercise of reasonable and ordinary care in discharging its obvious social duty of not leaving a highly dangerous machine, peculiarly attractive to children, exposed to their trespasses. But such care is not the care

34 Callahan v. Eel River, etc. R. R. Co., 28 Pac. Rep. 104, 92 Cal. 89.

35 Ilwaco, etc. R. Co. v. Hedrick, 1 Wash. 446, 25 Pac. Rep. 335.

36 Ilwaco, etc. R. Co. v. Hedrick, 1 446, 25 Pac. Rep. 835. Another court has, however, held that while it is competent for the railroad company to show that it secured the turn-tables or trucks inflicting the injury in the way customary with all railroad companies, such evidence is not conclusive on the question whether due care was exercised. O'Malley v. St. Paul, etc. R. Co., 43 Minn. 289, 45 N. W. Rep. 440. Another court has held that evidence of a custom on the part of railroad companies to keep their turn-tables locked is not admissible on their part in order to rebut negligence. Gulf, etc. R. Co. v. Evansich, 61 Tex. 3. See also Koons v. Railroad Co., 65 Mo. 592, 597.

³⁷ Nagel v. Missouri Pac. R. Co., 75 Mo. 653. 38 Gulf, etc. R. Co. v. Styron, 66 Tex. 421.

29 Houston, etc. R. Co. v. Simpson, 60 Tex. 103.

40 Gulf, etc. R. Co. v. McWhirter, 77 Tex. 856, 14 S. W. Rep. 26.

which is usually exercised by railroads, because it seems that they usually leave their turn-tables unguarded and unfastened. They may be liable, although they have fastened them in the ordinary manner, that is, by an arrangement which children can easily detach or unfasten.41 The true test of their liability is what care a well regulated and prudently managed railroad company ought to exercise, in view of the great danger to children from this source.42 The question of the contributory negligence of the parents is liable to cut a considerable figure here, as in other cases of injuries to children; but it is to be observed that the law does not impute contributory negligence to the act of the parents in allowing children, except those of a very tender age, to play upon the streets or upon open places where they can enjoy the advantages of pure air and sunshine. On the contrary, for parents to restrain their children from so exercising would be a plain violation of parental duty, with which the law ought, if necessary, to interfere.43

VI. Evidence in these Cases.—It is sufficient that the thing from which the injury proceeded was within the occupancy and under the control of the defendant; it is not necessary to prove that he was the owner of it;44 as where the plaintiff was injured by the falling of piles negligently piled by the defendant.45 In an action for personal injuries sustained by falling through a trap-door negligently left open, evidence that people were generally waiting by the trap-door for mail at that hour, has been held admissible, as tending to show additional reasons for the exercise of due care in closing or guarding the door.46 In such an action, where the injury

41 Barrett v. Southern Pac. R. Co., 91 Cal. 296, 48 Am. & Eng. R. Cas. 532, 24 Am. St. Rep. 186, 27 Pac. Rep. 666.

42 Bridger v. Asheville, etc. R. Co., 25 S. C. 24.

43 The question of contributory negligence in this relation was left to the jury, in a case where a mother allowed her boy six years old, to go to a circus unattended except by his sister, age eleven years, who left the brother near the circus ground, neither she nor the mother knowing that there was a turntable in the vicinity. Nagel v. Missouri Pac. R. Co., 75 Mo. 653. Where the child, and not the father, was suing for the injury, the fact that the father was the watchman of the railroad company, whose duty it was to guard the turn-table, did not authorize a nonsuit, but the case should have gone to the jury. Ferguson v. Columbus, etc. R. Co., 75 Ga. 637.

44 Nagel v. Missouri Pac. R. Co., 75 Mo. 653.

45 Palmer v. St. Albans, 56 Vt. 519.

46 Engel v. Smith, 82 Mich. 1, 45 N. W. Rep. 21.

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proceeded from the negligence of the servants of the defendant in failing properly to guard the trap-door into which the plaintiff fell, it is immaterial that they acted in violation of their instructions from their master; consequently evidence tending to show that he had given them orders carefully to guard it is immaterial and properly excluded.⁴⁷

SEYMOUR D. THOMPSON.

"Engel v. Smith, 82 Mich. 1, 45 N. W. Rep. 21. In an action for personal injuries from the fall of a shutter from a church steeple, testimony as to whether the proper method of repairing the steeple was to build a scaffold was inadmissible, in an absence of any evidence that the accident was produced, in whole or in part, by the failure to erect such a scaffold. Woods v. Trinity Parish (D. C.), 21 Wash. L. Rep. 259.

CHATTEL MORTGAGES — ANIMALS — OWNER-SHIP OF INCREASE.

SHOOBERT V. DE MOTTA.

Supreme Court of California, March 31, 1896.

In California, where the title remains in the mortgagor, the offspring of mortgaged animals, begotten after the execution of the mortgage, are not subject to its provisions.

HARRISON, J.: June 22, 1893, one Cascalia executed a mortgage to the plaintiff's assignor upon a band of sheep which were then in Kings county, consisting of 1,700 ewes and 1,050 lambs. The sheep were afterwards removed to Tulare county, and in August, 1893, while they were in Tulare county, bucks were put with the ewes, and during the months of January and February, 1894, there were born, as the offspring of the ewes, 1,300 dambs. The court finds that the period of gestation in the case of sheep is about five months. April 18, 1894, Cascalia, in consideration of an indebtedness from him to the defendant, executed to the defendant a bill of sale of these 1,300 lambs; and on the 21st of April the lambs were delivered to the defendant, and taken away by him. The plaintiffs brought the present action to recover the possession of the lambs or their value. Judgment was rendered in favor of the defendant, and the plaintiffs have appealed.

It has been held in some States that the lien of a mortgage of domestic animals extends to the increase of the animals during the life of the mortgage, whether the terms of the mortgage include such increase or not; and, following these decisions, such a rule is stated in text books upon chattel mortgages. It will be found, however, upon examination of these cases, that the decisions therein are based upon the principle of the common law, which was in force in those States, that, by the mortgage, the mortgagee is vested with the title to the mortgaged property, and becomes the owner thereof; and that in the case of domestic animals, applying another rule of both

the common and the civil law, that "the brood belongs to the owner of the dam or mother, partus sequitur ventrem" (2 Bl. Comm. 390), he thereby becomes the owner of such Increase; and, being the owner, his title in any action at law must prevail. The earliest application of this rule was in the case of a mortgage of a female slave—Hughes v. Graves, 1 Litt. (Ky.) 317-which was decided in Kentucky in 1822, and was afterwards followed in Maryland in 1836, in the case of Evans v. Merriken, 8 Gill & J. 39, which also involved the offspring of a female slave that had been mortgaged; and these cases are cited as the authority upon which cases involving the same question have been decided in other States, in some instances referring also to the principle upon which the rule rests, and in others merely referring to the cases as an authority. Cahoon v. Miers, 67 Md. 573, 11 Atl. Rep. 278; Gundy v. Biteler, 6 Ill. App. 510; Ellis v. Reaves, 94 Tenn. 210, 28 S. W. Rep. 1098. The rule has also been stated in many other cases in which the question was neither involved nor decided. Kellogg v. Lovely, 46 Mich. 131, 8 N. W. Rep. 699; McCarty v. Blevins, 5 Yerg. 195; Gans v. Williams, 62 Ala. 41. And there is still another line of decisions in which it has been sought to uphold the propriety of the rule by holding that the increase which was in gestation at the execution of the mortgage was inferentially included therein, as a part of the mortgaged property. Funk v. Paul, 64 Wis. 35, 24 N. W. Rep. 419; Rogers v. Highland, 69 Iowa, 504, 29 N. W. Rep. 429; Edmonston v. Wilson, 49 Mo. App. 491. Another line of decisions limits this application of the rule, by holding that the increase is subject to the lien of the mortgage only for so long a time as the young are in a state of nurture from the mother. Rogers v. Gage, 59 Mo. App. 107; Darling v. Wilson, 60 N. H. 59; Forman v. Proctor, 9 B. Mon. 124. The want of logical sequence in this limitation has been felt by the courts, and some of them have sought to place their decision upon the fact that, while the young were following the mother, a purchaser from the mortgagor had notice by that fact that it was her offspring, and subject to the mortgage, and was thus prevented from claiming to be a purchaser in good faith. Placing the decision on this ground is, however, necessarily a repudiation of the principle upon which all the above cases rest; for, if the mortgagee is in fact the owner of the increase, the question of good faith in a purchase from the mortgagor is immaterial. Prior to 1873, the giving of a chattel mortgage in this State vested the mortgagee with the title to the property mortgaged (Heyland v. Badger, 35 Cal. 404); and, while this rule of law prevailed, the foregoing decisions would have been applicable. The civil code, however, went into effect at the beginning of that year; and under its provisions the mortgagor is not, by the execution of the chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien

thereon. Civ. Code, § 2888; Bank v. Moore, 106 Cal. 673, 39 Pac. Rep. 1071. Consequently, the foregoing decisions cannot be regarded as having authoritative force; but the rights of the parties must be determined upon the general principles controlling the relations between a mortgagor and mortgagee. In the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the property which is described in the mortgage, and does not include other property of the same character which the mortgagor may have afterwards acquired and placed with the mortgaged property. Jones, Chat. Mortg. §§ 138, 154. If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner; and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee. See Simpson v. Ferguson (recently decided by this court), 44 Pac. Rep. 484. If, in the case of sheep, the use to which he puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs. We are aware that the Supreme Court of Texas, in First Nat. Bank of Austin v. Western Mortg. & Inv. Co., 86 Tex. 636, 26 S. W. Rep. 488, held that although, by the laws of that State, the mortgagor of personal property remains the owner thereof after the execution of the mortgage, the foregoing decisions control the right of the mortgagee to the increase of domestic animals; but the opinion in which the decision is given merely states the proposition, without presenting any reasoning in its support, and does not meet with our approval. We are not called upon to determine in the present case whether, if the lambs in question had been in gestation at the date of the mortgage, they would have been included as a part of the property mortgaged; but we hold that, inasmuch as they were begotten upon the ewes after the mortgage was executed, the mortgagee has no lien upon them, or right to their possession. The conclusion thus reached renders it unnecessary to consider the rulings of the court upon the offer of the plaintiffs to show that the defendant had knowledge of the mortgage at the time he purchased the lambs. The judgment and order are affirmed.

NOTE.—The principal case shows how embarrassing the questions involved therein have been to the courts, and what different conclusions they have reached. As underlying these questions the old rule was, that property to be acquired in the future, or not in existence, or incapable of identification, could not be mortgaged. Loth v. Carty, 85 Ky. 591; Barnard v. Eaton, 2 Cush. 295. This rule was subsequently modified as to property, which the mortgagor or grantor had a reasonable certainty of acquiring very speedily, or, as it is described, relative to those things which he has potentially, though not actually. Funk v. Paul, 64 Wis. 35; McCown v. Mayer, 65 Miss. 537. Future crops were then considered to be potentially possessed (34 Cent. L. J. 133), though this is not universally accepted where the rights of creditors or

purchasers intervene. Maize v. Bowman, 98 Ky. 205. Again, such mortgages are considered to be inoperative, if at the time of making the mortgage the crop so sown has not appeared above the ground, or shows no indication of a growing crop. Funk v. Paul, 64 Wis. 35. When such mortgages are considered valid, they cannot be made to cover indefinite future crops. but must be confined to crops of the current year or those to be planted in the following year. Smith v. Coor, 104 N. C. 139; Henderson v. Gates, 52 Ark. 371. But the 'crop referred to must be so described as to be capable of identification. A mortgage was made of a crop of corn to be raised on forty acres of a quarter section of land, and it appeared that the mortgagor planted seventy-five acres of land in that quarter section in corn, and raised the crop together; the mortgage was held to be invalid. Wood, etc. Co. v. Minneapolis, etc. Co. (Minn., Feb., 1892), 51 N. W. Rep. 378. A mortgage of all the crop the mortgagor might raise in the year 1884 in acertain county was considered to contain a sufficient description for the purposes of identification. Johnson v. Grissard, 51

Offspring Follows the Venter.—The rule adopted as to slaves, that the offspring takes the condition of the mother is adopted as to the increase of animals, though it is said that the rule as to slaves is partly caused by feelings of humanity. Rogers v. Gage, 59 Mo. App. 107. The general rule is said to be that offspring of animals born after the making of the mortgage are subject to its provisions. Dyer v. State, 88 Ala. 225. This is true where the mortgage in words specially covers all increase during its term (Thompson v. Anderson [Iowa], 63 N. W. Rep. 355), and also when it mentions that the mortgaged animal is in foal, as to such offspring, at least while the foal continues to obtain its nourishment from its dam (Edmonston v. Wilson, 49 Mo. App. 491), though in one case no such limitation as to time was imposed. Latta v. Foulkes, 94 Tenn. 219. When the fact, that the animal is in foal is not mentioned in the mortgage, it is generally held that even an innocent purchaser is not protected if he buy the offspring while it is still following the dam; but that a purchase after that period will be protected, since the recorded mortgage gives no information that the foal is bound by it. Enright v. Dodge, 64 Vt. 502; Meyer v. Cook, 85 Ala. 417; Winter v. Landphere, 42 Iowa, 471; Darling v. Wilson, 60 N. H. 59; Rogers v. Highland, 69 Iowa, 504; Funk v. Paul, 64 Wis. 35. Under Illinois law, which requires a mortgagee in order to protect his rights to take possession of the mortgaged property on the maturity of the mortgage, a party purchasing the increase of mortgaged animals during the existence of the mortgage obtains no greater rights than those of the mortgagor. Gandy v. Biteler, 6 Ill. App. 510. As between all the parties to the mortgage and others who are not innocent purchasers for value, which in many States is the condition of mortgagees who have secured pre-existing debts, the offspring of mortgaged animals, though not mentioned in the will and regardless of the period of nuture, are covered by the mortgage. Funk v. Paul, 64 Wis. 85; First N. Bk. v. Western, etc. Co. 6 Tex. Civ. App. 59; First Nat. Bk. v. Western, etc. Co., 86 Tex. 636. S. S. MERRILL-

JETSAM AND FLOTSAM.

A LAWYER'S DUTY AS AN OFFICER OF COURT.

A question of interest to the profession has come up recently in the English courts in regard to the



duties of the solicitor as an officer of the court. In the Chancery Forgery Case (Marsh v. Joseph), 12 The Times, L. R. 255, a forger, without authority, used the name of A, a solicitor, in a bogus proceeding, whereby he secured a fund out of court. On the swindler's informing him of this and offering him a share of the costs allowed, A accepted the money and thereby, the court held, connected himself at once with the proceeding as solicitor, and must make good so much of the funds as he could have saved had he promptly investigated the whole proceedings. This is a remarkable decision in that the court found there was nothing to lead A to suspect more than the unauthorized use of his name. The principle of the decision is, that a solicitor acting in non-contentious proceedings is under a duty to bring before the court all matters essential for it to know in order to deal properly with the matter. This proposition is derived from Mr. Justice Stirling's opinion in In re Dangar's Trusts, L. R. 41 Ch. D. 178.

It is to be noticed that this case does not go so far as to hold an attorney liable because he knows of some irregularity, but he must have connected himself with the proceedings in his official capacity. He then becomes liable for so much loss as he could have prevented after that. This is important because, from the note on the case in 31 Law Journal, 195, it would seem that it has been supposed to stand for the broader proposition. If the case did stand for such a proposition, there would indeed be cause for surprise. Members of the bar are no less averse to becoming informers than any other class of men. It would be impossible to hold a lawyer as guarantor of the regularity of all the steps in a proceeding because some irregularity has come to his knowledge, perhaps so trivial that interference on his part would be characterized as officious.

At a subsequent hearing of the case under discussion (12 The Times L. R. 266), the solicitor's partner was held to the same liability as the solicitor himself. However, if this decision causes surprise, the court has erred, if at all, on the right side. The relation in which the profession stands to the public requires that there should be no disposition to treat leniently the shortcomings of its members. To allow consequential damages in such cases is no doubt a hardship, but courts cannot permit loss to result from a defect in the machinery of justice.

The case has been appealed, and the opinion of the upper court will be awaited with interest.—Harvard Law Review.

CORRESPONDENCE.

OUERY.

WITHDRAWAL FROM BUILDING ASSOCIATION.

To the Editor of the Central Law Journal:

A took stock in a building association which had been "sold" to another at a monthly premium of \$8.25 on \$1,000—5 shares of \$200 each. By an alleged agreement between A and the association's secretary the monthly payments (\$18.25) were deferred from April, when the money was advanced, until October when they were begun. They were then continued, with some four defaults, for four years when A was informed by the secretary that it would require \$962.03 to "pay up and get out." The pass-book shows, by entries made in it by the secretary each six months, that for 32 months from the advance no credit was given to stock at all, but they were distributed wholly between premium, interest, fines, insurance, etc. So

that in November, 1895, the advance having made in April 1891, the secretary informed A that the withdrawal value of his stock then was \$80.60. The dues on 5 shares was \$5.00 per month. The interest 6 per cent. Can this be justified? If not, why? Or, if so, upon what grounds? This is a Tennessee building association.

BOOK REVIEWS.

FISHBACK'S MANUAL OF ELEMENTARY LAW.

In this manual "an effort has been made" says the author in his preface "to put the reader in possession of a summary of the well settled elementary principles of the law by stating them dogmatically in language as simple as the subject admits of. After all that is said derisively about the glorious uncertainty of the law, there are many rules of civil action regulating the political, business and domestic relations of life which may be said to be settled. It has been the effort in these pages to collect these rules from authoritative sources and print them in a form at once comprehensive and compact. What may be objected to as a defect I count one of the chief merits of the book, viz: the absence of notes and citations." The book is designed for the use of students the author being the dean of the Indiana Law School. It may be said to be an admirable exposition of the elementary principles of American law, from which the student may tobtain a clear idea of the outline and scope and bearing of substantive law. It treats in successive chapters of laws in general, international law and citizenship, written laws, unwritten laws, rights, property in general, real property, incorporeal property, feudal system, ancient tenures, modern tenures, title to real property, personal property, contracts in general, parties to contracts, of particular contracts, negotiable instruments, contracts of insurance, consideration, statute of frauds, corporations, security of the person, assault and battery, false imprisonment, malicious prosecution, defamation, injuries to civil and political right, fraud, nuisance, negligence, animals, busband and wife, parent and child, guardian and ward, master and servant, wrongs to incorporeal property, wrongs to personal property, courts in general, civil procedure, equity, admiralty, extraordinary remedies, criminal law, criminal of-fenses and criminal procedure. As the above statement of its contents may suggest the book will be found of value to the student and practitioner and of interest to the general reader who will find here a statement of the sources and foundation of the law under which we live as well as many rules and principles of business which may serve to guide him in the performance of duties of citizenship. The manner in which it has been constructed and prepared, and the style in which it is written is worthy of praise. It is a work of nearly five hundred pages, well printed and bound and is published by the Bowen-Merrill Company, Indianapolis.

BOOKS RECEIVED.

A Treatise upon Conveyances made by Debtors to Defraud Creditors. By Orlando F. Bump. Revised and Enlarged, with References to all American and English Cases. By James McIlvaine Gray. Fourth Edition. Washington, D. C. W. H. Lowdermilk & Co., Law Publishers and Booksellers, 1896.



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A Treatise on the Law of Garnishment, Embracing Substantive Principles, Procedure and Practice, and Garnishment as a Defense; also Conflict of Laws and Foreign and Domestic Exemption Statutes as Affecting or Affected by Garnishment Proceedings. Adapted to General Use. By John R. Rood, Counselor at Law. St. Paul, Minn.: West Publishing Co. 1896.

The Question of Copyright, comprising the text of the copyright law of the United States, a summary of the copyright laws at present in force in the chief countries of the world, together with a report of the legislation now pending in Great Britain, a sketch of the contest in the United States, 1837-1891, in behalf of international copyright, and certain papers on the development of the conception of literary property, and on the results of the American Act of 1891. Compiled by George Haven Putnam, A. M., Secretary of the American Publishers' Copyright League. Second edition, revised, and with additional material. G. P. Putnam's Sons, New York, 27 West Twenty-third street, London, 24 Bedford street, Strand: The Knickerbocker Press. 1896.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Tecritorial Courts of Last Resert, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCIDENT INSURANCE—Liabilities.—Where an accident policy prepared in blank for insuring in a principal sum for death, and in a weekly indemnity, not exceeding 52 weeks for total disability, and with separate provisions for payment in each case, was filled out and executed only for the weekly indemnity, and this made payable to the insured, and the insured died within 24 hours after an accident, his personal representative was not entitled to recover indemnity for the balance of the period.—ROSENBERRY V. FIDELITY & CASUALTY CO. OF NEW YORK, Ind., 43 N. E. Rep. 317.

- 2. ACTION—Parties not Privy to Contract.—While a promise by the grantee of a mortgagor to pay the mortgage debt can be enforced in equity by one to whom the mortgagee has assigned the debt, on the principle of equitable subrogation, the assignee cannot enforce such promise in his own right in an action of assumpsit against the promisor without any prayer for equitable relief, or stating any element of equity in his complaint.—WOODCOCK v. BOSTIC, N. Car., 24 S. E. Rep, 862.
- 8. ADVERSE POSSESSION—Color of Title.—Possession by a grantee in a deed purporting on its face to convey a good title, and taken in good faith, adverse to a tenant in remainder, for seven years, coupled with the payment of taxes for such period, bars the estate in remainder, notwithstanding the existence of an outstanding estate for life.—NELSON V. DAVIDSON, Ill., 48 N. E. Red. 362.
- 4. ADVERSE POSSESSION—Right of Way of Bailroad.—Where a railroad company, in 1851, was granted a right of way 200 feet wide through certain land owned by the State, but after the construction of its road, fenced only 50 feet on each side of its track, and subsequent grantees of the State, by conveyance without reservation, claimed and occupied all the land outside the railroad fences for more than 20 years, such occupancy barred the easement and right of entry of the railroad company thereon.—ILLINOIS CENT. R. CO. v. MOORE, Ill., 48 N. E. Rep. 364.
- 5. ALTERATION IN NOTE—Burden of Proof.—In an action against an indorser on a note containing the words "by renewal, with interest at 6 per cent.," with an ink erasure drawn over them, plaintiff's statement averred that these words were erased before the note was received by him; and the affidavit of defense alleged that, when defendant indorsed the note, it did not bear interest, and these words were not upon it, and that they were fraudulently inserted without his knowledge or consent after he indorsed the note; and it further stated that defendant was an accommodation indorser, who received no consideration for his indorsement: Held, that the burden was on plaintiff to show that the alteration was innocently made, without prejudice to the rights of defendant.—CITIZENS' NAT. BANK OF BALTIMORE V. WILLIAMS, Penn., 34 Atl. Rep. 303.
- 6. APPEALABLE ORDER—Bill of Exceptions.—Where notice of intention to appeal was served and filed, and bond was given, and an order extending beyond the term the time for presenting a bill of exceptions was made before adjournment of the term, such order operated to retain jurisdiction, so that a subsequent order made after the term, setting aside the judgment appealed from and granting a new trial, was not appealable.—Henrichsen v. Smith, Oreg., 44 Pac. Rep. 496.
- 7. APPEAL—Parties—Dismissal.—Unless all the parties against whom a joint decree in substance is rendered unite in an appeal, or the appeal be taken in the name of all, with summons and severance, or equivalent proceedings, as to those who refused to join therein, the appeal will be dismissed, in the absence of any application to bring the proper parties before the court by amendment and necessary proceedings.—Jones v. Stewart, Fla., 19 South. Rep. 657.
- 8. Assignment of Note.—Gen. St. 1888, § 167, requiring suit to be brought against the maker of a note by an assignee, or proof that the suit would have been unavailing, to fix liability upon the assignor, does not require such suit or proof, to fix liability on the assignor, where, in the contract of assignment, the assignor guaranties the payment of the note.—LOWE V. FARNHAM, Colo., 44 Pac. Rep. 507.
- 9. ATTACHMENTS—Grounds. When an insolvent debtor makes a disposition of his property which the law inhibits as against creditors, and which naturally and necessarily tends to hinder, delay or defraud creditors, it is conclusively presumed that he intended his act should have that affect; and it is such a

fraudulent conveyance as will sustain an attachment at the suit of a creditor, even though there may not have been any actually corrupt motive or dishonest purpose.—COOK V. BURNHAM, Kan., 44 Pac. Rep. 447.

- 10. ATTORNEY'S LIEN.—An attorney has no lien, at common law, on his client's cause of action.—SHERRY V. OCEANIC STEAM NAV. Co., U. S. C. C. (N. Y.), 72 Fed. Rep. 565.
- 11. Banks and Banking—Deposit of Check for Collection.—That a check deposited with a bank for collection was unrestrictedly indorsed to the bank, and credit therefor given the depositor, does not pass the title to the bank; where, on non-payment of the check, its amount was to be charged up to the depositor, so as to prevent its recovery by the depositor from a receiver appointed for the bank.—Armour Packing Co. v. Davis, N. Car., 24 S. E. Rep. 365.
- 12. Banks—As Collection Agents.—In an action by the drawer to recover the proceeds of a draft collected by a bank, the fact that the bank has credited such proceeds to the account of another bank, from which the draft was received, is no defense, where the in dorsement thereon showed that the sending bank held it for collection only; the money being subject to the order of the real owner, unless actually paid over to the sending bank before notice of the revocation of its agency.—Boykin v. Bank of Fayetteville, N. Car., 24 S. E. Rep. 358.
- 18. Building Association—Rights of Stockholder.—A stockholder in a building association may maintain an action in equity to restrain the directors from closing out a series of shares before their maturity, and in violation of a by-law of the association, and from releasing the securities of borrowing members, some of whom are insolvent.—FISCHER v. PATTON, Mo., 34 S. W. Rep. 1096.
- 14. Carrier-Passenger-Damages.—A common carrier is liable to a passenger put off at a wrong station for the inconvenience, sickness, and expense incurred in going to her proper station, two miles distant, where the evidence shows circumstances forcing her to act as she did, and fails to show that any other course was available to her.—Texas & P. RI. Co. v. Hartnett, Tex., 34 S. W. Rep. 1050.
- 15. Carriers Live Stock Shipments.—A railroad company does not assume the common-law duties of a common carrier in respect to stock shipped over its line, but it is only bound to transport the same with ordinary care and skill, and with reasonable dispatch.—Heller v. Chicago & G. T. Ry. Co., Mich., 66 N. W. Rep. 667.
- 16. Carriers of Passengers Street Railroad—Injury to Passenger.—An injury to a passenger in stepping off a moving street car, after it has passed a point at which the conductor had stated it would stop, cannot be considered the natural or proximate consequences of the failure to stop, and, if a contract to stop can be implied, damages for the personal injury cannot be recovered in an action for its breach.—WHITE V. WEST END ST. R. Co., Mass., 43 N. E. Rep.
- 17. CARRIERS—Passenger—Abuse by Fellow Passenger.—One of two railway passengers, who were acquaintances and had been drinking together, and who entered the train together, cannot recover damages from the carrier for abusive language used towards him by the other, who was intoxicated, or even for an assault, where the conductor used all reasonable efforts to protect him, quieted the offender once or twice, [and, on his again becoming bolsterous, gave him into custody at the next station,—Kinney v. Louisville & N. R. Co., Ky., 24 S. W. Rep. 1066.
- 18. CHATTEL MORTGAGE—After-acquired Property.—A vendor of chattels, who delivers the same, and takes a note, with security, for the price, has no equity in the nature of a vendor's lien as against the holder of a chattel mortgage previously given by the vendee, containing a clause covering after-acquired property,

- which reaches the chattels in question.—DUNN V. HASTINGS, N. J., 34 Atl. Rep. 256.
- 19. CHATTEL MORTGAGE—Validity.—Under the statute of Washington relating to the lien of chattel mortgages, such a mortgage, unless accompanied by the affidavit required by the statute, and properly recorded, is void as to creditors, though they have actual notice of its existence.—AMERICAN LOAN & TRUST CO. V. OLYMPIA LIGHT & POWER CO., U. S. C. C. (Wash.), 72 Fed. Rep. 620.
- 20. CHATTEL MORTGAGE—What Constitutes.—An assignment of personal property which recites that a particularly described part of the purchase price is still unpaid, and, fixing the times of payment of such unpaid balance, expresses the intention of the vendor to maintain a lien upon the property for said debt, which conditions are accepted by the purchaser, is, in effect, a chattel mortgage.—LUMBERT v. WOODWARD, Ind., 43 N. E. Rep. 302.
- 21. CIRCUIT COURTS—Suits between Aliens.—The circuit courts of the United States have no jurisdiction of suits between aliens.—POOLEY v. LUCO, U. S. C. C. (Cal.), 72 Fed. Rep. 561.
- 22. CONSTITUTIONAL LAW—Interstate Commerce—Intoxicating Liquors.—Intoxicating liquors are a legitimate subject of commerce, and burdens upon interstate commerce therein cannot be justified under the police power of a State.—EX PARTE LOEB, U. S. C. C. (S. Car.), 72 Fed. Rep. 658.
- 23. CONTRACT FOR COUNTY PRINTING.—The act of letting the county printing is administrative, and may be performed by any ministerial officer of the county to whom such duty has been intrusted by the legislature.—BOARD OF COM'RS OF WASHINGTON COUNTY V. KEMP, Ind., 43 N. E. Rep. 814.
- 24. CONTRACT—Memorandum.—Evidence that a memorandum of a contract of sale was entered in the books of account of the vendee, by the vendee's book-keeper, in the presence of the parfies, is insufficient to render the memorandum admissible to prove the contract.—HAZER V. STRBICH, Wis., 66 N. W. Rep. 720.
- 25. CONTRACT OF INSURANCE.—A contract by a foreign corporation, in consideration of a sum paid, to purchase, at a fixed price, accounts which, during one year, a certain business firm should have against ascertained insolvent debtors, or debtors against whom execution should be returned unsatisfied, is a contract of insurance, within the Massachusetts insurance act (St. 1887, ch. 214, § 3), providing that a contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do something in which the other party has an interest.—CLAFLIN v. UNITED STATES CREDIT SYSTEM CO., Mass., 43 N. E. Rep. 293.
- 26. CORPORATIONS—Corporate Existence—Estoppel.—A voluntary benefit association, having an organization consisting of directors, president, etc., a name implying a corporation, exercising corporate powers, and authenticating its acts by common seal, is estopped, when sued by a member for indemnity due him under the rules of the association, to deny its corporate existence.—FITZPATRICK V. RUTTER, Ill., 48 N. E. Rep. 392.
- 27. CORPORATION—Corporate Stock—Issue for Services.—A statutory provision that no stock shall be issued, "except for money, labor done, or money or property actually received," does not prevent payment in stock for labor or services bona fide to be thereafter rendered.—SHANNON V. STEVENSON, Penn., 34 Atl. Rep. 218.
- 28. CORPORATIONS—Estoppel Corporate Existence.
 —Where an association was recognized by the public authorities as a duly organized corporation, and did business and filed its annual reports as such, a creditor who dealt with it as a corporation cannot attack its corporate existence, and hold its stockholders liable aspartners. Gow v. Collin & Parker Lumber Co. Mich., 66 N. W. Rep. 676.

- 29. CORPORATIONS—Foreign Insurance Companies—Right to Sue.—It is unlawful for a fire insurance company incorporated under the laws of another State to transact any business of insurance in this State, unless specially authorized so to do by the superintendent of insurance of this State; and, before such company can recover in an action brought by it to enforce a contract relating to such business, it must allege and prove that, at the time such contract was entered into, it was authorized to do the business contracted for.—GILBERT V. STATE INS. CO. OF DES MOINES, IOWA, Kau., 44 Pac. Rep. 442.
- 80. CORPORATIONS-Receivers .- In a suit brought by stockholders in a corporation against the corporation and its directors to stop alleged fraudulent and illegal transactions of the company, and to compel an accounting from the directors for profits unlawfully realized by them through breaches of their fiduciary obligations, and to procure the rescission of a fraudulent contract and the cancellation of spurious stock, where it is alleged that the directors are tools of and under the control of one of their number, who profits by the frauds alleged, and who maintains his control by means of the spurious stock, the appointment of a receiver to collect and preserve the property of the corporation to meet the charges which the plaintiffs seek to establish is a proper remedy.-AIKEN V. Colo-RADO RIVER IRR. Co., U. S. C. C. (Cal.), 72 Fed. Rep. 591.
- 31. CRIMINAL LAW-Evidence. Where evidence offered is imperfect for want of preliminary proof, an objector must specifically point out the defect in his objection, or it will be waived. So an objection to the admission of an article as an exhibit as "incompetent, irrelevant, and immaterial, and not connected with the defendant," will not raise the question, on appeal, of the sufficient identification of the exhibit.—PEOPLE v. FOO, Cal., 44 Pac. Rep. 463.
- 32. CRIMINAL LAW—Homicide—Insanity as a Defense.

 —In a prosecution for murder, defendant is entitled to an acquittal if the evidence shows a reasonable doubt as to his sanity at the time of the homicide. The burden is not upon defendant to prove insanity, though, in the absence of rebuttal evidence, the presumption of sanity is sufficient to sustain the case on the part of the prosecution.—Ford v. State, Miss., 19 South. Rep. 665.
- 83. DECEIT—False Representations.—That one creditor falsely informs another that their debtor is solvent, and that he does not intend to press his claim against him, will not make his attachment, which he gets against the debtor's property, fraudulent as against the other creditor; the latter having no right to rely on the representations.—GLAZER V. FIRST NAT. BANK OF FT. SMITH, Ark., 34 S. W. Rep. 1061.
- 34. DECEIT—Misrepresentation by Agent.—One who obtains goods through unauthorized misrepresentations by an agent is responsible for such misrepresentations, if he fall to return the goods.—MEYERHOFF V. DANIELS, Penn., 34 Atl. Rep. 298.
- 35. DECEIT—Obtaining of Goeds—Evidence.—In an action for obtaining goods by fraud, the fact that a check was given for the goods, payment of which was afterwards stopped, does not render inadmissible evidence of what occurred before the check was given.—COLE v. HIGH, Penn., 34 Atl. Rep. 292.
- 86. DEDICATION—Evidence.—On an issue of dedication of a highway, between a municipality and the owner of a fee, an adjoining owner, part of whose land was included in the dedication, testified that they both, in writing, agreed with each other and with others interested in the opening of the highway, for a valuable consideration, to open the street, and that, pursuant thereto, the street was opened. This witness was corroborated by two others, one interested in the dedication, and all were contradicted by such owner. The written agreement was shown to have been lost: Held, that a dedication was shown.—WAGGEMAN V. VILLAGE OF NORTH PEORIA, Ill., 43 N. E. Rep. 848.

- 87. DESCENT AND DISTRIBUTION—Legitimacy—Burden of Proof.—In partition of land of a decedent, of whom complainant claimed to be a child and heir, defendant denied that complainant was a legitimate child or heir of deceased. The evidence showed that complainant was brought up in the family of deceased and his wife as their lawful offspring, and that he was always treated and recognized as their child, by them and others: Held, that the burden of disproving complainant's parentage and right to inherit was cast on defendant.—METHENY v. BOHN, Ill., 43 N. E. Rep. 380.
- 88. EMINENT DOMAIN—Damages.— Where, in a proceeding by a railway company to condemn land for widening its right of way for an additional track, it appears that the company's track already located crossed highways 150 feet on each side of the land to be condemned, in proving the damages to the remaining land a city ordinance requiring the company to raise its tracks where they cross the highways to 16 feet above the highway may be considered, as it renders necessary the construction of an elevated roadbed on the land condemned.—PITTSBURGH, FT. W. & C. BI. CO. V. LYONS, III., 48 N. E. Rep. 377.
- · 39. EQUITABLE ASSIGNMENT OF FUND—Orders to Pay.—An assignment of "all my right, title and interest in and to any compensation" for certain salvage services, and directing the owners or consignees of the property saved, or any other person into whose hands the fund may come, to pay the assignee \$3,200, is, notwithstanding the general words of the assignment, merely an order to pay a specified sum, and is therefore merely an equitable assignment of a part, as distinguished from a legal assignment of the whole fund.—PRICE V. ELMBANK, U. S. D. C. (Cal.), 72 Fed. Rep. 610.
- 40. EVIDENCE—Negligence—Contributory Negligence.—Where it appeared that defendant, who was approaching plaintiff in a buggy on the opposite side of the road, drove across and ran into the latter's horse, evidence as to previous ill feeling on defendant's part toward plaintiff, and as to what defendant subsequently said about the collision, was competent to show his motive in crossing the road.—TYLER V. NEL. SON, Mich., 66 N. W. Rep. 671.
- 41. EVIDENCE—Res Gestæ—Negligence.—The declarations of deceased to a co-employee as to the cause of the injury, made a few minutes after it occurred, in a room adjoining the scene of the accident, was competent as a part of the res gestæ.—CHRISTIANSON V. PIONEER FURNITURE CO., Wis., 66 N. W. Rep. 699.
- 42. FEDERAL COURTS Comity between State and Federal Courts.—In cases of concurrent jurisdiction it is a fixed rule of the federal courts never to take jurisdiction of a cause which presents the same issues and seeks the same relief as are presented and sought in a cause pending in a State court.—STATE TRUST CO. OF NEW YORK V. NATIONAL LAND IMP. & MANUFG CO., U. S. C. C. (S. Car.), 72 Fed. Rep. 575.
- 43. FRAUD Laches.—One who is induced by fraudulent representations to buy stock from a corporation cannot, after waiting a year and a half with knowledge of the fraud, until the company is insolvent, obtain relief.—HILLIARD V. ALLEGHENY GEOMETRICAL WOOD CARVING CO., Penn., 34 Atl. Rep. 231.
- 44. FRAUDULENT CONVEYANCES.—To sustain a conveyance by a husband, when insolvent, to his wife, of his business, which he subsequently carries on ostensibly in his own name, the wife, as against creditors of the husband, must show that the transaction was fair and honest.—MANNING V. CARRUTHERS, Md., & Atl. Rep. 254.
- 45. HOMESTEAD—Intent.—Land which a householder merely intends to occupy as a homestead, but which is in fact never so occupied by him, cannot be exempted as such.—LEVY V. RUBARTS, Ky., 34 S. W. Rep. 1079.
- 46. INSUBANCE—Building—Detached Room.—A shed, or lean-to, which formed part of a wooden store building at the times of the issuance of policies of insurance

on goods therein, which was moved back to allow the building of an addition to the main building, and left standing three feet from such addition, to which it was connected by a wooden piatform, nailed to both, and which continued to be used for the storing of goods as before, still remained a part of the building, and goods therein were covered by the insurance.—GROSS V. MILWAUKEE MECHANICS INS. Co., Wis., 66 N. W. Red. 712.

- 47. INSURANCE—Insurable Interest—Ownership.—The vendee of personal property under a bill of sale conveying absolute title, though given as security for debt, being in possession, and the debt being past due, is a sole and unconditional owner of the property, within the meaning of a contract of insurance which provides that the policy shall be void if the interest of the assured be other than unconditional and sole ownership.—CARET v. LIVERPOOL & LONDON & GLOBE INS. CO., Wis., 66 N. W. Rep. 693.
- 48. INSURANCE—Limitation of Actions.—Where a fire policy stipulated that no action should be brought thereon unless commenced within 12 months "after the fire," nor "until after full compliance" with its provisions, one of which required proof of loss to be filed within 60 days, and another provided that loss should not be payable till after notice, estimate, and satisfactory proofs, and appraisal, if required, the limitation commenced to run from the accrual of the cause of action, and not from the date of loss.—Sample v. London & L. Fire Ins. Co. of Liverpool, Eng., S. Car., 24 S. E. Rep. 334.
- 49. Intoxicating Liquors—Sunday.—It is an offense against the provisions of section 11 of the acts of May 14, 1886, as amended April 14, 1888 (Rev. St. [Giauque] § 8902), to keep a saloon open on Sunday, so that patrons may enter, although business be not carried on as on other days of the week.—STATE v. HEIBEL, Ohio, 43 N. E. Rep. 323.
- 50. JUDICIAL SALE.—Where a commissioner appointed by the court for the purpose, sold land, and after a confirmation of the sale executed a deed therefor, reciting the facts, and purporting to convey the property by virtue of such sale, the fact that he added no designation to his signature to indicate that it was not made in his individual capacity will not affect the validity of the deed, it appearing that he had no interest of his own in the property.—EXUM V. BAKER, N. Car., 24 S. E. Bep. 352.
- 51. LANDLORD AND TENANT—Covenants of Lessee to Repair.—A provision of a lease by which a lessee agrees "to keep the fences in repair, the material for which to be furnished by the lessor," constitutes an express covenant of the lessee to make repairs and an implied covenant of the lessor to furnish material where the circumstances existing at the inception of lease show that the provision was for their mutual benefit.—WOOD v. SHARPLESS, Penn., 34 Atl. Rep. 819.
- 52. LANDLORD AND TENANT—Lease of Wharf.—Where the lessee of a wharf from a city had abandoned it, the collection of wharfage by the city from a shipper who used it occasionally during the remainder of the term would not operate as a surrender of the lease, and release the lessee from payment of rent.—ABERDEEN COAL & MINING CO. V. CITY OF EVANSVILLE, Ind., 43 N. E. Bep. 316.
- 53. LIMITATION OF ACTIONS.—An action by a vendee against the vendor to recover the purchase price paid for land on failure of the vendor to convey as required by the written contract of sale is an action founded upon an instrument in writing, within Code Civ. Proc. § 339, subd. 1, and must be brought within four years.

 —THOMAS V. PACIFIC BEACH CO., Cal., 44 Pac. Rep. 475.
- 54. LIMITATIONS.—Where property is conveyed as security for an existing debt, the debt may be enforced to the extent of the security, though, at the time of the conveyance of the security, it was barred by the statute of limitations.—TAYLOR v. HUNT, N. Car., 24 S. E. Rep. 360.

- 55. MANDAMUS.—A writ of mandamus cannot be used as a writ of error, or to take the place of an appeal, and a proceeding will not be entertained by the supreme court for a writ to require the clerk of a district court to transfer a cause to a different division, where an application to the district court for the transfer has been made and refused.—KINDEL v. CLERK OF DISTRICT COURT OF ARAPAHOE COUNTY, Colo., 44 Pac. Rep. 506.
- 56. MARRIED WOMAN—Liability on Bid at Trustee's Sale.—A married woman, on failure to comply with her bid at a trustee's sale, is liable, to the extent of her separate property, for the difference between her bid and the price procured on a resale.—CAPRON V. DEVRIES, Md., 34 Atl. Rep. 251.
- 57. MASTER AND SERVANT Assumption of Risk.—A section hand, whose duties required him to ride over the road on a hand car, and who had been notified by the company, and of his own knowledge knew, that "wild" trains were frequently run over the road at a high rate of speed, assumed the risk of injury from being run into by one of these trains, running at a high rate of speed, on a foggy morning.—Hinz v. CHICAGO, B. & N. R. CO., Wis., 66 N. W. Rep. 718.
- 58. MASTER AND SERVANT—Employment—Compensation.—Where an employee engaged under a contract of indefinite hiring seeks to recover for a period while he was not working, the burden is on him to show that his right to compensation did not stop when he ceased work.—BARLOW V. TAYLOR PLACER MINING & MILLING CO., Oreg., 44 Pac. Rep. 492.
- 59. MASTER AND SERVANT Personal Injury Pleading.—In a complaint by a servant to recover from the master for a personal injury alleged to have been due to defective machinery, a general allegation of want of knowledge of such defect by plaintiff covers both actual and imputed knowledge, and will be sufficient, on demurrer, unless negatived by the specific facts stated.—Pennsylvania Oo. v. Witte, Ind., 48 N. E. Rep. 319.
- 60. MECHANICS' LIENS Claim Account.—That the notice for a mechanic's lien by a subcontractor and the petition in an action to enforce the lien include both work performed under a contract with the contractor and work under contract with the owner of the building, the claim having been filed under a bona fide belief that the entire work was under the contract with the contractor, will not defeat the enforcement of the lien, plaintiff on the trial having disclaimed recovery for the work under the contract with the owner.—ITTNER v. HUGHES, Mo., 34 S. W. Rep. 1110.
- 61. MORTGAGE—Power of Sale Foreign Administrator.—Where a mortgage on land in Illinois, given to a non-resident, contains a power to sell and convey, which, in case of the death of the mortgagee, authorizes his administrator to make the sale and deed, the administrator of such mortgagee appointed in such foreign State only, may make such sale and deed.—STEVENS V. SHANNAHAN, Ill., 48 N. E. Rep. 350.
- 62. MORTGAGE-Power-Sale.—A sale of land under a power contained in a mortgage, to be valid, must be made in compliance with the terms of the power, and openly and fairly.—ATKINS v. CRUMPLER, N. Car., 24 S. E. Rep. 367.
- 63. MORTGAGES—Promise to Pay Prior Lien.—Where the mortgagee in a mortgage taken to secure the repayment of money loaned to the mortgagor assumes and agrees to pay an unpaid balance due on a prior note and mortgage given by the same mortgagor to a third party, such agreement is for the benefit of the mortgagor only; and no right of action founded on the contract arises in favor of such third party incidentally to be benefited thereby.—Savinos Bank of Southern California v. Thornton, Cal., 44 Pac. Rep. 466.
- 64. MORTGAGES Survivorship.—A mortgage, executed to the mortgages in lieu of their heirship interests in the mortgagor's estate, which provided simply that \$200 should be paid to C on a certain date, and \$200 to L at a later date, was not a joint mortgage;

and, on the death of C before the mortgage matured as to her, I. was not, as survivor, entitled to foreclose for the whole amount—\$400.—COOLEY V. KINNEY, Mich., 66 N. W. Rep. 674.

- 65. MUTUAL BENEFIT INSURANCE Limited Liability. —Where, under the application and certificate of membership, a mutual benefit association was not to be liable for the death of the assured by suicide, the association cannot be held liable for such death, even though neither the by-laws nor other rules of the association authorize such limitation.—MCCOY V. NORTHWESTERN MUTUAL RELIEF ASS'N., Wis., 66 N. W. Rep. 697.
- 66. NEGLIGENCE Contributory Negligence.—In an action for personal injuries caused by an explosion of natural gas, which, leaking from a sleeve in defendant's pipes, percolated through the ground and accumulated in plaintiff's cellar, 90 feet distant, where it appeared that plaintiff's house was supplied with gas by another company, the failure of the plaintiff to notify the defendant of the leak, even if she knew of its existence, did not constitute contributory negligence.—CONSUMERS' GAS TRUST CO. V. PERREGO, Ind., 43 N. E. Rep. 306.
- 67. NEGLIGENCE—Injury by Ice Wagon.—Defendant's lee wagon, which had been standing parallel to the curb, turned and backed in towards the curb through an opening which was left between two piles of paving blocks, to furnish access to the sidewalk from the street. Plaintiff, a child six years old, had started across the street from the other side, and was balfway across when the wagon began to move to back in, and he then ran to the opening, but was caught by the wagon in the opening, against a tree box. The driver testified that he looked in the opening before he backed in: Held, that there was evidence of negligence on the part of the driver.—McCloskey v. Chautauqua lake ICE Co., Penn., 64 Atl. Rep. 267.
- 68. NEGLIGENCE Instructions.—In an action to recover for personal injuries, an instruction which does not restrict the right of recovery to the particular acts of negligence charged in the declaration is erroneous.—CHICAGO, B. & Q. R. CO. V. LEVY, Ill., 43 N. E. Rep. 867.
- 69. NEGLIGENCE Proximate Cause-Electric Wires. -In an action against an electric railway company for personal injury, it appeared that plaintiff, employed Ly an electric light company, while climbing a pole to remove an electric light, came in contact with a span wire supporting defendant's trolley wire and the iron post to which span wire was fastened, receiving an electric shock which threw him to the ground; that the trolley wire was suspended from the span wire by a bell insulator, and the span wire supplied with a circuit break, interposed between the trolley and the post; that the plaintiff was experienced, and knew all the dangers connected with the trolley and span wires: Held insufficient to show that defendant's negligence was the proximate cause of plaintiff's injury .- HUBER V. LA CROSSE CITY RY. Co., Wis., 66 N. W. Rep. 708.
- 70. NEGLIGENCE Street Car Crossings.—Failure on the part of a street-car driver to comply with an ordinance requiring him to give way to the car of another company at a crossing is not necessarily negligence per se, but is merely evidence of negligence.—CONNOR V. ELECTRIC TRACTION CO., Penn., 34 Atl. Rep. 288.
- 71. NEGOTIABLE INSTRUMENT—Action on Note—Right to Set-off.—Defendants executed a note to a bank, which, after becoming insolvent, indorsed it, before maturity, to a third person as collateral, and the note was thereafter, and after maturity, transferred to plaintiff: Held, that defendants were entitled to set off the amount of funds on deposit to their credit in such bank at the date of insolvency.—MERCHANTS' EXCH. BANK V. FULDNER, Wis., 66 N. W. Rep. 691.
- 72. NEGOTIABLE INSTRUMENT—Bona Fide Purchaser.

 One dealing with a firm of stockbrokers turned over to them a note as collateral security for the payment oflosses that might result from his stock transactions,

- and the note was subsequently negotiated by the firm to an innocent purchaser for the payment of such losses: Held, that the pledgor of the note could not maintain a bill to recover it on the ground that the transactions in which the losses were incurred were gambling transactions.—ALBERTSON v. LAUGHLIN, Penn., 34 Atl. Rep. 216.
- 73. NEGOTIABLE INSTRUMENT—Note—Guaranty—Consideration.—The original consideration of a note will support a contract of guaranty of the collection thereof indorsed thereon before delivery of the note to the payee.—DILLMAN v. NADELHOFFER, Ill., 43 N. E. Rep. 378.
- 74. NEGOTIABLE INSTRUMENT Notes—Variance.—In an action on a note, an objection to the admittance in evidence of the note, on the ground of variance, must, to be available on appeal, point out the variance.—MURCHIE V. PECK, Ill., 43 N. E. Rep. 356.
- 75. NEGOTIABLE INSTRUMENT Promissory Note-Place of Payment.—Notes were executed and delivered by a Pittsburg firm in Chicago, all of them being written by the same member, who indorsed them all in the name of the payee firm, of which he was also a member. They were delivered to one person, towards payment of the same debt, on the same day, at the same time, bearing the same date and the rate of interest, and two of them matured at the same time. One of these two and the third note were expressly payable at Pittsburg: Held, that the other of the two notes was also payable there, as against one who knew that that was the place of business of the maker.—In RE Parisian Cloak & Suit Co.'s Estate, Penn., 34 Atl. Rep. 224.
- 76. NEW TRIAL—Newly-discovered Evidence.—While, as a general rule, a motion for a new trial based on the ground of newly-discovered evidence ought to be over-ruled, in the absence of a clear showing of diligence in endeavoring to obtain such evidence, still, where such motion is sustained, such ruling will not be disturbed by an appellate court, unless it clearly appears that the trial court abused its discretion in granting a new trial.—CITY OF TOPEKA V. SMELSER, Kan., 44 Pac. Rep. 485.
- 77. NUISANCE—Injunction—Action by Health Officer.—Rev. St. § 1411, directing a town health officer to take such measures for the prevention, suppression, and control of contagious disease as may be needful, does not authorize an action by him, in his own mame, to enjoin the maintenance of an isolation hospital for contagious diseases near the town, as endangering the health of the people of the town.—BUCKSTAFF V. CITY OF OSHKOSH, Wis., 66 N. W. Rep. 707.
- 78. PARTMERSHIP—Dissolution—Transfer of Good Will.—Upon the dissolution of a trading copartnership, its assets, including the good will of the business, may be sold as a whole, either by the partners directly, or through a receiver, under an order of court, in a case to which they are parties; and a purchaser thereof, under either method of sale, is entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose—SNYDER MANUF'G CO. V. SNYDER, Ohio, 43 N. E. Rep.
- 79. PAYMENT BY NOTE Presumption.—Circumstances may rebut the presumption that a note given, for an antecedent debt is intended as a payment. Such presumption is overcome when the circumstances show that it was merely a renewal of the same indebtedness, and was so intended by the parties.—MILLER V. HILTON, Me., 34 Atl. Rep. 286.
- 80. PLEADING—Payment—Admission.—A plea of payment in an answer is new matter, and stands admitted, unless denied by, a reply.—MINARD v. McBre, Oreg., 44 Pac. Rep. 491.
- 81. PRESUMPTION OF DEATH Disappearance.—The legal presumption of death arising from unexplained absence for seven years does not admit of a conclusion that the person in question died before the end of

such period, unless there is evidence that he was, at some particular date previous thereto, in contact with a specific peril.—IN RE MUTUAL BEN. Co., Penn., 34 Atl. Rep. 283.

- 62. PRINCIPAL AND AGENT Ratification.—Where a contract for the sale of real estate, made by one assuming, without authority, to act as agent, is subsequently ratified by the principal, with full knowledge of the facts,—such contract providing for the conveyance of a perfect title,—the vendee, after refusing a deed tendered by the principal, whose title is imperfect, cannot recover from the agent the increase in the value of the premises since the date of the contract.—LINGENFELDER V. LESCHER, Mo., 24 S. W. Rep. 1089.
- 83. PRINCIPAL AND SURETY—Bonds—Delivery.—Where a bond perfect on its face is delivered by the obligors to the obligee, that it was "signed" by the obligers on account of a promise on the part of the oblige to secure the signature of another person as co-obligor, ir respective of the question of whether it was delivered as an escrow to take effect only on signature by such other person, does not relieve the obligors of liability.—GARVEY v. MARKS, Mo., 34 S. W. Rep. 1108.
- 84. PUBLIC LANDS—Contending Claimants.—In an action in a State court for the possession of public land prior to the issue of a patent, on the ground that defendant in possession was an alien born, and had not declared her intention to become a citizen prior to her filing, the judgment did not conclude the action of the land office on the question of defendant's alienage and the claimant's rights to enter land, nor control the title evidenced by the patent subsequently issued.—MERRIAM v. BACHIONI, Oal., 44 Pac. Rep. 481.
- 85. QUIETING TITLE—Bill—Sufficiency.—A bill to remove a cloud on title which falls to show any title in the complainant is fatally defective.—PIERCE v. HUNTER, Miss., 19 South. Rep. 660.
- 86. RAILROAD AID BONDS—Conditions.—A provision, in an act authorizing an issue of county bonds in aid of a railroad, that they should not be valid obligations until the road is constructed through the county, so that a train of cars shall pass thereover, is not satisfied by the construction of the road from one boundary of the county to a point two miles short of the opposite boundary, where it connects with another road running outside the county.—MERCER COUNTY v. PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA, U. S. C. C. of App., 72 Fed. Rep. 623.
- 87. RAILEOAD COMPANIES Consolidation.—A transaction by which one railroad company conveyed its property to another company on condition that, in addition to the assumption by the grantee of the grantor's bonded indebtedness, such grantee should issue its stock to the stockholders of the other company, in exchange for their stock in the corporation by which the conveyance was made, thereby leaving the grantor without property, corporate rights or franchises, and uniting all the stockholders of each corporation in one, is not a mere purchase and sale, but a consolidation.—CHICAGO, S. F. & C. RY. Co. v. ASHLING, III., 48 N. K. Rep. 374.
- 88. RAILROAD COMPANY-Stock Killing. Under Act April 8, 1891, declaring it the duty of "all persons running trains" to keep a "constant lookout" and making the company liable if any person or property is killed or injured by the neglect of "any employees" of any railroad to keep such lookout, it is not necessary that the engineer and firemen at the same time keep a lookout where the track is straight and level, and where objects can be seen as well by one as the other; but, where the object can be seen by only one 'ithem, it is not enough that the other was keeping a
- ithem, it is not enough that the other was keeping a pokout.—ST. LOUIS S. W. RY. Co. v. RUSSELL, Ark., AS. W. Rep. 1060.
- 89. RAILROADS—Plantation Crossing.— An owner of land which is divided by a railroad track, and which he resides on and uses, is entitled to have a plantation crossing maintained for his use, though the land is not

- inclosed.—HARDY V. ALABAMA & V. RY. Co., Miss., 19 South. Rep. 651.
- 90. RAILROADS Purchase of Parallel Lines. Act Ky. March 7, 1854, giving a railroad company power to "unite" its road with any other road connecting therewith, on such conditions as the two companies might agree on, did not authorize a consolidation of roads, but merely a mechanical union of roads running into the same town.—LOUISVILLE & N. R. CO. V. COMMONWEALTH OF KENTUCKY, U. S. S. C., 16 S. C. Rep. 714.
- 91. REAL ESTATE BROKERS—Commission.—A real estate agent who carries on the negotiations between the parties, and finally brings them together, is entitled to his commission, though the trade is eventually effected by the owner himself, or by a third person acting for him.—HOWE V. WERNER, Colo., 44 Pac. Rep. 511.
- 92. REAL ESTATE BROKERS-Commissions.-In an action for commissions by a real estate broker, there was evidence that plaintiff brought the land to the attention of purchasers; that he had several interviews with the purchasers' agent, and at such agent's suggestion procured from defendant the list of tenants and rents; that there was never any definite termination of the negotiations between plaintiff and such agent; that such agent suggested, to a broker who afterwards was employed by the vendors, that, if such broker were to present the estate to the purchasers, they might buy it, saying that he was unwilling to buy through plaintiff; and that negotiations went on continuously from that time until the sale was closed. Such agent testified that he went to the second broker because he was not willing to negotiate for the property through plaintiff: Held, that plaintiff was entitled to commissions .- DOWLING V. MORRILL, Mass., 48 N. E. Rep. 295.
- 93. RELEASE AND DISCHARGE—Rescission for Fraud.
 —The beneficiary of a life insurance certificate, who settles for less than its face, cannot rescind the settlement for fraud, and maintain an action on the claim, without first repaying the money received.—MOORE V.
 MASSACHUSETTS BENEFIT ASS'N, Mass., 48 N. E. Rep. 298.
- 94. SALE—Breach—Measure of Damages.—Where the seller of cattle knows that the buyer contracted to purchase the same for resale at another place, and there is no market to purchase cattle at the place where they are sold, the measure of damages for the seller's breach of the contract is the difference between the contract price, added to the cost of transportation, and it current market price at their destination on the day when it was contemplated by the parties that the cattle should arrive.—Hockersmith v. Hanley, Oreg., 44 Pac. Rep. 497.
- 95. SALE OF STOCKS—Legality.—If stock purchased by a broker for another is called for by the latter, and an actual tender thereof made, he is not exempted from liability for the price by the fact that the stock was, in the first place, bought for him by the broker on a margin.—ANTHONY V. UNANGST, Penn., 84 Atl. Rep. 284.
- 96. SALE—Right of Buyer to Rescind.—One who enters into a contract for the purchase of certain personal property, and advances a portion of the agreed price, cannot, by refusing without legal cause or excuse to accept the property—the other party being ready and willing to perform on his part—maintain an action to recover back the money advanced.—GIBBONS v. HAYDEN, Kan., 44 Pac. Rep. 445.
- 97. SHERIFF—Writ of Replevin.—An officer in whose hands a writ of replevin is placed has no right to demand a replevin bond before the seizure and appraisal of the property. In case of doubt as to the ownership of the property, he may require a bond of indemnity; but otherwise, or when such bond is tendered, it is his duty to execute his writ without delay.—HAMBERGER V. SEAVEY, Mass., 43 N. E. Rep. 297.
- 98. SPECIFIC PERFORMANCE—Contract to Convey.—Where an owner of property, while negotiating for its

sale by correspondence, conveyed it to his wife, an offer subsequently made by him, and its acceptance by the correspondent after the conveyance of the wife had been placed on record, do not constitute a contract which can be specifically enforced against the wife, in the absence of proof that the offer was authorized by her.—Brown v. Lapham, Colo., 44 Pac. Rep. 504.

99. Taxation — Leased Lands Owned by Municipal Corporation.—Lands owned by a municipal corporation, and leased for more than 14 years, not subject to revaluation, are, ander the provisions of section 2783, Rev. St., taxable only to the extent of the lessee's interest therein.—ZUMSTEIN v. CONSOLIDATED COAL & MINING CO., Ohio, 48 N. E. Rep. 329.

100. TAXATION-TAX on Peddlers.—Acts 1895, ch. 116, imposing a license tax on peddlers, and declaring any person carrying a wagon, cart or buggy for the purpose of exhibiting or delivering any wares or merchandise, to be a peddler, is not void, as an interference with interstate commerce, as applied to a foreign corporation, there being no discrimination against non-residents in favor of citizens of the State.—WROUGHT-IRON RANGE CO. V. CARVER, N. Car., 24 S. E. Rep. 352.

101. TRESPASS — Damages. — In trespass q. c. f. for damages caused by the defendant railway company raising its lot adjoining plaintiff's, on which was operated its railway tracks, thereby breaking down plaintiff's wall, and causing gravel, water, etc., to fail upon plaintiff's lot, the injury being a permanent one, the damages should be estimated up to the time of trial, and not merely to the time of the commencement of the suit.—CHICAGO & A. R. CO. V. ROBBINS, Ill., 48 N. E. Rep. 382.

102. TRIAL DE NOVO.—Under Rev. St. art. 816, which authorizes a defendant to plead any new matter to defeat a plaintiff's claim except a counterclaim or set.off, and which applies to cases removed from justice to county court by appeal as well as by certiorari, defendant is entitled on such an appeal to file written pleadings, including all defenses except pleas of set.off or counterclaim not pleaded below.—SLOVER v. McCORMICK HARVESTING MACH. Co., Tex., 84 S. W. Rep. 1055.

103. TRIAL—View by Jury.—The view by the jury of the property which is the subject of litigation, or of the place where a material fact occurred, which may be ordered in a civil action, under section 5191, Rev. St., is solely for the purpose of enabling them to apply the jevidence offered upon the trial.—Machader v. WILLIAMS, Ohio, 43 N. E. Rep. 324.

104. TRUST—Express Trusts.—In an action to set aside conveyances from a daughter to her mother, an allegation of the answer that defendant was induced to take absolute title to the property through fear that the daughter's lack of experience would enable some fortune hunter to rob her of her inheritance, is not sufficient to prove an express trust.—White v. Ross, Ill., 43 N. E. Rep. 336.

105. TRUST—Resulting Trust.—Where land is paid for by the joint labor and money of two sisters, and the deed, though in the name of one sister alone, is for the two, the other sister is entitled to an undivided one-half interest.—Speer v. Burns, l'enn., 34 Atl. Rep. 212.

106. USURY AS A DEFENSE—Offer to Restore Benefits.

One setting up usury to defeat the collection of interest, or to have interest payments applied on the principal sum, need not offer to restore the benefits received.—FIRST NAT. BANK OF MASON V. LEDBETTER, Tex., 34 S. W. Rep. 1042.

107. USURY—Forfeiture of Interest.—Rev. St. III. 1881, ch. 74, providing that, if any person shall contract to receive a greater rate of interest than 8 per cent., he shall forfeit the whole of said interest, and shall be entitled only to recover the principal, imposes the loss of all interest—both that which accrues before and that accruing after maturity of the principal obligation.—MAYNARD V. HALL, Wis., 66 N. W. Rep. 715.

109. VENDOR AND PURCHASER—Deed—Restriction.—A provision in a deed conveying an interest in land in fee-simple, that the grantee shall not dispose of it without the written consent of the grantors, will not render his conveyance of the same without such consent invalid.—MILLER v. DENNY, Ky., 34 8. W. Rep. 1079.

109. WATER COURSE — Pollution — Injunction. — The operation of a starch factory so as to pollute the waters of a natural stream and render them unfit for watering stock and ordinary domestic use will be enjoined at the instance of a riparian owner who is deprived of such use of the water. — MIDDLESTADT V. WAUPACA STARCH & POTATO CO., Wis., 66 N. W. Rep. 714.

110. WILLS—Devise.—Where plaintiff, in an action for possession of land, dies, and his heirs at law and executors are made parties plaintiff in his stead, and offers evidence that their ancestor is dead, that they are his heirs, and that he left a will, which has been probated, the presumption is that the ancestor devised all his property, and the heirs must, by the will or otherwise, show that they are his devisees.—BLUE V. RITTER, N. Car., 24 S. E. Rep. 338.

111. WILLS—Nature of Estate.—Where testator devised certain real estate to his executors in trust to pay the income thereof to his wife, or permit her to occupy the same as a home—it being expressly provided that the devise was made in lieu of dower—and after devising other property in trust for a daughter, and making other bequests, provided further that the executor should carry out the devise to the wife in preference to all others, the widow, by accepting the provisions of the will in lieu of dower, becomes a purchases for value, and is entitled to her life estate in preference to the devise in trust for the daughter.—Ix RE TAILOR'S ESTATE, Penn., 34 Atl. Rep. 307.

112. WILLS—Precatory Trust.—A will which, after disposing of the residuary estate of the testatrix to her husband "absolutely," expresses the wish that he shall so arrange his affairs that at his death "whatever may remain" of the property will go to the son of the testatrix, does not create a precatory trust in the property passing under the provision, but vests in the husband an absolute estate, with full power of disposition.—NUNN. O'BRIEN, Md., 34 Atl. Rep 244.

113. WILLS — Validity. — The presumption, arising from the execution of a will, that testator was aware of its contents, is not overcome by proof that it was not drawn in accordance with his instructions, but as near thereto as the law would permit, testator having been told that his directions could not be entirely followed—and that he was neither seen nor heard to read it.—Sheer v. Sheer, Ill., 43 N. E. Rep. 334.

114. WITNESS — Cross-examination. — While the indorsement of a note by the payee imports a consideration, and the holder may rest on the presumption until evidence of the illegality of the note is produced, yet if, where such illegality is pleaded, he testifies in chief that he gave a consideration for the note, such testimony is material to the issues made, and the defendant is entitled to cross-examine in regard to the consideration.—KENNY v. WALKER, Oreg., 44 Pac. Rep.

115. WITNESS—Impeachment — Declarations Out of Court.—When the impeachment of a witness who has given a narrative of facts consists of evidence to the effect merely that he was not present at the transaction about which he has testified, a former unsworn statement, made out of court, that he was present and saw such transaction, is not admissible.—Baltimore City Pass. Ry. Co. v. Knee, Md., 34 Atl. Rep. 252.

116. WITNESS—Transaction with Decedent.—In an action on a note, which was made by G and indorsed by K, who has since died, the testimony of the maker and of the payee that K's indorsement was on the note when delivered to the payee, is not within Rev. St. § 4069, as in respect to a transaction had "personally" with a deceased person.—Sawyer v. Choats, Wis. (t N. W. Rep. 669.

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The question as to the constitutionality of acts prohibiting barbering on Sunday has recently come before three courts with different results. The Supreme Court of Missouri, in the case of State v. Granneman, held invalid an act making it a misdemeanor for any person to carry on the business of barbering on Sunday, upon the ground that it is in derogation of the constitution prohibiting the passage of local or special laws. The court while conceding the power of the legislature to pass a general law, compelling the observance of Sunday as a day of rest, applicable alike to all classes and kinds of labor, denied such power as to one particular kind of labor, holding it to be special legislation prohibited by the organic law. So, also, the Supreme Court of Illinois, in the later case of Eden v. The People, declared the act of the legislature which provides that it should be unlawful for any one to keep open any barber shop, or carry on the business of shaving, hair cutting, or any kind of tonsorial work on Sunday, to be unconstitutional, upon much the same ground as the Missouri court, viz., that the act in question was not binding upon all the members of the community. "The act," says the court, affects one class of laborers and one class only. The merchant and his clerks, the restaurant with its employees, the clothing house, the blacksmith, the livery stable, the street-car lines, and the people engaged in every other branch of business, are each and all allowed to open their respective places of business on Sunday and transact their ordinary business if they desire, but the barber and he alone is requested to close his place of business. The barber is thus deprived of property without due process of law in direct violation of the constitution of the United States and of this State. Moreover, if the merchant, the butcher, the druggist, and other trades and callings are allowed to open their places of business and carry on their respective avocations seven days of the week, upon what principle can it be held that a person who may be engaged in the business of barbering

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may not do the same thing? Why should a discrimination be made against that calling and that alone?"

On the other hand the Court of Appeals of New York has recently, in the case of People v. Havnor, declared constitutional an act of this character. They hold that the legislature has the constitutional right to prohibit the business of barbering on Sunday and to discriminate as to hours and locality with respect thereto; that the exercise of the police power by the legislature is not in conflict with the constitution when the real object of the statute has a reasonable connection with the welfare of the public. When thus exercised, even if the effect is to interfere to some extent with the use of property, or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, essential to organized society, of necessity involve some sacrifice of natural rights.

The court has little to say upon the point upon which the Missouri and Illinois cases were decided, though the New York court evidently regarded it as untenable. Indeed, they not only held valid an act applicable to one calling but which was in terms made applicable to certain localities only within the State. Three of the members of the court dissent. The question suggested by these cases, as to what is "special" legislation, is not by any means clear of solution. In opposition to the view of the Missouri and Illinois courts, it is said that the matter of applying the Sunday law to a particular trade or calling is one of legislative discretion, and does not furnish a proper occasion for interference by the judiciary. It is quite clear that the making of laws has been intrusted to the legislative branch of the government, and so long as the actions of the legislature are such that one could conceive them to have been actuated by some rational public reason, the legislature must be deemed to have acted within its province. Applying this test to the subject of special legislation "can it be said," asks an eastern law exchange commenting upon this subject, "for example, that a reasonable man could not by any possibility have seen fit to apply a Sunday closing rule to barber shops without at the same time applying it to other trades? Some rational reason must be found, it is said, for singling out barber shops; another way of putting it is to say that some rational reason must be shown why the legislature did not go farther. It would not be argued that the legislature must go, if at all, to the full length of closing all shops, including that of the apothecary. Some line must be drawn; and it is conceivable that the legislature may from their present knowledge feel incompetent to draw that line. They may feel sure that barbers should fall on the prohibited side, and yet be in just doubt as to other occupations. Can it be said, then, that the legislature might not have had a reasonable ground for declining to carry their prohibition to its utmost extent? If not, then there is a conceivable reason why it should have stopped where it did. If, whenever a mischief arose in any particular instance, it were necessary for the legislature to consider all possible instances to which they might think the mischief applied, legislation would indeed be a slow process."

NOTES OF RECENT DECISIONS.

RAILROAD COMPANY-CONTROL OF PARAL-LEL LINES-VESTED RIGHTS.-The Supreme Court of the United States decides, in Pearsall v. Great Northern Ry. Co., 16S. C. Rep. 705, that a contract by which one railroad agrees to guaranty the bonds of a parallel, competing road, in consideration of which half the stock of the latter road is to be transferred to the stockholders of the former road, or to a trustee for their use, is within Laws Minn. 1874, ch. 29, providing that no railroad shall consolidate with, lease, purchase, or in any way control, any parallel or competing line and that a general power given a railroad by its charter, to consolidate with, purchase, lease, or acquire the stock of other roads, may, while it remains unexecuted, be limited by the legislature, without impairing any vested right, to cases where the other roads are not parallel or competing. Justice Field and Mr. Justice Brewer dis-

CHATTEL MORTGAGE — GROWING CROPS — RIGHTS OF MORTGAGOR.—It is held by the

Supreme Court of California, in Simpson v. Ferguson, 44 Pac. Rep. 484, that the statute providing the manner of mortgaging growing crops, is intended to be exclusive of other modes, and is a declaration of legislative intent that such property shall be regarded as a chattel. They also declare that while growing crops are sometimes, and for some purposes, a part of the realty, as between a mortgagor of the land and the mortgagee, the mortgagor is the owner of the crops growing thereon, free from any lien of the mortgage, and with full power to dispose of or mortgage the same, until he is divested of possession of the land by foreclosure proceedings, either by a receiver, or under final decree. The following is from the opinion of the court:

It is urged that section 2955 and following of the Civil Code, providing for the manner of mortgaging growing crops, do not establish an exclusive method: that as this class of property may under some conditions be regarded as realty, and under other condi-tions as personalty, it must follow that under corresponding conditions the property may be the subject of a real estate mortgage, or a chattel mortgage, according to the circumstances; and that plaintiff having a valid mortgage upon the land, with its rents, issues and profits, this gives him a valid lien upon the growing crops, as effectually, to the same extent, for all purposes, as if executed with the formalities required in the case of a crop mortgage. We are unable to coincide in this view. In the first place, we think it quite manifest, from the provisions of the Code in question that the legislature intended thereby to provide an exclusive mode for the mortgaging of growing crops, and intended to declare that for such purposes this species of property shall be regarded as a chattel. There is nothing in the statute to indicate that it was not intended to cover every case of a morfgage given upon that class of property. In the second place, while it is perfectly true that growing crops may be either personal or real property, according to circumstances, and while, as suggested by respondent, a mortgage of the land gives a lien upon everything that would pass by a grant of the land, which includes crops growing thereon, it is nevertheless well established that such lien, so far as the growing crops are concerned, is limited in its effect to the crops growing upon and unsevered from the land at the time of foreclosure. It does not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. Until the latter event, where, as in this State, the mortgage creates no estate in the mortgagee, but confers only a lien upon the property, the mortgagor is entitled to such crops, with the same absolute right and dominion over them as if the mortgage did not exist. This doctrine is thoroughly well settled, with no considerable diversity upon the subject among text writers or the courts. The general rule is well stated in Mr. Jones' work on Mortgages (5th Ed.), \$ 670, where it is said: "So long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate. His contract is to pay interest, and not rest.

Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise this right he cannot claim the profits. Upon a bill in equity to obtain foreclosure and sale, he may, in proper cases, apply for the appointment of a receiver to take for his benefit the earnings of the property. He is then confined to the rents and profits accruing during the pendency of the suit. If he neglects to apply for a receiver, the final decree, if stlent upon this subject, does not affect the mortgagor's possession or right to the earnings in the meantime. It is only after sale under the decree, except where statutes provide otherwise, that the mortgagor is wholly divested of title, and consequently of right to possession. Unless restrained by the terms of the mortgage, the mortgagor in possession may work mines or quarries upon the mortgaged property, and whatever he severs from the realty becomes unincumbered personalty, and his own property. Even if the rents and profits of the mortgaged property are expressly pledged for the security of the mortgage debt, with the right in the mortgagee to take possession upon default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver." In Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. Rep. 420, the authorities upon this subject are exhaustively reviewed, and it is there held (quoting from the syllabus): "A conveyance to a trustee, absolute on its face, but with an instrument of defeasance showing that it is to secure payment of a debt due to a third party, is a mortgage, and is subject to the rule that a mortgagee is not entitled to the rents and profits until he acquires actual possession. The rule that the mortgagee is not entitled to the rents and profits before actual possession applies even when the mortgagor covenants in the mortgage to surrender the mortgaged property on default in payment of the debt, and nevertheless refuses to deliver it after default, and drives the trustee to his action to enforce the trust." In that case the court, stating the doctrine as laid down in Gilman v. Telegraph Co., 91 U. S. 603, say: "It was declared by this court that where a railroad company executed a mortgage to trustees on its property and franchise, 'together with the tolls, rents and profits to be had, gained or levied thereupon,' to secure the payment of bonds issued by it, the trustees in behalf of the creditors were not entitled to the tolls and profits of the road, even after condition broken and the filing of a bill to foreclose the mortgage, they not having taken possession or had a receiver appointed." Chancellor Kent states the rule thus: "The mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover possession by regular entry by suit, before he can treat the mortgagor, or the person holding under him, as a trespasser." 4 Kent, Comm. 157. In the case of Sexton v. Breese (N. Y. App.), 32 N. E. Rep. 183, where the mortgagor of the land, subsequent to the giving of the mortgage, but before it was due, sold a growing crop of wheat raised on the land, and, subsequently to such sale, delivered possession of the land to the mortgagee thereof, it was held that the vendee of the crop was entitled to the same, as against the mortgagee, and it is said: "If we assume that the plaintiff was in possession of the land as by an actual surrender from the

mortgagor, his rights in its use were subject to the previous disposition made of the growing crop of grain by the owner of the land. He had planted the crop, and it was perfectly competent for him to dispose of it while he held the title to the land. Though, in a sense, a growing crop of grain is a part of the real estate, it nevertheless possesses the characteristics of a chattel, and is salable and transferable as other personal property is, and may be taken upon execution, and sold in discharge of a judgment debt." In West v. Conant, 100 Cal. 231, 34 Pac. Rep. 705, where the mortgagor remained in possession of the mortgaged land after the foreclosure sale, and received all the rents, issues and profits therefrom, it was held that he was entitled to hold such premises until the expiration of the period of redemption, and that the purchaser at the sale was not entitled to a receiver to take possession of crops of hay and grain growing upon the land intermediate the sale and the expiration of the equity of redemption. In the recent case of Freeman v. Campbell, 42 Pac. Rep. 85, decided by this court, where the conveyance from Anderson, plaintiff's intestate, to defendant, was held to be a mortgage, and where defendant had taken possession of the land and received the rents thereof, it was held that the administrator of Anderson, the mortgagor, was entitled to recover the amount of the rents received by Campbell as money had and received, belonging to the estate, and it is there said: "The claim that the mortgage included the rents, as well as the land, does not aid the appellant, as under section 2927, Civ. Code, he had no right to the possession of the mortgaged security. His right to the rents was no greater than that to the land. A mortgage is a contract by which specific property is hypothecated (Civ. Code, § 2920), but such contract is independent of the fact of possession, and does not of itself confer the right of possession. If a receiver had been appointed to take possession of the mortgaged premises, the authority of that officer would have included the right to take possession of the rents, as well as the land, and the rents would then have been in the custody of the court, and subject to its direction; but, in the absence of some intervention by the court, the mortgagor has the right to these rents, even though they are included in the instrument of mortgage, and the mortgagee's right to them is limited to their disposition by the court in the judgment, or subsequent thereto." From the principles here declared, it follows that the mortgagor being in possession of the land, and entitled as of right to the crops grown thereon, it was competent for him to sell or mortgage, or otherwise dispose of them, and convey good title thereto, as against the mortgagee of the land or his assigns, at any time prior to the foreclosure of the latter's mortgage.

It is claimed by respondent that the cases of Montgomery v. Merrill, 65 Cal. 432, 4 Pac. Rep. 414, and Treat v. Dorman, 100 Cal. 623, 35 Pac. Rep. 86, are in conflict with the doctrine that growing crops can only be mortgaged with the formalities prescribed for the execution of chattel mortgages. But we do not so regard them.

REFORMS IN THE LAW OF NEWS-PAPER LIBEL.

The publisher of a newspaper possesses no immunity from liability in publishing a libel other or different from any other person.

The law makes no distinction between him and any private person who may publish an article in a newspaper, or other printed form, and if either abuses the right to publish his sentiments on any subject, and upon any occasion, he must defend himself upon the same legal ground.1 The publisher of a newspaper is liable for everything appearing in its columns,2 though he was ignorant or even forbade the publication.8 He is liable though he believed it to be true and acted in good faith.4 The proprietor, the editor, printer and the publisher are liable to be sued either separately or together.5 Every sale or delivery of a libel is a fresh publication, for which a civil action lies against the seller, and the onus is on him to prove that he was ignorant of its contents.6 The proprietor is liable to a party libeled, notwithstanding the libel is accompanied with the name of the author,7 and he may be sued without joining the writer as a defendant.8 So an editor is not bound to give up the name of his correspondent, and if he refuses to do so no blame will attach to him, and the plaintiff must be content to sue the proprietor of the paper.9 Nor can the proprietor of a newspaper, who was made liable for the publication of a libel and mulcted, sue the writer for contribution, though the libel may be inserted by the latter without the knowledge or consent of the former.10 Editors have the full liberty to criticise the conduct and motive of public men and the measure and policy of government,11 but the discussion must be fair and legitimate. If one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he must do so at his

what he says or answer in damages to the party injured.12 The same rule is applied to candidates for office. Editors may publish what they please in relation to the character and qualifications of the candidate, but they are responsible for the truth of all they so publish.18 What is true may be published of any man, public or private, and proof of the truth of the charge under a plea of justification will be a complete defense in a civil action.¹⁴ Proprietors of newspapers are not to be punished for publishing a fair, full and true report of judicial proceedings, except on actual proof of malice in making the report.16 The reason for this rule is that the public have a right to know what takes place in a court of justice, and unless the proceedings are of an immoral, blasphemous, or indecent character, or accompanied with defamatory observations or comments, the publication is privileged.16 • Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private person whose conduct may be the subject of such proceedings.17 So every impartial and accurate report of any proceeding in a public law court is privileged, unless the court has itself prohibited the publication or the subject-matter of the trial be unfit for publication.18 If the publication is accompanied with defamatory comments it becomes illegal and libelous.19

peril, and must either prove the truth of

¹ Brouson v. Bruce, 59 Mich. 467.

² Buckley v. Knapp, 48 Mo. 152; Rex v. Walter, 8 Esp. 21; Story v. Wallace, 60 Ill. 51; Scripps v. Reilly, 38 Mich. 10.

⁸ Storey v. Wallace, 60 Ill. 51; Andrews v. Wells, 7 John. 260, 5 Am. Dec. 267; Dunn v. Hall, 1 Ind. 344; Perrett v. Times Newspaper, 25 La. Ann. 170; Commonwealth v. Morgan, 107 Mass. 199; Curtis v. Mussey, 6 Gray (Mass.), 260; Detroit Post Co. v. McArthur, 16 Mich. 447; Scripps v. Reilly, 38 Mich. 10.

4 Littlejohn v. Greely, 18 Abb. (N. Y.) Pr. 41.

⁵ Ludwig v. Cramer, 53 Wis. 193; R. v. Dever, 6 How. St. Tr. 546.

6 Staub v. Van Benthuysen, 36 La. Ann. 467.

⁷ Doyle v. Lyon, 10 Johnson, 447, 6 Am. Dec. 346.

8 Ludwig v. Cramer, 58 Wis. 198.

9 Harle v. Catherall, 14 L. Tr. 802.

10 Colburn v. Patmore, 1 Cromp. M. & R. 78.

11 Negley v. Farrow, 60 Md. 176.

12 Hamilton v. Eno, 81 N. Y. 116; Negley v. Farrow,
 60 Md. 176; Shadden v. McElwee, 86 Tenn. 146; State
 v. Schmidt (N. J.), 9 Atl. Rep. 774.

18 King v. Root, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; Wheaton v. Beecher (Mich.), 33 N. W. Rep. 503.

14 Gathercole v. Miall, 15 M. & W. 321. Ve. 75337615 Commonwealth v. Blanding, 3 Pick. (Mass.) 304;
Thompson v. Powning, 15 Nev. 202; Ackerman v.
Jones, 5 J. & Sp. (N. Y.) 42: Hawkins v. Globe Printing Co., 10 Mo. App. 174; Cincinnati, etc. Co. v. Timberlake, 10 Ohio St. 548; Stanley v. Webb, 4 Sandl.
Sup. Ct. 21; Forbes v. Johnson, 11 B. Mon. 48; Davison v. Duncan, 7 E. & B. 231; Wason v. Walter, 4 L.
R. Q. B. 82.

16 Thompson v. Powning, 15 Nev. 202.

17 Cowley v. Pulsifer, 137 Mass. 896, 50 Am. Rep. 318; Rex v. Wright, 8 T. R. 293; Davison v. Duncan, 7 El. & Bl. 229; Commonwealth v. Blanding, 3 Pick. (Mass.) 304.

18 Odger's L. & S. 248.

19 Commonwealth v. Blanding, 3 Pick. (Mass.) 304;

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So it is libelous to publish a pleading of one party in a newspaper or it would seem the whole proceedings before the matter has come to be heard.20 An accurate report of a portion of a judicial proceeding will still be privileged if it does not purport to be a report of the whole. Thus when the trial lasts more than one day, reports published in the newspapers each morning are protected. When a man publishes only a portion, when it is in his power to publish the whole, this fragmentary publication will be evidence of malice, if the part selected and published tell more against the plaintiff than a report of the whole trial would have done.21 The privilege attaching to fair and accurate reports may be rebutted by proof of actual malice.22 The reports of judicial proceedings, although fair and accurate, are not privileged and are indeed illegal, when the court has itself prohibited the publication, as it frequently did in former days.28 Where the subject-matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication, it is not justifiable to publish even a fair and accurate report of such proceedings; such a report will be indictable as a criminal libel;24 nor is the publication of proceedings before a grand jury privileged.25

The common law remedy allowed to a person injured by a libel: First, special damages for every injury of a pecuniary nature resulting from the wrong, which he had to both plead and prove; and second, general damages to his standing and reputation, which the law presumed without proof from the fact of the publication of libel actionable per se. Malice is the gist of every action for libel; either malice in fact consisting of im-

Clark v. Binney, 2 Pick. (Mass.) 113; Thomas v. Croswell, 7 John. 264; Heywood v. Cuthbert, 4 McCord, 864; Roberts v. Brown, 10 Bingh. 519; Flint v. Pike, 4 Barn. & Cr. 473; Salisbury v. Union & Advertising Co., 45 Hun (N. Y.), 120; Godshark v. Metzzar, 17 Atl. Rep. (Pa.) 215; Stanley v. Webb, 4 Sandf. Sup. Ct. 21.

²⁰ Cowley v. Pulsifer, 187 Mass. 396; Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548; Kelley v. Lafitte, 28 La. Ann. 435; Burrows v. Bell, 7 Gray (Mass.), 301; Barber v. St. Louis Dispatch Co., 8 Mo. App. 377.

²¹ Odger's L. & S. 258.

proper and unjustifiable motives, or constructive malice, which the law presumed without proof from the fact of the falsity of the publication. Evidence of intention, that is, of the absence of malice in fact, was always admissible when the communication was privileged in justification, and when it was not proven in mitigation of damages. A retraction was always admissible in mitigation. When a newspaper article is libelous and does not appear to be privileged, it is presumed to be false and malicious, and no other evidence of falsehood is necessary than the publication itself in order to establish a prima facie case for the plaintiff.26 The law in all such cases implies malice; in other words, it says you have no right to libel another, whatever may have been the motive or intention.27 So if the publication is false the law will imply malice, though the editor believed it to be true and acted in good faith,28 and where malice is implied exemplary damages may without proof be awarded.29 But if the communication be privileged, express malice must be proved by the plaintiff before he can recover.

Newspapers have had a great deal to say concerning the inadequacies of this law as it now stands, and have discussed various changes which might relieve them from the annoyance of buncombe suits brought at the instigation of shyster lawyers. The agitation of the question by the press apparently resulted in convincing the legislatures of some of the States that the law was unjust, and not in harmony with the spirit of modern journalism. Michigan and Minnesota have passed statutes modifying the old law. In Michigan, by the statutes of 1887 (Laws 1887, p. 153), it was enacted that, in suits brought for the publications of libels in any newspaper, the plaintiff should only recover actual damages if it shall appear that the publication was made in good faith, and did not involve a criminal charge, and its falsity was due to mistake or misapprehension of the facts; and that in the next regular issue of said newspaper, after such mistake or misapprehension

²⁶ Dixon v. Allen, 69 Cal. 208; King v. Root, 4 Wend. (N. Y.) 133, 21 Am. Dec. 103; Negley v. Farrow, 60 Md. 177; Smith v. Bradwell, 11 Met. (Mass.) 869; Thompson v. Powning, 15 Nev. 208.

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²² Coleman v. Hartlepool Harbor & Ry. Co., 2 L. T. 766; Stevens v. Sampson, 5 Ex. D. 53.

²³ Brook v. Evans, 29 L. J. Ch. 616.

²⁴ R. v. Evening News, 3 Times L. R. 255.

⁵ McCabe v. Cauldwell, 18 Abb. (N. Y.) Pr. 377.

²⁷ Negley v. Farrow, 60 Md. 177.

²⁸ Littlejohn v. Greely, 13 Abb. (N. Y.) Pr. 41.

²⁹ Illinois, etc. R. Coal Co. v. Ogle, 98 Ill. 858.

was brought to the knowledge of the publisher or publishers, whether before or after the suit was brought, a correction was published in as conspicuous a manner and place in said paper as was the article sued on as libelous. By section 3, it was enacted: "The words 'actual damages' in this act, shall be construed to include all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other damages." Statutes substantially the same were enacted in Minnesota.

This is a step toward reform, but it does not cure all defects. In the first place, the statute purports to confine recovery, in certain cases, against newspapers, to what it calls "actual damages," and then defines actual damages to cover all direct pecuniary loss in certain specified ways, and none other, namely; in respect to property, business, trade, profession or occupation. Proof of actual damages would not only be impracticable and very difficult in these defined cases, but it does not reach all. still be injured and their prospects blighted who have no property, business, trade or profession. Nine times out of ten such losses cannot be the true damages in the worse cases of libel. As Campbell, J., in Park v. Detroit Free Press, 30 says: "A woman who is slandered in her chastity is, under this law, usually without any redress whatever. man whose income is from fixed investment or salary, or official emolument or business not impending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon there could be particularly no risk of this, and the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. could never be any such loss when employers or customers know or believe the charges un-The statute does not reach cases founded. where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence

which suspicion, helped by ill-will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure, with any accurate standard, the precise amount of evil done or probable. There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief; and, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice. The law has, therefore, always drawn distinctions between intentionally false and wicked assaults on character, and those which were not actually designed to create a false impression, although necessarily tending to injure reputation if false in fact, but it has made both actionable. This statute has not, apparently, attempted to relieve any persons, but the publishers of newspapers, from responsibility for every injury to character by libel, whether intentionally false or not. If a person, not a publisher, had written in a letter just what this paper published, and had done so under the same impression which Mr. Robison had, the statute would not save him from full responsibility for the damages of all kinds, to which the general rules of law have always subjected persons guilty of libel. While the statute is certainly ambiguous, we cannot attribute to the legislature the monstrous wrong of shielding the intended malice of writers, who impose on fair-minded publishers, from responsibility for newspaper libels, because the publishers themselves may be innocent of deceit, or of making the publishers responsible for the full degree of actual malice in the writer who misinforms them."

One of the leading journals of the country proposed, as a change in the law, that a "libel suit against a newspaper be a criminal suit brought against that person in the paper whose wickedness or carelessness wrought the injury, be he correspondent, news editor, reporter, editorial writer, or whoever may have been the effective 'utterer' of the offense, and the punishment be not a fine, but im-



prisonment." Such a law would be unfair. The proprietor of the paper printing the libel is the only person connected with the journal who, in ninety-nine cases out of a hundred, is known to the person libeled. To compel the libeled person to grope through the mazes of the editorial and reportorial staff in search of the proper party against whom to bring the suit would be a hopeless task. would virtually deny him justice, for there would, as a matter of course, in view of staring prison doors, be a general inclination to shift responsibility, with the result, doubtless, in many cases, of showing that the really responsible person was not connected with the journal at all, but one who had in good faith told a reporter what he or she at the time had believed to be perfectly true. Such a law would allow the proprietor to suppress the names of the writers and reporters, and advertise his own as proprietor and editor. and he would get all the credit for the bright ideas and good reportorial work in his paper. But when anything went wrong, or the paper was sued for libel, the name of the unfortunate reporter or writer of the article that caused the trouble would be immediately made public and surrendered to the police. The proprietor of the paper stands ready at all times to take credit for his journal's suc-The editor who maps out and conducts a political campaign for him is a secondary consideration when victory is achieved, and the reporter who makes his paper the talk of the town by reason of his clever work in unraveling a mystery or tracing a criminal is in the general order of things never heard of outside of his own ranks. So when in the energetic rush and zealous effort to beat his competitors some ambitious scribbler happens to blunder into the penning of a libel, the proprietor, who would gracefully have accepted all the tribute had no error been committed, should not be permitted to gracefully step aside and allow all the ignominy, shame and expense of a criminal prosecution to fall upon the man who had probably been working night and day for a small salary to build up the proprietor's property and the reputation of his journal. If it were possible always to discriminate between malicious libels and libels that creep in inadvertently—that are the result not so much of blamable carelessness as of temporary and pardonable lapse of

care caused possibly by overwork—then it might be well to hold responsible and imprison the writer of the malicious articles, and in the other case look for reparation to the proprietors, but as the law does not and cannot be made to discriminate in this way, it would be grossly more unjust to punish the writer for a momentary lapse of care than to force the proprietor, who must have profited, to a certain extent, by the publication, to pay in dollars and cents for the damage that he had done to the libeled person. To make the writers alone liable would work the slightest good on the score of care either to the press or the public. Because, first, the newspaper reporter's pride in his work and loyalty to his paper make strongly for accuracy; second, the organization and discipline of the office serve as checks to inaccuracy; and third, the feeling of certainty which every writer has, that any evidence of carelessness in the handling of important matters will bring about his dismissal from his paper, is quite as good as fear of a libel suit in making him cautious.

Under no circumstances should the proprietor of a newspaper be relieved of the responsibility of the utterances of his property—the newspaper. His vocation is to print the news of the day so that it can be known to the public. We must suppose him an educated man, one of clear, sound judgment and experience, whose rule is the old golden one, "Do unto others as you would be done by," and when items of news come into his establishment there is no excuse for his printing and issuing them without having a knowledge of what they are. If the news item relates to a party's character he must be particularly careful of how it reads, and make it read as if there certainly was a doubt in his mind, as far as the statement affecting the party's character is concerned. We are well aware that the proprietor of a paper can't be in the publication office to read over all the advertisements and news items before the paper goes to the public, but as we understand the machinery of a newspaper, there is always some person whose duty it is to read everything carefully that it is decided to print. He acts for the proprietor, and if he is incompetent, that's his employer's lookeut, and he is not to be blamed, and should not be sued for libel unless the proprietor cannot

be got at, for he is the agent of the proprietor, who is responsible in law for the acts of his agents. To have the proprietors eliminated from the responsible party would be bad policy and cause no end of trouble, and leave the way open for the unrestricted publication of scandal. The public would be entirely without security or relief.

If newspapers, instead of pandering to the passions and prejudices of others, would strive more to correct abuses and expose wrongdoing, if they would encourage rather than discourage convictions, and if they would hold their subordinates to a stricter accountability, speculative suits would grow infrequent and the public would have less cause to complain of wanton publications relating to private persons and private affairs, and outrageous assaults upon public men who have at least some rights which newspapers should respect.

D. M. Mickey.

Chicago, Ill.

PRINCIPAL AND SURETY—DISTINCTION BETWEEN SURETYSHIP AND GUARANTY—NOTICE OF DEFAULT—BONDS—CONDITIONAL SIGNATURE.

PAGE V. WHITE SEWING MACH. CO.

Court of Civil Appeals of Texas, December 21, 1895.

- 1. A bond whereby the obligors bind themselves severally and individually for the performance by the principal of certain acts, consisting of the payment to the obligee, a sewing machine company, of all claims owing the obligee from the principal, is, as affects the sureties, a contract of suretyship, and not of guaranty, and therefore the failure of the obligee to notify the obligors of the default of the principal does not affect their liability.
- 2. When a bond provides that each obligor signing the bond shall be absolutely bound, without regard to any other instrument of agreement whatever, an obligor cannot defend by showing that his liability was subject to oral conditions.
- 3. A bond conditioned on the payment of all indebtedness from the principal obligor, whether evidenced by book accounts, notes, or otherwise, provided that the obligors waived "presentment for payment, notice of non-payment, protest, and notice of protest, and diligence, on all notes." Held, that notice of default in payment of notes given for the purchase of goods sold the principal by the obligee was waived by the sureties.

LIGHTFOOT, C. J.: The appellee sued appellants, August 22, 1889, upon the following bond, which was duly signed and executed by W. S. Page, G. G. Towles, W. P. Epperson, and W. H. Niles: "Know all men by these presents, that we, W. S. Page and G. G. Towles and W. P. Ep-

person and W. H. Niles are held and firmly bound, severally and individually, unto the White Sewing Machine Company, in the sum of one thousand dollars, lawful money of the U.S. of America, to be paid to the White Sewing Machine Company, their representatives or assigns, for which payment (together with ten per cent. thereon in case of suit upon this bond), well and truly to be made, they bind themselves, their heirs, executors, administrators, and separate estate, jointly and severally, firmly by these presents. Sealed with their seals. Dated the March 12th, one thousand eight hundred eighty-six. The conditions of the above obligation are such that if the above-bounden W. S. Page, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter, in any manner, exist or be incurred, on the part of the said W. S. Page, to the White Sewing Machine Co. or its assigns, whether such indebtedness or liability shall exist in the shape of book accounts, notes, or leases, renewals or extensions of notes, accounts, leases, acceptances indorsements, consignments of property or merchandise, failure to deliver or account for same, or any part thereof, or otherwise, and whether same shall be waived under any contract between said White Sewing Machine Company and said W. S. Page or otherwise, and whether same shall arise out of the purchase and sale of sewing machines, or otherwise, hereby waiving presentment for payment, notice of non-payment, protest, and notice of protest, and diligence, upon all notes, accounts or leases now or hereafter executed, indorsed, transferred, guarantied, or assigned by the said W. S. Page to the White Sewing Machine Company, its agents or assigns, then this obligation shall be null and void, but otherwise to be and remain in full force and effect. Each one signing this bond is bound according to the purport of it, without regard to any understanding that any person should also sign this instrument, and the person to whom this is intrusted has absolute authority to deliver it, and the same is made and shall be construed without reference to any other instrument or agreement whatsoever. It is further understood, and the undersigned hereby agree and consent, that the White Sewing Machine Company or its agents may, in their discretion, take and receive from said W. S. Page any security whatsoever, mortgage, personal or other property, at any time or times, and grant any extension to said W.S. Page, without in any way affecting the liability of the signers hereto, or either of them, from the obligations of this bond." The above bond was made an exhibit to the petition. W. P. Epperson and W. H. Niles, being non-residents and insolvent, were not sued. The petition alleged a breach of the bond, in that W. S. Page, the principal in the bond, became indebted to plaintiff by the purchase of sewing machines under his contract, and that judgment had been ob-

tained against him for \$4,449.24 therefor, which he had failed and refused to pay. Plaintiff set out various claims, and prayed for judgment on the bond, and for 10 per cent. attorney's fees, and for general relief. December 2, 1893, the appellants. W. S. Page and G. G. Towles, filed their second amended answer, consisting of a general denial, a plea of res adjudicata by W. S. Page, a plea in the nature of non est factum by G. G. Towles; that said contract was signed by him upon a condition which was never fulfilled; that no notice of the acceptance of same was ever given him by plaintiffs, etc.; that defendant G. G. Towles is released by reason of plaintiff's having failed to notify him of the default of defendant Page; and that the contract was changed, and additional credit given said Page, in 1888, whereby the defendant G. G. Towles was released, etc. December 2, 1893, plaintiff filed its first supplemental petition in reply to defendant's said answer, alleging that, by reason of the terms of the contract sued upon, defendant Towles was estopped from setting up said defenses contained in his second amended answer. On December 3, 1893, the case was tried by a jury; and in accordance with the instructions of the court the jury returned a verdict in favor of plaintiff and against defendants for \$1,000, with interest at the rate of 6 per cent. per annum from August 22, 1889, until the trial, and 10 per cent. as attorney's fees, upon which judgment was rendered, and defendants appeal.

The above bond of appellant W. S. Page was introduced in evidence, and it was fully shown that he was indebted to appellee as alleged in its petition. Appellants have ably presented the case, from their standpoint; but appellee has filed no brief, or appeared in this court, and we have had no aid whatever from that side in the investigation of the important questions considered.

Under appellants' fifth, sixth, and seventh assignments of error, they complain of the ruling of the court in excluding the testimony of appellant G. G. Towles, by which he attempted to show that appellee had no cause of action against him, because, when he signed the bond, he did so on condition that the contract of W. S. Page should be extended to other counties, and additional credit given him, and that he (Towles) should be notified of the fact, and that the bond never became a binding obligation upon him. The bond, which was signed by the witness Towles as a surety, provides on its face that "each one signing this bond is bound according to the purport of it, without regard to any understanding that any person should also sign this instrument, and the person to whom this is intrusted his absolute authority to deliver it, and the same is made and shall be construed without reference to any other instrument or agreement what oever." The instrument was delivered, the territory of W. S. Page was extended, and his line of credit enlarged. Under such facts, did the court err in excluding the oral testimony of G. G. Towles, by which he sought to evade the terms of the written contract by parol understanding? We think not.

It is further contended by appellants that the court erred in excluding the testimony offered by appellant Towles tending to show that, if he had known of the default of his principal, he could have saved himself harmless by getting additional security, but the company gave him no notice. Appellants insist upon treating the contract as one of strict legal guaranty. We cannot so regard it. It is a plain bond, executed by W. S. Page to the appellee, with G. G. Towles and others as securities. The contract is between the appellee, on the one side, and W. S. Page as principal, and Towles and others as sureties, on the other. The difference between a contract of guaranty and one of suretyship is not always clearly marked or well defined. In And. Law Dict. p. 497, the difference is thus stated: "A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, whereas a guaranty is a liability only for his ability to perform this act. A surety assumes to perform the contract for the principal debtor, if he should not. A 'guarantor' undertakes that his principal can perform; that he is able to perform. The undertaking of a surety is immediate and direct—that the act shall be done, and, if not done, then he is to be responsible at once; but, from the nature of the undertaking of a guarantor non-ability (insolvency) must be shown." "A guarantor insures the solvency of the debtor. A surety insures the debt itself. A surety must demand proceedings, with notice that he will not continue bound unless they are instituted, whereas a guarantor may rely upon the obligation of the creditor to use due diligence to secure satisfaction of his claim." Reigart v. White, 52 Pa. St. 438; Kramph v. Hatz, Id. 525. Mr. Brandt, in his work on Suretyship and Guaranty (section 1), thus states the difference: "What is a Surety or Guarantor-Difference between Them. A surety or guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. The words 'surety' and 'guarantor' are often used indiscriminately, as synonymous terms; but, while a surety and a guarantor have this in common,-that they are both bound for another person,-yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal, by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor, from the beginning, and is held ordinarily to know every default of his principal. Usually, he will not be protected, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the

principal does not join. * * * The principal and surety, being directly and equally bound, may be sued jointly in the same suit, while the guarantor, being bound by a separate contract, and only collaterally liable, cannot usually be joined in the same suit with the principal." See, also, Id. § 100. This definition was adopted, in substance, by the court of appeals, from Burge on Sureties, as follows: "Surety-Guarantor-Difference between. A surety is usually bound with his principal in one and the same instrument, executed at the same time and on the same consideration. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. Burge, Sur. § 1. A surety is, in the first instance, answerable for the debt for which he makes himself responsible, while the guarantor is only liable when default is made by the party whose undertaking is guarantied. A guarantor is entitled to notice. Id. § 157. A surety is liable upon the delivery of the obligation." Garrett v. Insurance Co., 1 White & W. Civ. Cas. Ct. App. § 937. This distinction has been recognized and acted upon by our supreme court wherever the question has arisen, though we find no direct adjudication upon it. This is a plain bond, executed by a principal, with sureties, whereby the obligors bind themselves for the performance of certain things by the principal in the bond. It is not a technical contract of guaranty, under which the sureties may claim a release because they are not notified of the default of the principal. Manufacturing Co. v. Ponder, 82 Tex. 653, 18 S. W. Rep. 152; Association v. Smith, 70 Tex. 168, 7 S. W. Rep. 793; Bennett v. Association, 57 Tex. 72; Lemp v. Armengol, 86 Tex. 690, 26 S. W. Rep. 941; Hueske v. Broussard, 55 Tex. 201; Clark v. Cummings, 84 Tex. 610, 19 S. W. Rep. 798; Palmer v. Bagg, 56 N. Y. 523. Under a technical contract of guaranty, where the guarantor alone makes a contract with the guarantee, that he will stand bound for the acts of a third person, the contract is between the guarantor and the guarantee, and the rules as to notice will usually ap-Wilkins v. Carter, 84 Tex. 438, 19 S. W. Rep. 997; Johnson v. Bailey, 79 Tex. 516, 15 S. W. Rep. 499; Davis v. Wells, 104 U.S. 159; Id., 115 U.S. 524, 6 Sup. Ct. Rep. 173. But we have here no such contract of guaranty, and the rules invoked by appellant do not apply.

Appellants, in their able presentation of the case, rely upon the cases of Davis v. Mills, 55 Iowa, 543, 8 N. W. Rep. 356, and Manufacturing Co. v. Littler, 56 Iowa, 601, 9 N. W. Rep. 905. In the former there was a clear contract of guaranty. In the latter the terms of the contract are vaguely set out, but, from the portions given, it seems to be a very different contract from the one before us. The court there lays much stress on a provision in the contract that the party indemnified had the power, at pleasure, to annul and put an end to the contract, and the company did terminate it, taking the note of the agent on settle-

ment. In this case no such provision occurs in the contract, but, on the contrary, the contract provides as follows: "It is further understood. and the undersigned hereby agree and consent, that the White Sewing-Machine Company or its agents may, in their discretion, take and receive from said W. S. Page any security whatsoever, mortgage, personal or other property, at any time or times, and grant any extension to said W. S. Page, without in any way affecting the liability of the signers hereto, or either of them, from the obligations of this bond." Thus, the parties bound themselves, in the most solemn manner, that the sureties should not be released by reason of any extension of time, or the taking of any security or property whatsoever from W. S. Page. Under our statutes, appellant, whose duty it was, under the contract, to keep himself posted in regard to his principal, could have relieved himself by serving notice on the party indemnified at any time after a cause of action accrued. Sayles' Civ. St. art. 3660. "Any person bound as surety upon any contract for the payment of money or the performance of any act, when the right of action has accrued, may require by notice in writing, the creditor or obligee forthwith, to institute suit upon such contract." No such notice was given by appellant Towles, but he here claims that notice should have been given to him by the obligee in the bond. We fully realize the difficulty in determining the exact difference between contracts of strict guaranty and suretyship, and of harmonizing the conflicting decisions upon the subject. It has been held, with much forcible reasoning, in some of the States, that in every case where the bond signed by the surety is collateral to the main contract, even though such bond is also signed by the principal in the main contract, it is nevertheless a contract of guaranty; that the surety is only bound collaterally, and is entitled to notice of the default of the principal, so that he may protect himself. La Rose v. Bank, 102 Ind. 332, 1 N. E. Rep. 805, and authorities there cited; Kearnes v. Montgomery. 4 W. Va. 29; Manufacturing Co. v. Forsyth, 108 Ind. 334, 9 N. E. Rep. 372. On the other hand, in a case similar to the one before us, involving a bond giving to a sewing machine company, not 80 strong in its terms as this, it was held by the Supreme Court of Alabama, supported by quite an array of authorities, that while a case might arise involving only the secondary liability of the sponsors, though the undertaking be signed also by the principal, "in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship." Saint v. Manufacturing Co., 95 Ala. 362, 10 South. Rep. 539, and authorities there cited; Campbell v. Sherman, 151 Pa. St. 70, 25 Atl. Rep. 35; Reigart v. White, 52 Pa. St. 440. After all, the contract in each case must be construed, and its true intent and purpose drawn from the terms in which the parties themselves

have expressed it. In the case of Davis v. Wells. 104 U.S. 169, the Supreme Court of the United States held that even though the contract was one of continuing guaranty, and so shown upon its face, yet the guarantor, by agreeing to guaranty, "unconditionally and at all times," the indebtedness, waived notice of the default. It has been held in Illinois that in case of an absolute guaranty the guarantor is not entitled to notice of non-performance. Taussig v. Reid, 145 Ill. 488, 32 N. E. Rep. 918, citing 2 Story, Cont. § 1133; Baylies, Sur. 202. See, also, McMillan v. Bank, 32 Ind. 11; Beebe v. Dudley, 26 N. H. 249. Whether the contract in this case should be construed as a continuing guaranty or suretyship, in either event the only object of notice of default on the part of the principal would be that the surety might protect himself against loss. The contract itself provides the conditions of the bond, as follows: "The conditions of the above obligation are such that if the above-bound W. S. Page, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter in any manner exist or be incurred, on the part of said W. S. Page to the White Sewing Machine Company or its assigns, whether such indebtedness or liability shall exist in the shape of book accounts, notes, or leases, renewals or extensions of notes, accounts, leases, acceptances, indorsements, consignments of property or merchandise, failure to deliver or account for same or any part thereof, or otherwise, and whether the same shall be waived under any contract between said White Sewing Machine Company and said W. S. Page or otherwise, and whether the same shall arise out of the purchase and sale of sewing machines or otherwise, hereby waiving presentment for payment, notice of non-payment, protest and notice of protest, and diligence, upon all notes, accounts, or leases now or hereafter executed, indorsed, transferred, guarantied, or assigned by the said W. S. Page to the White Sewing Machine Company, its agents or assigns," etc. The liability upon which this suit was brought originated in the sale of certain sewing machines by the company to Page, for which he had executed his promissory notes. Were the appellants entitled to notice of non-payment of these notes? The contract itself expressly waives notice of nonpayment of the notes, as well as diligence on the part of the company in collecting them, which waiver applies to all notes executed by Page, as well as those indorsed, transferred, guarantied, or assigned by him. The court did not err in excluding the testimony of Towles, as complained of under these assignments. The other assignments are not considered asimaterial. The judgment of the court below fully protects appellant Page by providing that any sum which may be realized from this judgment shall also be credited on the other judgment in favor of appellee against him, and that any sum realized on

that judgment shall be credited on this. We find no error in the judgment, and it is affirmed.

NOTE.—As stated in the principal case the courts have found it difficult to decide in many cases whether a party is a surety or a guarantor; yet the rights and duties of parties (Hall v. Weaver, 34 Fed. Rep. 104), occupying the two situations, differ in many particulars. A surety is not discharged because the creditor gives time to the debtor (Benson v. Phipps, 87 Tex. 578; Smith v. Mason, 44 Neb. 610). unless he has made a contract upon sufficient consideration so to do; whether a contract to pay the interest accruing during such delay is based upon a sufficient consideration is a disputed question. Wayman v. Jones, 58 Mo. App. 318; Benson v. Phipps, 87 Tex. 578. A guarantee, however, runs the risk if he delays his efforts to collect from the debtor that the guarantor may be discharged. Campbell v. Sherman, 151 Pa. St. 70. Neither a guarantor nor a surety is discharged by the receipt by the creditor of additional security (Presb. Board v. Gilliford, 139 Ind. 524; Mack v. Anderson, 38 N. Y. Sup. 208), but a refusal by the creditor to receive his debt when tendered to him works the discharge of a surety. Spurgeon v. Smita, 114 Ind. 458. Whatever rights a party may have as guarantor or surety may be waived or altered by contract, and the courts will follow the provisions of the contracts the parties may choose to make. Davis, etc. Co. v. Rosenbaum (Miss., Nov., 1894), 16 South. Rep. 340. Sureties have claimed release because other parties, who by agreement were also to sign, have not done so; in such cases the courts generally refuse such release, if the obligee was not aware of such agreement. Winters v. Robison, 14 Pa. Co. Ct. 264; Owen v. Owen, 39 Neb. 14. It is different, however, when the contract or bond on its face shows that others were to sign it (Martin v. Hornsby, 55 Minn. 187), unless all the signers were present when the bond was delivered to the obligee, for a waiver would be then inferred. Van Norman v. Barbeau, 54 Minn. 388.

Contract of Guaranty.—A contract of guaranty requires a sufficient consideration to make it binding. The consideration need not pass directly from the party giving it to the party receiving it. It is enough if a benefit arises to the party for whom the guaranty is given, or the party receiving the guaranty is or may be injured by it. Winans v. Gibbs, etc. Co., 48 Kan. 777. When the guaranty is made and on the faith of it the guarantee carries out his contract, there is sufficient consideration to support the guaranty. Heyman v. Dooley, 77 Md. 162. When the guaranty is subsequent to the original undertaking and was not an inducement to it, though the subsisting liability is the ground of the promise without any direct and connected inducement, there must be some additional consideration to sustain it. Peck v. Harris, 57 Mo. App. 467. A guarantee of a note after its delivery requires some new consideration. Grier v. Cable, 45 Ill. App. 405.

Notice of Acceptance of Guaranty.—It is held, that the guarantor must receive from the guarantee within a reasonable time, in order to bind him thereby, a notice that his guaranty has been accepted, except in cases of absolute guaranty, when no notice is required. Klostermanv. Olcott, 25 Neb. 882. The courts do not agree as to the definition of an absolute guaranty. Where the guaranty was, that, if A purchased a case of tobacco on credit B agreed to see the same paid within four months, it was held that the guaranty was absolute

WHITE DESIGNATION OF THE PARTY OF THE PARTY

because no condition was attached except the sale. Case v. Howard, 41 Iowa, 479. The same was the ruling where A authorized B to sell certain goods to C, and in case C did not pay he would after notice for a certain time (Platter v. Green, 26 Kan. 252); so where A agreed to pay B whatever C should owe him up to a specified time. Maynard v. Morse, 36 Vt. 617. When it is an offer to be bound in consideration of an act to be done, the doing of the act constitutes the acceptance of the offer, and unless the act is of such a kind that knowledge of it will not come quickly to the promiseor, it is not necessary to give the latter any notice of the acceptance of his promise. Bishop v. Eaton, 161 Mass. 496; Hyman v. Dooley, 77 Md. 162. When the guaranty is signed at the request of the guarantor, it is generally held that no notice of its acceptance is necessary. Lehigh, etc., Co. v. Scallen (Minn., May, 1895), 68 N. W. Rep. 245; Davis v. Wells, 104 U. S. 159. Contra: Evans v. McCormick, 167 Pa. St. 247. Nor is notice necessary, when the guaranty mentions a consideration therefor. Taylor v. Tolman Co., 47 Ill. App. 264. The delivery of the guaranty by the guarantor to the agent of the guarantee dispenses with notice, of its acceptance. Lemp v. Armengol, 86 Tex. 690. In all cases where the writing or instrument is in legal effect merely an offer or proposal, which requires acceptance to make a bargain, a notice of its acceptance must be given within a reasonable time in order to render the guarantor liable. Davis v. Wells, 104 U. S. 159; Taylor v. Tolman Co., 47 Ill. App. 264; Farmers' Bk. v. Tatnail, 7 Hous. 287; Carter v. Williams (Tex. Civ. App. Jan., 1895), 29 S. W. Rep. 1102. Unless stipulated otherwise the knowledge of the acceptance of the offer may come from any source. Webster v. Smith, 4 Ind. App. 44. It is sufficient notice, that the guarantor is doing work, relying on the guaranty. Bascom v. Smith, 164 Mass. 61. It is sufficient if such notice is communicated in such manner as under the circumstances was to be expected. Where the guarantor lived in a different county from that of the guarantee. a notice of acceptance sent through the mail was considered to be sufficient though the guarantor asserted it was never received. Bishop v. Eaton, 161 Mass. 496. Though a guaranty is unlimited as to time and amount, yet it will not be held binding in such matters beyond what is reasonable under the circumstances of the case. Lehigh, etc. Co. v. Scallen. supra.

Notice of Default of Debtor.-The courts disagree as to whether it is incumbent on the guarantee to notify the guarantor of the default of the debtor. Hyman v. Dooley, 77 Md. 162. Where such duty is imposed on the guarantee, the guarantor is relieved from responsibility to the extent that he has suffered from such lack of information by reason of any change in the circumstances of the debtor. Taussig v. Reid, 145 Ill. 488; Bishop v. Eston, 161 Mass. 496. The same rule has been applied, when the guarantee has not used due diligence in collecting the debt from the debtor. Durand v. Bowen, 73 Iowa, 578; Burrow v. Zapp, 69 Tex. 474. Of course no such rule can be applied in case the debtor was unable to pay, when the guaranty was given, and his financial condition has not changed since that time. Hooper v. Hooper, 81 Md. 155.

S. S. MERRILL.

JETSAM AND FLOTSAM.

NOTARY'S PROTEST OF HIS OWN NOTE.

The question whether a bank cashier, who himself was the maker of a promissory note, could act as notary public to protest the note so as to charge the indorser, arose in Dykman v. Northbridge, N. Y. Supreme Court, Appellate Division. When suit was brought on this note one of the defenses was that the note was improperly protested, because the maker thereof could not act as notary. The court, disposing of the point, said that no reason could be seen why the cashier, acting as agent of the bank, could not notify the indorser of his non-payment, or why, as notary, he could not make a proper protest for nonpayment. The act itself was not inconsistent with his official duty as notary. The note had come to the notary's hands for presentation for payment. He then protested it in the usual way by mailing to the indorser's address a notice of protest in the usual form. This complied in all essential respects with the law, and constituted a sufficient notice to charge the indorser. The court cited Bank v. Warden, 1 N. Y. 418; Bank v. Barkus, 86 N. Y. 111. In the absence of any suggestion of fraud or irregularity or a prohibiting statute, no reason exists why a notary may not protest his own note as long as he complies with the law. Perhaps in practice it were better not to do so, and the cases are rare.-National Corporation Reporter.

CORRESPONDENCE.

A QUESTION OF DEVISE.

To the Editor of the Central Law Journal:

In every issue of the JOURNAL I notice more or less questions propounded and answered in some subsequent issue. I have one upon which I would like to be enlightened by yourself or some of the readers of, or contributors to, the JOURNAL. It is as follows: W T died leaving a will containing the following item: "Item 6. I give, devise and bequeath to my grandchildren, A T and W T, the north 1-2 of the northeast 1.4 of section 9, township 59, range 29, 80 acres, and to their bodily heirs forever; said land is not to be sold or incumbered during the minority of said grandchildren, said land lying and being in the county of Daviess and State of Missouri." The grandchild, A T, is a woman eighteen years old and married, while the grandchild, W T, is a girl not yet eighteen years old. Now, assuming that there are no other provisions in the will of W T affecting or limiting in any manner the meaning of item 6, what estate is devised to the grandchildren in the eighty acres of land? The devisor dying in July, 1895, and this eighty acres having been leased by him together with other land in one body for that year, who would be entitled to the rent earned by the eighty for that year, the grandchildren or the executor?

J. A. S.

BOOKS RECEIVED.

Extraordinary Cases. By Henry Lauren Clinton. New York: Harper & Brothers, Publishers. 1896.

Hand Book on the Law of Bailments and Carriers. By William B. Hale, LL.B., St. Paul, Minn.: West Publishing Co. 1896.



A Treatise on the Employers' Liability Acts, by Conrad Reno, LL.B. Author of a Treatise on the Law of Non-residents and Foreign Corporations, etc.; Member of the Boston Bar, and Instructor in the School of Law of Boston University. Boston and New York: Houghton, Mifflin & Company. The Riverside Press, Cambridge. 1896.

HUMORS OF THE LAW.

It was one of the delights of the late Lord Coleridge to profess ignorance of things supposed to be of common knowledge. In a newspaper libel action his lordship, in his most silvery tones, asked, "What is 'Truth'?" "It is a newspaper, my Lud," replied counsel. "Oh!" said his lordship, preserving his simplicity and splendid gravity; "isn't that an entirely new definition?"

WEEKLY DIGEST

or ALL the Current Opinions of ALL the State and Territorial Courts of Last Resert, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recout Decisions.

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WISCONSIN

- 1. ADVERSE POSSESSION. The occupancy of two cabins situated on a tract of timber land owned by a non-resident, by various persons at different times—it not appearing by whose authority, or that they paid any rent—cannot be considered the possession of the holder of a tax deed which was not recorded, and cannot be tacked to the possession of a subsequent grantee of the tax purchaser.—Wilson v. Purl., Mo., 34 S. W. Rep. 884.
- 2. Assumpsit Implied Promise. Where plaintiff orally agreed to convey certain premises to defendant, and to build a house thereon, defendant on his part agreeing to furnish material, and, by mortgage of the premises, to furnish the necessary money, and upon completion of the house to reconvey to plaintiff, taking second mortgage to secure himself against loss, the defendant, on his refusal to reconvey as agreed at the completion of the work, having received the benefit of the money expended by plaintiff, will be held liable under an implied promise to repay the amount so expended.—Holbrook v. Clapp, Mass., 48 N. E. Rep. 508.
- 3. ALTERATION OF INSTRUMENT Notes Negotiability.—It is not an alteration of the contract of the

- maker of a note that the payee, on transferring it to a third person, in addition to indorsing it, writes thereon a guaranty of payment thereof.—HUTCHES v. J. I. CASE THRESHING MACH. CO., Tex., 35 S. W. Rep. 60.
- 4. ATTACHMENT—Property Subject to.—In an action to recover goods taken under alleged wrongful attachment, where it appeared that plaintiff, having purchased debtor's goods under attachment, put him in possession as agegt, and, while so in possession, he intermingled with them other goods not so purchased and defendant attached the whole stock, alleging that the larger portion of it belonged in fact to the debtor, it was error to charge the jury that, if the goods, so intermingled with those of plaintiff were of less value, the defendant had no right to take them under attachment.—BROOKS V. LOWENSTEIN, Tenn., 35 S. W. Rep. 89.
- 5. Building Association—Sale of Stock—Authority of Agent.—Where a building association's agent, engaged in establishing local boards, soliciting stock, negotiating loans, and at times, with the consent of the association, collecting the price of prepaid stock, accepted payment for prepaid stock partly in cash and partly in stock of another association, and falled to turn over such cash and stock to the association, and no prepaid stock was issued to the purchaser, the association was liable to him to the extent of the cash payment, since the collection of the price of the stock was to that extent within the apparent scope of the agent's authority.—German-American Building Ass'n v. Droge, Ind., 48 N. E. Rep. 475.
- 6. CARRIERS OF GOODS—Delivery to Carrier—Custom.
 —Where it is shown that by local custom placing goods on a depot platform for shipment by a carrier was a delivery to the carrier, a railroad company is liable to the owners for the value of cotton placed on its platform for shipment with the knowledge of its agent, and destroyed while there by fire set by a boy who was playing on the platform, and could have been seen by the agent from the depot office.—FT. WORTH & D. C. RY. CO. V. MARTIN, Tex., 35 S. W. Rep. 21.
- 7. CARRIERS OF PASSENGERS—Conditions on Ticket.

 —A provision on a railroad ticket that it shall be good for one day only, unless the holder shall deposit the return half thereof with the company's agent before expiration, and have it extended, is reasonable.—Missouri, K. & T. Ry. Co. of Texas v. Murphy, Tex., 85 S. W. Rep. 66.
- 8. CARRIERS—Passengers—Complaint. A complaint against a common carrier for injuries to a passenger from being thrown from a vehicle, which did not expressly aver that the passenger was free from contributory negligence, but alleged that, by reason of the negligence of defendant's servant in the management of the horses and vehicle, the passenger was violently thrown therefrom, was insufficient.—WAHL V. SHOULDER, Ind., 43 N. E. Rep. 458.
- 9. CHATTEL MORTGAGES—Conversion by Mortgagee.—Where the mortgagee, authorized to take possession of the mortgaged chattels on default in payment, and sell the same for the payment of the debt, takes possession, and instead of foreclosing, the mortgage, keeps the property, treating it as his own, he is liable as for a conversion thereof.—HOWERY V. HOOVER, IOWA, 66 N. W. Rep. 772.
- 10. CHATTEL MORTGAGES Rights of Mortgagee. Where the mortgagee authorizes the mortgager, before the mortgage debt is due, to sell the mortgaged chattels, the proceeds to be applied upon the mortgage debt, the mortgagee has no lien on the unpaid price due the mortgagor, as against creditors of the mortgagor attaching the purchase money by garnishment proceeding; Civ. Code, § 2888, providing that the title to mortgaged chattels remains in the mortgagor.— MAIDER V. FREEMAN, Cal., 44 Pac. Rep. 357.
- 11. CONSTITUTIONAL LAW—Legislative Act—Impeachment.—A bill properly enrolled and signed by the presiding officer of each of the two houses, and signed and approved by the governor, cannot be impeached

by reference to the journals of either house to show that its mode of enactment was not in conformity to all constitutional requirements.—LAFFERTY V. HUFF-MAN, Ky., 35 S. W. Rep. 128.

- 12. CONSTITUTIONAL LAW—Protection of Game.—Laws 1895, ch. 221, providing for the protection of fish, and authorizing the game wardens to seize and destroy any nets found in the waters of the State in violation of the law, is not unconstitutional as depriving the owner of the nets of his property without due process of law.—BITTENLAUS V. JOHNSTON, Wis., 66 N. W. Rep. 805.
- 18. CONSTITUTIONAL LAW—Statute—Prohibitory Laws.—In a legislative act prohibiting the sale of liquor in a certain county, a provision conferring jurisdiction of prosecutions for its violation on justices of the peace is germane to the subject-matter of the act, and naturally embraced therein, and is not invalid because not specially referred to in the title.—McTigus v. Commonwealth, Ky., 35 S. W. Rep. 121.
- 14. Contract—Construction. A contract whereby plaintiff agrees to furnish defendant certain merchandise at a certain price, to be sold by him as agent for plaintiff, the defendant to purchase the merchandise remaining unsold at a certain time, title to remain in plaintiff until the price is paid, is a contract of agency, and not a sale of the goods to defendant, so as to render him absolutely liable for the goods if destroyed by fire without negligence on his part.—NORTON V. MELICK, IOWA, 65 N. W. Rep. 780.
- 15. CONTRACT FOR SUFFORT OF LUNATIC.—Where the contract by defendant to pay for the support of a dipsomaniac while confined in a State asylum provides for his removal whenever the room occupied by him shall be required for a class of patients preferred by law, that the dipsomaniac was discharged without notice to any one, and before he had derived any benefit from his confinement, is no defense to an action to recover for his support.—WOOD v. DEAN, Mass., 43 N. E. Rep. 510.
- 16. CONTRACT OF SALE Construction. Defendant contracted, in writing, to manufacture and deliver to plaintiffs, for shipment, oil of a certain brand, color, and fire test. Plaintiffs, pursuant te the rules of the produce exchange, which were made a part of the contract, appointed an inspector, who certified that the oil delivered was of the brand, color and test contracted for. Said rules also provided that the acceptance of the oil by the buyer's inspector should be an acknowledgment that the oil is in accordance with the contract: Held, that defendant was bound to deliver oil free from latent defects growing out of the process of manufacture, which would render it unmerchantable at the time and place of delivery, and which could be avoided by the exercise of reasonable care.—Carleton V. Lombard, Aters & Co., N. Y., 48 N. E. Rep. 422.
- 17. CONTRACT—Time for Performance.—Where in a contract for the manufacture of material, no time is specified for its performance, in determining what would be a reasonable time, regard must be had to the capacity of the manufacturer's plant, though the other party was unaware of its capacity; and such question is not to be determined from the time in which manufacturers in general would have performed the contract.—SMITH v. SPRATT MACH. Co., S. Car., 24 S. E. Rep. 876.
- 18. CORPORATIONS—Action against Stockholder.—It is not a good plea in abatement, in an action against a stockholder in a corporation, based on a statute providing that the stockholders shall be personally liable for the indebtedness of the corporation, beyond their stock, to an amount equal to the par value of their stock, to allege merely that there are many other stockholders besides the defendant, and many other creditors besides the plaintiff, without alleging any interest in any one else in the plaintiff's cause of action, or that others are jointly liable with the defendant.—Glems Falls Nat. Bank v. Cramton, U. S. C. C. (Vt.), 72 Fed. Rep. 734.

- 19. CORPORATIONS—Dissolution—Right of Receiver.—A receiver of the assets of a corporation, appointed, upon its dissolution, as its successor, by the statutes and the courts of the State where it was organized, can sue in a federal court sitting in another State upon rights of action belonging to such corporation.—AVERY V. BOSTON SAFE-DEPOSIT & TRUST CO., U. S. C. C. (Mass.), 72 Fed. Rep. 700.
- 20. COUNTY BOARD—Power to Mortgage County Land.
 —Express authority to county commissioners to sell real estate of the county at a fair price does not imply power to mortgage the same, thereby permitting an indirect alienation at much less than the value of the property.—VAUGHAN V. BOARD OF COM'RS OF FORSYTH COUNTY, N. Car., 24 S. E. Rep. 425.
- 21. CRIMINAL LAW— Burglary Indictment. Under Code, § 4802, providing that, in prosecutions for offenses against the person or property, erroneous allegations as to the name of the person injured shall be immaterial, a mistake in an indictment for burglary as to the name of the owner of the building is immaterial.—STATE V. PORTER, IOWA, 66 N. W. Rep. 745.
- 22. CRIMINAL LAW-Embezzlement—Where Punishable,—Pub. 8t. ch. 208, §§ 87, 89, 41, 48, relating to embezzlement, provide that one who embezzles "shall be deemed guility of simple larceny," or "deemed guility of larceny;" and as a person who commits larceny in another State, and brings the property into the State, can be punished for larceny in the State, one who can be punished for larceny in the State, one who can be punished for larceny in the State, one who of the railroad ticket in New York as an employee of the railroad, and converts it to his own use in the State instead of canceling it, and returning it to the office of the railroad company, may be convicted in the State of embezzlement.—COMMONWEALTH V. PAEKER, Mass., 48 N. E. Rep. 499.
- 28. CRIMINAL LAW Faise Pretenses Meaning of "Property."—Under Code, § 45, subds. 9, 10, making the word "property" embrace real and personal property, and including under personal property "evidences of debt," a non-negotiable draft drawn on an insurance company by its authorized adjuster, in settlement of a claim, subject to the company's approval, is "property," within Code, § 4078, punishing any person who obtains money, goods or property by faise pretenses, though such draft be never approved or accepted.—STATE V. PATTY, Iowa, 66 N. W. Rep. 727.
- 24. CRIMINAL LAW—Fraudulent Banking.—McClain's Code, §§ 1824, 1825, provide that if any bank shall receive or accept any deposit when insolvent, any officer or managing party thereof, knowing of such insolvency, who shall knowingly permit the receiving of any such deposit as aforesaid, shall be guilty, etc.: Held, that an officer of an insolvent bank, who, knowing of its insolvency, permits or connives at the receiving of deposits, is guilty of the offense described, whether he is a managing party or not.—STATE V. YETZER, IOWA, 65 N. W. Rep. 787.
- 25. CRIMINAL LAW Homicide.—In indictment for murder, where the evidence shows that the prisoner had concealed himself behind a tree in order to shoot his victim, and the trial judge instructed that if the killing was by lying in wait and shooting deceased from behind a tree, and was willful, deliberate, and premeditated, it was murder in the first degree, the additional instruction that there was no evidence in the case of murder in the second degree was error, under Laws N. C. 1893, ch. 85, § 3, providing that the jury should determine in their verdict whether the crime was murder in the first or second degree.—STATE V. LOCKLEAR, N. Oar., 24 S. E. Rep. 410.
- 26. ORIMINAL LAW-Homicide—Evidence.—On a murder trial, where it appeared that deceased and his friends formed one faction in a neighborhood feud, and that defendant and his friends formed the other, evidence that prior to the homicide there were frequent quarrels and fights between the factions was admissible, where it also appeared that defendant was present and took part.—STATE V. HELM, IOWA, 86 N. W. Rep. 751.

- 27. CRIMINAL LAW Homicide Premeditation.—To constitute deliberation and premeditation as an element of the crime of murde in the first degree, something more must appear than the prior existence of actual malice, arising from the use of a deadly weapon, and, though the mental process may require but a moment of thought, the State must show it, so as to satisfy the jury beyond a reasonable doubt that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill in furtherance of such purpose or motive.—STATE V. THOMAS, N. Car., 24 S. E. Rep. 481.
- 28. CRIMINAL LAW Keeping Disorderly House.— Where a wife owns a bawdy house, and conducts the business, her husband, who lives with her in such house and off the proceeds of such business, is guilty of keeping a bawdy house.—HUNTER V. STATE, Ind., 48 N. E. Rep. 452.
- 29. CRIMINAL LAW-Jury-Competency.—A juror who heard part of the evidence and of the argument on the trial of one who was jointly indicted with defendant is not disqualified to serve as juror on the trial of defendant, where he says he has no opinion as to the guilt of accused.—STATE v. PHILPOT, Iowa, 66 N. W. Red. 780.
- 80. CRIMINAL LAW Jurors Competency.—Though jurors testify that they have formed opinions as to defendant's guilt from reading newspaper reports of the evidence on a former trial, yet, when their entire voir dire examination shows that the alleged opinions were merely impressions, their acceptance as jurors is not error.—STATE V. TAYLOR, MO., 80 S. W. Rep. 92.
- 81. CRIMINAL LAW—Use of Witness not Named on Indictment.—A notice by a county attorney of the intention to use a witness whose name is not on the indictment is not rendered insufficient by the fact that it states, as one of the facts expected to be proved by the witness, that defendant stole the property charged in the indictment from a certain place, the connection showing that the word "stole" was used in the sense of taking and carrying away.—STATE v. HALL, Iowa, & N. W. Rep. 725.
- 52. CRIMINAL LAW—Warehousemen Conversion of Stored Wheat.—Rev. St. 1894, § 8726 (Rev. St. 1881, § 6547), provides that no warehouseman shall sell or remove from his control any goods for which a receipt has been given without the written consent of the holder of such receipt, and section 8728, Rev. St. 1894 (section 6549, Rev. St. 1881), makes "any warehouseman" violating such section indictable: Held, that an information against a warehouseman for disposing of wheat without the written consent of the holder of the warehouse receipt need not allege that the defendant was a public warehouseman.—MILLER V. STATE, Ind., 48 N. E. Rep. 440.
- 33. DEATH BY WRONGFUL ACT Action by Administrator.—Under Rev. St. 1894, § 285 (Rev. St. 1881, § 284), authorizing an administrator to maintain an action on the ground of negligence to recover for a personal injury resulting in the death of his decedent, where the facts are such that the deceased might have maintained an action had he lived, the administrator is required, as the decedent would have been, to allege and prove freedom from contributory negligence; and where, in such case, there were no witnesses to the injury, and there is no evidence tending to show whether it was due to the negligence of the defendant or the deceased, a verdict for the defendant should be directed.—KAUFFMAN V. CLEVELAND, C. C. & ST. L. RY. CO., Ind., 43 N. E. Rep. 446.
- 34. DEED—Cancellation—Fraud.—An attorney, in the interest of himself and an associate, by fraudulently representing that the land was held in adverse posses. sion, obtained from the owners authority to recover it, or compromise with the claimants, he to receive one-half the land or proceeds for his services, and subse-

- quently, on an alleged compromise, obtained a conveyance from the owners to the supposed adverse claimants in trust for himself, receiving himself one-half the amount of the compromise. The trustee conveyed to the associate: Held, that the associate was charged with fraud of the attorney, and the deed would be set aside.—HORTER v. HERNDON, Tex., 35 S. W. Kep. 80.
- 35. DRAINAGE Assessment.—Where the lands of an owner, by reason of their situation, are provided with sufficient natural drainage, they are not liable for the costs and expense of a ditch necessary for the drainage of other lands, simply for the reason that the surface water of his lands naturally drain therefrom to and upon the lands requiring artificial drainage.—BLUE V. WENTZ, Ohio, 48 N. E. Rep. 498.
- 36. EASEMENTS—Creation.—Where, in a suit to enjoin interference by defendant with an easement claimed by plaintiff over certain land, defendant merely claims in his answer ownership of the land through possession, and a common source of title is traced to him, it is prima facie evidence that he is in under such title.—SMITH V. YOUNG, Ill., 48 N. E. Rep. 486.
- 37. EJECTMENT—Alienee of Mortgagee in Possession.

 —An alienee of a mortgagee, who claimed title under a foreclosure sale, acquires all the rights of the mortgagee, even though the foreclosure sale is void for irregularity, so as not to bar the equity of redemption. Being in the position of a mortgagee in possession after breach of condition, with the debt unpaid, he has a good defense to an ejectment brought on the bare legal title.—BRYAN V. BRASIUS, U. S. S. C., 16 S. C. Rep. 803.
- 38. EJECTMENT—Railroads Condemnation Proceedings.—Ejectment will not lie against a railroad company for land upon which, after a report in its favor by commissioners duly appointed, and payment into court of the damages assessed, it has entered for construction of its road, notwithstanding the proceedings were still pending, since it has the right of possession under Code, § 1081, authorizing it, under such circumstances, to enter for such purpose.—RUDD V. FARM-VILLE & P. R. Co., Va., 24 S. E. Rep. 386.
- 39. EVIDENCE—Admissions.—In an action for seizure of plaintiff's goods under attachments against another, receipts from a third person, acknowledging the receipt from plaintiff of the rent of the premises from which the goods were taken, are hearsay, and inadmissible to prove payment of such rent by him.—SiL-VERSTEIN V. O'BRIEN, Mass., 48 N. E. Rep. 496.
- 40. EXECUTION—Exemptions—Right of Partner.—Un der the rule that one partner cannot claim exemptions from execution on a judgment against the partnership without his copartner's consent, surviving partners cannot claim exemptions without the consent of the administrator of a deceased partner.—RICHARDSON V. REDD, N. Car., 24 S. E. Rep. 420.
- 41. FEDERAL COURTS—Jurisdiction—Enjoining Boycott.—In a suit by a Missouri corporation to enjoin certain trades unions or assemblies, and their members, from instituting a boycott, the federal court has no jurisdiction of individual defendants who are citizens of Missouri, nor can the association be sued as a body, or members thereof enjoined who are not parties to the record.—OXLEY STAVE CO. V. COOPERS' INTERNATIONAL UNION OF NORTH AMERICA, U. S. C. C. (Kan.), 72 Fed. Rep. 696.
- 42. FEDERAL COURTS—Jurisdiction of Supreme Court—State Courts.—In an action brought in a State court to recover an assessment on the unpaid stock of a corporation, made by a decree of a court of another State, a decision overruling a contention that the decree was entitled to full faith and credit as a judgment against the defendant, and permitting defendant to rely on the State statute of limitations, is reviewable in the Supreme Court of the United States, but that court must judge for itself of the true nature and effect of the order making the assessment.—GREAT WESTERN TEL. CO. V. PURDY, U. S. S. C., 16 S. C. Rep. 810.

- 48. FEDERAL OFFENSE-Mailing Obscene Document. -An indictment for depositing in the mail an obscene document, which alleges that the document in question is so obscene and indecent that the same would be offensive to the court, and improper to be placed upon the records thereof, wherefore the grand jurors do not set forth the same, and which does not set forth the document mailed, nor describe the same so as to furnish means of identifying it, is insufficient .-UNITED STATES V. FULLER, U. S. D. C. (Oreg.), 72 Fed.
- 44. FEDERAL OFFENSE-Postal Laws Obscene Letter.—An officer of the United States who carries on a correspondence with one suspected of using the mails for illegal purposes, in order to obtain evidence on which to base a prosecution, is not thereby disqualified from testifying in respect to an offense committed by defendant in the course of such correspondence .-ANDREWS V. UNITED STATES, U. S. S. C., 16 S. C. Rep.
- 45. FEDERAL OFFENSE-Violation of Postal Laws-Embezzling Letters.-In an indictment charging a letter carrier with embezzling and stealing letters containing money, it is no defense that such letters were decoy letters .- MONTGOMERY V. UNITED STATES, U. S. 8. O., 16 S. C. Rep. 797.
- 46. FRAUDULENT CONVEYANCES—Assignment for Benefit of Creditors.—A mortgage of a debtor's entire stock to secure the claim of a creditor who had assumed other bona fide indebtedness of his debtor for the purpose of procuring a loan for the latter is valid, notwithstanding a fraudulent intent on the part of the mortgagor, if the mortgagee had no knowledge of such intent, nor of facts which should have put him on inquiry .- ROBERTS V. PRESS, Iowa, 66 N. W. Rep.
- 47. GARNISHMENT .- The clerk of a court is not disqualified from issuing a writ of garnishment or taking the answers of garnishees in a proceeding in such court because of the fact that he is included with them in the writ, nor is the validity of the proceedings af-fected by his approval of a bond for garnishment, no such bond being required by law .- WOMACK V. STOKES, Tex., 35 S. W. Rep. 82.
- 48. GUARDIAN OF INFANT Appointment. A court has no jurisdiction to appoint a guardian of infants absent from the State, though their domicile be within it .- DE LA MONTANYA V. DE LA MONTANYA, Cal., 44 Pac. Ren. 854.
- 49. HIGHWAY Obstruction-Indictment.-Evidence that the owner of land lived thereon while a road was being used for 18 years by the public, over the land, and that he himself traveled the road, is sufficient to prove knowledge on the owner's part of the use of the road as a highway so as to establish a highway by prescription under the law prior to 1873.—STATE V. TEETERS, Iowa, 66 N. W. Rep. 754.
- 50. Homestead-Actual Residence. An insolvent and his wife owned jointly a tract of land; the wife owning in her own right part of the tract, designated by metes and bounds. The land owned by the husband adjoined that of the wife, and the whole tract was used and cultivated as one farm. The house in which they lived was on the tract to which the wife had the fee, and contiguous to that of the husband: Held, that the husband is entitled to a homestead in the tract to which he held the fee, even though actual residence was on land owned by the wife.—MASON v. COLUMBIA FINANCE & TRUST CO., Ky., 85 S. W. Rep.
- 51. Homestead Conveyance by Husband.-Const. 1876, art. 16, § 50, forbidding a married man to sell the homestead without consent of the wife, means the alienation, not merely of the wife's homestead right, but of the property itself; and a deed by the husband in violation of such inhibition is ineffectual for any purpose .- STALLINGS V. HULLUM, Tex., 85 S. W. Rep. 2.
- 52. HOMESTEAD EXEMPTION-City Property.-Under Const. 1876, art. 16, § 51, declaring that the homestead

- in a city shall consist of a lot or lots not to exceed a certain value used for the purposes of a home, "or as a place to exercise the calling or business of the head of a family," a lot used by a gardener for the cultivation of produce, and separated from his dwelling by streets is exempt. - WAGGENER V. HASKELL, Tex., 35 8. W. Rep. 1.
- 58. HOMESTEAD-Vendor's Lien-Note.-A landowner, who is a widower, may, in consideration of the renewal of a purchase-money note which is a lien on a portion of his homestead, extend the lien by the provisions of the new note to cover the whole tract .-STOKER V. PATTON, Tex., 85 S. W. Rep. 64.
- 54. HUSBAND AND WIFE-Community Property.-The surviving widow has power to convey community property in payment of community debts, without regard to its being exempt .- NELMS V. NAGLE, Tex., 35 8. W. Rep. 60.
- 55. HUSBAND AND WIFE-Conveyance of Wife's Land. -Under the Texas statute requiring that there shall be a joint conveyance from the husband and wife of the separate property of the wife, a deed of the wife's land executed by her in her own right, and as attorney in fact of her husband, conveys a good title.-ROGERS v. ROBERTS, Tex., 35 S. W. Rep. 77.
- 56. HUSBAND AND WIFE-Minority of Husband .- A husband, whether a minor or of contracting age, has the right to sue for the recovery of all community interests, and a husband who is a minor, and who sues by his next friend to recover damages on account of a nuisance, may recover for the injury sustained by both himself and his wife, to the same extent as though of full age and suing in his own name.—TEXAS & P. RY. CO. V. ALEXANDER, Tex., 35 S. W. Rep. 9.
- 57. Injunction Conspiracy Unlawful Combinations .- A conspiracy to prevent the loading or unloading of a vessel, except by such labor as may be acceptable to defendants, may be enjoined, though no particular overt act against that particular vessel is alleged or proved .- ELDER V. WHITESIDES, U. S. C. C. (La.), 72 Fed. Rep. 724.
- 58. Injunction-Damages.-Damages for suing out an injunction, in the absence of malice and want of probable cause, can only be recovered in an action on the undertaking which Rev. St. 1894, § 1167, requires the plaintiff to give.-HARLESS V. CONSUMERS' GAS TRUST CO., Ind., 43 N. E. Rep. 456.
- 59. Injunction—Damages—Prima Facie Case.—In an action on an injunction bond, plaintiff makes out a prima facie case by establishing the dissolution of the temporary injunction, and the dismissal of the original suit, and the burden is on defendant to show that the injunction was rightfully issued .- FINDLAY V. CARson, Iowa, 66 N. W. Rep. 759.
- 60. Injunction-Motion to Dissolve.—On application for injunction, a hearing was had on petition and affidavits, and a temporary injunction was granted. Afterwards, upon a supplemental petition being filed, another temporary injunction was granted ex parte, after which defendants filed a motion to dissolve both injunctions: Held, that the hearing on the first petition was not equivalent to a hearing on a motion to dissolve, within Code, \$ 3402, providing that only one motion to dissolve or modify an injunction upon the whole cause shall be allowed .- HINKLE V. SADDLER, Iowa, 66 N. W. Rep. 765.
- 61. INSOLVENCY-What Constitutes .- Where a milling company whose mill and contents were burned continues in such business, as is natural under the circumstances, collecting such assets as it can, paying debts from time to time, holding meetings of its directors, and though some of the directors thought the company was insolvent, others did not, until, the company being held liable for wheat stored in the mill, a bill was filed to wind up its affairs, there was no such overt act of insolvency as would constitute its assets a trust fund for the benefit of creditors, and defeat the acquisition by a creditor of a priority by means of

judgment and garnishment.—McClaren v. Union Roller Mill & Elevator Co., Tenn., 35 S. W. Rep. 88.

- 62. INSURANCE—Action Prematurely Brought.—Under McClain's Code, § 1784, prohibiting the bringing of an action to recover on an insurance policy within 90 days after notice of loss is given, where an action is brought before the expiration of such time the objection may be raised by motion in arrest of judgment, and is not waived because not sooner made.—Wood-COOK V. HAWKETE INS. Co., Iowa, 66 N. W. Rep. 764.
- 63. INSURANCE—Actions—Pleading.—A complainant in an action on a fire insurance policy, showing that suit was commenced more than 90 days after the loss, but failing to show when proofs of loss were made, is not subject to exception, on the ground that it does not show that the cause of action had accrued, because it does not show that sixty days had elapsed after proofs of loss.—PENNSYLVANIA FIRE INS. CO. V. FAIRIES, Tex., 35 S. W. Rep. 55.
- 64. INSURANCE—Failure to Disclose Mortgage.—A fire policy is not vitiated by the presence of a mortgage on the property and failure of insured to voluntarily disclose that fact, the policy having been issued without any inquiries or representations having been made, though the policy provides that it shall be void "if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated therein."—MOROTOCK INS. Co. v. RODEFER, Va., 24 S. E. Rep. 398.
- 65. INSURANCE Oral Contract—Power of Agent.—In the absence of statutory provision, unless its powers are restricted by by-law, a mutual insurance company may make valid oral contracts of insurance, and a general custom and usage of such companies that their agents for the solicitation of business may bind them until notice of the refusal of the risk is received by the agent and communicated to the applicant, may be shown in a proper case.—Brown v. Franklin Mutual Fire Ins. Co., Mass., 43 N. E. Rep. 512.
- 66. INSURANCE—Vacant Premises Waiver of Condition.—The fact that a fire policy was issued, and the premium accepted, with knowledge that the building was vacant, is not a waiver of a condition rendering the policy void if the building became vacant or unoccupied, and remained so "for ten days."—QUEEN INS. Co. OF AMERICA V. CHADWICK, Tex., 25 S. W. Rep. 26.
- 67. JUDGMENT Allotment of Dower.—A judgment allotting dower to a widow in all the lands of which her husband died seised, all the heirs and adverse claimants being parties thereto, is conclusive as to the title of the husband and the rights of the wife growing out of his estate, and will operate to estop the widow from afterwards maintaining an action to subject a portion of the lands to a parol trust in her favor, on the ground that the husband purchased such portion with money received from her separate estate.—BOYD V. REDD, N. Car., 24 S. E. Rep. 429.
- 69. JUDGMENT—Eminent Domain.—Where, in an action for damages to land caused by opening a county road through it, interest on the damages is not demanded in the complaint, nor allowed in the verdict, and there is no evidence that defendant has yet been deprived of the use of the land to be taken, interest is allowable on the damages only from rendition of the judgment.—MORRIS. V. COLEMAN COUNTY, Tex., 85 S. W. Rep. 29.
- 69. JUDGMENT—In Actions against Joint Obligors.—
 Rev. St. § 2884, authorizing a court, in an action against defendants jointly liable on a contract, but some of whom are not served, to enter judgment, in form, against all the defendants, so far as that it may be enforced against joint property, though permissive in form, becomes mandatory when required by the rights of a defendant; and, in an action against partners, one who is served has the right to insist on the entry of such judgment, so that it may be enforced against the

- property of the firm.—BRAWLEY v. MITCHELL, Wis., 68 N. W. Rep. 799.
- 70. JUDGMENT Res Judicata.—In an action by a widow to recover the amount due under an autenuptial agreement giving her the right to certain produce and a stated sum yearly from the husband's estate after his death, a prior judgment in an action between the same parties is not res judicata as to a claim for produce which had not fully matured when the issues in the former action were made up.—Franke v. Franke, Ind., 48 N. E. Rep. 468.
- 71. LANDLORD AND TENANT—Recovery of Possession.—In an action by a landlord to recover possession of premises from a tenant alleged to be wrongfully holding over, defendant may, under a general denial, show that there had been an extension of the old lease, or that he was in possession as tenant by virtue of some new contract with the landlord.—Hamlin v. Engle, Ind., 43 N. E. Rep. 468.
- 72. LANDLORD AND TENANT—Trade Fixture.—A lease provided that the lessee should erect a storehouse within six months, and should have a renewal for a second term, unless the lessor elected not to renew, in which case the lessor would pay for the building; and it appeared that the lessee was allowed to enter three months before the term began, in order to complete the building within the time stated: Held, that the building was part consideration for the lease and renewal, and did not become a trade fixture, removable at the end of the second term.—PIERCE v. GRICE, Va., 24 S. E. Rep. 392.
- 78. LIMITATIONS—Action against Devisee.—Where no letters of administration are granted on the estate of a decedent within three years after his death, a cause of a action arises under Code Civ. Proc. § 1844, subd. 1, against the heir or devisee in favor of the creditors of the decedent, and the subsequent granting of letters will not have the effect to bring the claims within subdivision 2 of such section, and further suspend the action against the heir or devisee for three years from their issue.—ADAMS v. FASSETT, N. Y., 48 N. E. Rep. 488.
- 74. MARRIAGE SETTLEMENT Revocation.—A woman who has made a voluntary antenuptial settlement by trust deed, and, in so doing, acted freely and intelligently, and understood the contents of the deed before she executed it, cannot have it set aside on her testimony that she did not understand its legal effect.—TAYLOR v. BUTTRICK, Mass., 43 N. E. Rep. 507.
- 75. MASTER AND SERVANT—Defective Cars Negligence.—A brakeman cannot, as a matter of law, be held to be negligent in failing to discover that the bumpers on cars he is about to couple were rotten, and so defective as to permit the cars to come almost together, so as to prevent a recovery for his death, caused by such defects.—Chesapeaks & O. Ry. Co. v. Lash's AD'ME., Va., 24 S. E. Rep. 385.
- 76. MASTER AND SERVANT-Independent Contractors. It appeared that defendants, desiring to erect a brick barn, contracted with certain mechanics for its construction; that the contract for the brick work was let to H, and provided that the scaffolding should be furnished by the brick layer, and that the work should be done under the direction of the architect and defendants and to their entire satisfaction; that the contract for the carpenter work was let under similar conditions to another mechanic; that defendant had no control over the employees of such contractors, or over the method in which the work should be performed; and that plaintiff was employed by H as a brick layer on the building: Held, that the mechanics were inde pendent contractors, and that defendants were not liable for injuries which happened to the servants of such contractors through negligence of the contractors or their servants .- HUMPTON V. UNTERKIRCHER, Iowa, 66 N. W. Rep. 776.
- 77. MASTER AND SERVANT Injuries to Employee—Contributory Negligence.—A master was not liable for

injuries to an employee due to machinery being out of order, where he was not informed of the particular defect causing the accident, though he was informed of other defects in the machine.—SCHULZ V. ROHE, N. Y., 48 N. E. Rep. 420.

- 78. MASTER AND SERVANT Negligence—Assumption of Eisk.—In an action for personal injury, where defense pleaded assumption of the risks of the employment and contributory negligence, the refusal to give instructions to the effect that if the plaintiff, because of his age, understanding, and experience, knew and comprehended the dangers, or if, from all the circumstances, he ought to have known and comprehended such dangers, the jury should find that he assumed the risk of such injury as incidental to his employment, is error.—KLATT v. N. C. FOSTER LUMBER CO., WIS., 66 N. W. Rep. 791.
- 79. MORTGAGE After-acquired Interests.—Code, § 1981 (providing that, when a deed purports to convey greater interests than the grantor at the time possessed, an after-acquired interest inures to the benefit of the grantee), does not apply where a mortgagor holding an undivided four-sevenths of a tract of land, and intending to convey only his interests, it being so understood by the grantee, by mistake conveys the whole estate, and the title to the remaining three-sevenths is afterwards acquired by him.—Cook v. Prindle, Iowa, 66 N. W. Rep. 781.
- 80. MORTGAGE—Foreclosure.—Under Rev. St. § 8187, providing that, in an action affecting title to real estate, plaintiff, at the time of filing the complaint, or any time thereafter before judgment, may file a notice of the pendency of the action, and that in a foreclosure of a mortgage such notice must be filed 20 days before judgment, the notice of pendency does not become operative until the complaint is filed, and a judgment of foreclosure rendered on the same day the complaint is filed, though more than 20 days after the filing of notice, is premature.—GILE v. COLBY, Wis., 66 N. W. Rep. 802.
- 81. MORTGAGE FORECLOSURE Reversal after Sale.—
 There is no substantial difference in the basis on which
 restitution is required at law and in equity. It is ordered at law when conditions existing would require it
 in equity, and the law courts can protect the equities
 of all the parties. It may be refused at law because its
 processes are not adequate to do full justice in the
 premises; and in equity the matter rests somewhat in
 the sound discretion of the chancellor, who may, when
 the equities require or justify it, impose conditions, as
 a prerequisite to the relief.—Alabama & G. Manup'o
 Co. v. Robinson, U. S. C. C. of App., 72 Fed. Rep. 708.
- 82. MORTGAGES—Consideration—Parol Evidence.—In an action on a note, where defendant claimed to be surety only, and it appeared that the principal had given a mortgage to plaintiff covering the property for which the note sued on was given, the consideration stated in the mortgage not including the note in suit, it was proper to allow defendant, he not being a party to the mortgage, to show by parol that, as part of the consideration of the mortgage, it was agreed by plaintiff that he would release defendant from all liability on the note.—DE GOEY V. VAN WYE, Iowa, 66 N. W. Rep. 787.
- 88. MORTGAGES-Subsequent Grantee-Surety.—The transfer of property incumbered by trust deed, to one who assumes the mortgage, with the consent of the insurer of the property, the trustee and the beneficiary, converts the original mortgagor from principal to surety, as between all the parties, and entities him to all the rights of a surety.—MERCHAMTS' INS. CO. OF NEW YORK V. STORY, TEX., 35 S. W. Rep. 68.
- 84. MUNICIPAL CORPORATION—Abatement of Nuisance.

 —A municipal corporation, in the exercise of a granted power to "restrain, prohibit, or suppress" a public nuisance, may, under proper circumstances, invoke the aid of a court of equity.—CITY OF HURON V. BANK OF Volga, S. Dak., 66 N. W. Rep. 815.

- 85. MUNICIPAL CORPORATIONS Closing Streets.—A municipal corporation has no implied authority to close a public alley to allow the land to revert to the owners of the abutting property for a moneyed consideration against the will of persons owning lots in the square through which the alley runs, and who have an easement over it.—CITY OF LOUISVILLE v. BANNON, Ky., 35 S. W. Bep. 120.
- 86. MUNICIPAL CORPORATION—Contract with City.—Where a claim is made against a city for injuries, and the city council, on report of a committee, allows the claimant a certain amount, less than the sum claimed, a demand by the claimant in writing, on the city treasurer, for an order, after such allowance, and before any proceedings are taken to reconsider the matter, constitutes an acceptance completing the contract by the city to pay the sum allowed.—SHARP V. CITY OF MAUSTON, Wis., 66 N. W. Rep. 808.
- 87. MUNICIPAL CORPORATIONS—Detective Sidewalk—Liability for Injuries.—In an action for injuries resulting from a fall caused by ice which accumulated during the previous night on a sidewalk at a point where the city had lowered the street grade, and changed the sidewalk so as to cause it to gradually incline for a short distance in order to reach the lower grade at the crossing, plaintiff was not entitled to recover, where the facts were not sufficient to warrant the court in inferring that the city was negligent either in adopting the grade or making the improvement.—MCQUEEN V. CITY OF ELKHART, Ind., 43 N. E. Rep. 460.
- 88. MUNICIPAL CORPORATIONS—Defective Streets.—In an action for injuries caused by defective street the court could not assume, from the fact that plaintif had previous knowledge of the defects that he actually saw and understood the condition of the street at the time of the accident, since plaintiff had a right to assume that defendant had discharged its duty by removing the defects, and to act on that assumption.—THOMPSON V. CITY OF WINSTON, N. Car., 24 S. E. Bep. 421.
- 89. MUNICIPAL CORPORATION—Injury from Defective Street.—The charter of the city of Dallas (section 163), providing that no action shall be maintained against the city for injuries from defective streets, sidewalks, or sewers, "or other things being out of repair from gross negligence of said city, unless the same shall have remained so for ten days after special notice in writing given to the mayor or city engineer," does not exempt the city, in the absence of such notice, from liability for ordinary negligence.—PRACOCK V. CITY OF DALLAS, Tex., 36 S. W. Rep. 8.
- 90. MUNICIPAL CORPORATIONS—Powers.—A municipal corporation is not liable for negligence in perform ance of any duty, whether legislative or judicial, or for a failure to perform such duty, but is liable for negligence arising from the exercise of the privilege granted, or for neglect to perform a ministerial duty.—VAUGHTMAN V. TOWN OF WATERLOO, Ind., 48 N. E. Rep. 476.
- 91. NEGLIGENCE-Presumption-Derailment of Train. -Though, ordinarily, in an action for damages arising from negligence, the negligence charged must be proved by the plaintiff, when the injury complained of arises from an accident which, in itself, is indicative of negligence, such as the derailment of a train of cars, the plaintiff is relieved from the burden of further proving the defendant's negligence, as the isw presumes its existence. It is not, therefore, necessary for the plaintiff, in an action for damages caused by the derailment of a logging train, to prove that running such train at any given rate of speed was dangerous, in order to justify the submission to the jury of the question of defendant's negligence in running it at too high a speed .- ALBION LUMBER CO. V. DE NOBRA, U. S. C. C. of App., 72 Fed. Rep. 789.
- 92. NEGOTIABLE INSTRUMENT Notes Protest Waiver.—Where waiver of protest and notice is embodied in the note, it is binding upon subsequent is-



dorsers. — LEEDS V. HAMILTON PAINT & GLASS Co., Tex., 35 S. W. Rep. 77.

- 93. NEGOTIABLE INSTRUMENTS Indorsee after Maturity.—An indorsee of a note after maturity, whose indorser, before transfer of the note, forged a similar note, which was negotiated by him, and paid by the maker of the genuine note without notice that it was not the genuine note, cannot recover from the maker.—Leach v. Funk, Iowa, 66 N. W. Rep. 768.
- 94. NEGOTIABLE INSTRUMENTS Notes Consideration.—A note given for money theretofore loaned by the payee to the maker is supported by a valuable consideration.—WOOLEY v. COBB, Mass., 43 N. E. Rep.
- 95. PARTITION.—One of several persons who together inherited from the same person two tracts of land may, without his complaint being open to the objection of improperly uniting several causes of action, maintain an action for partition of the two lots, against his coheirs and persons to whom they have conveyed an interest in one or the other or both of the lots.—Grady V. Cannon, Wis., 66 N. W. Rep. 806.
- 96. Partition—Wife's Agreement—Acknowledgment.

 —A wife's agreement to partition of land in which she has an interest is not void because there was no privy acknowledgment of its execution.—Betts v. Simons, Tex., 85 S. W. Rep. 50.
- 97. PLEADING—Amendment.—In an action against a railway company for damages caused by a fire started by an engine on its right of way, it is an abuse of discretion to allow an amendment of the complaint, three years after limitations would have run against the action, so as to include a recovery for damages from burning vegetation on other land than that included in the original complaint, and situated a mile therefrom.—O'CONNOR V. CHICAGO & N. W. RY. Co., Wis., 66 N. W. Rep. 785.
- 98. PLEDGE.—One employed on a salary to sell goods which are put into his manual possession is a person intrusted with merchandise and having authority to sell or consign the same," within Pub. St. ch. 71, § 3, protecting one who receives goods from such person, and advances money thereon, in good faith, believing him to be the actual owner.—CAIRNS V. PAGE, Mass., 43 N. E. Bep. 508.
- 99. PRACTICE Dismissal. The absence from the custody of the clerk of the papers in a case, they being in the possession of the plaintiff's attorney, does not affect the validity of the order dismissing the case for want of prosecution.—FONES v. RICE, Tex., 85 S. W. Rep. 44.
- 100. PRINCIPAL AND AGENT—Authority—Revocation.—Oral authority to sell personal property, if given as security for a claim, and based on a consideration valid within the law applicable to executory contracts, is irrevocable.—TERWILLIGER v. ONTARIO, C. & S. R. Co., N. Y., 43 N. E. Rep. 432.
- 101. PRINCIPAL AND AGENT—Authority to Sell.—An agent for the sale of land has no authority to sell posts cut from said land, and cannot recover the value thereof from his vendee, though he intended, after payment by the vendee, to settle with the owner of said land.—St. LOUIS S. W. RY. CO. OF TEXAS V. BRAMLETTE, Tex., 35 S. W. Rep. 25.
- 162. Public Lands—Decisions of Land Department.
 —The decisions of the land department in contested cases are conclusive only as to matters of fact within their jurisdiction, and a patent is not evidence of title to land which was not subject to disposition by the United States; but the question whether land included within a patent was, at the time of the issue thereof, a part of the public domain, or subject to such disposition, is always open for consideration.—NORTHERN PAC. B. Oc. v. MCCORMICK, U. S. C. C. of App., 72 Fed. Rep. 786.
- 108. PUBLIC LANDS Homestead.—The requirement that one, at the time of application for survey of land as a homestead donation must be an actual settler

- thereon, is not satisfied by anything less than that applicant be at that time personally living thereon.—BRINKLEY V. SMITH, Tex., 25 S. W. Rep. 48.
- 104. Quo WARRANTO Limitations.—A quo warranto proceeding prosecuted by the State, for the purpose of ousting one charged with unlawfully exercising the office of a police magistrate, is not affected by the statute of limitations barring ordinary civil actions.—Mc-PHAIL V. PROPLE, Ill., 48 N. E. Rep. 882.
- · 105. RAILEOAD COMPANIES—Crossing Tracks—Negligence.—A person, in crossing the tracks of a railway company laid upon a street, is not required to use "extraordinary" care, but only such care as ordinarily careful and prudent persons would have exercised under the circumstances.—GOODERCH V. BURLINGTON, C. R. & N. RY. Co., Iowa, 66 N. W. Rep. 770.
- 106. RAILEOAD COMPANY Electric Railroad Damages.—A street car company using electricity is bound to employ the best mechanical contrivances and inventions, and evidence that a particular trolley wire has been the subject of frequently recurring accidents is admissible, as showing that the company had notice of its unsafe condition.—RICHMOND RAILWAY & ELECTRIC CO. V. BOWLES, Va., 24 S. E. Rep. 388.
- 107. RAILEOAD COMPANIES Injuries to Person on Track.—A railway company is liable for injuries to an intoxicated person upon its tracks when, after the negligence of such person in going upon the track, the engineer of the train, by the exercise of ordinary care, could have avoided injuries to him.—BARER v. WILMINGTON & W. B. CO., N. Car., 24 S. E. Rep. 415.
- 108. RAILEOAD COMPANY—Location of Road.—Where a railroad was located so as to divide plaintiff's land, and in awarding damages the county commissioners took into consideration the fact that no right of crossing had been reserved for plaintiff, plaintiff cannot afterwards assert a legal right to a crossing.—New York, N. H. & H. R. Oo. v. MILLER, Mass., 48 N. E. Rep. 499.
- 109. RAILROAD COMPANIES—Public Crossing.—Sayles' Civ. St., art. 4170b, requiring every railroad "to place and keep that portion of its roadbed and right of way over or across which any public county road may run, in proper condition for the use of the traveling public," requires a condition reasonably suitable for the ordinary public travel.—St. LOUIS S. W. RY. CO. OF TEXAS V. BYAS, Tex., 35 S. W. Rep. 22.
- 110. RAILROAD COMPANY Street Railways Negligence.—In an action against an electric street railway for negligence resulting in the death of plaintiff's intestate, where it appeared that deceased was killed while attempting to cross defendant's tracks, an instruction that, when the motorman saw deceased was proceeding as though to cross the track, it would be his duty, so far as he was able, to reduce the speed of his car and stop the same before reaching the point where deceased was crossing, was properly refused.— Galberaith v. West End St. Ry. Co., Mass., 48 N. E. Rep. 501.
- 111. REAL ESTATE AGENT—Authority to Sell Land.— The power of an agent to execute a binding contract for the sale of land may be established by letters and telegrams received from his principal.—FARRELL v. EDWARDS, S. Dak., 66 N. W. Rep. 812.
- 112. REAL ESTATE BROKERS—Commission.—Where a broker employed to sell defendant's farm on commission produces a purchaser who takes the property at a price fixed by defendant, the latter cannot withhold the commission on the ground that when the contract of employment was made the broker had, unknown to defendant, already found the customer, and was employed by him to buy a farm, but from whom he was to receive no commission.—DONOHUB V. PADDEN, Wis., 66 N. W. Rep. 904.
- 118. REMOVAL OF CAUSES Diverse Citizenship Fraudulent Joinder.—In order to justify the removal to a federal court of a suit in which one of the defendants are citizens of the same State as the plaintiff, on the

ground that such defendants have been fraudulently joined to defeat the jurisdiction of the federal court, it must appear not only that they were joined for that purpose, but that no cause of action is stated against them, or that they are in law improperly joined, or that the averments of fact on which a joint liability is asserted are so palpably untrue or unfounded as to make it improbable that the plaintiff could have inserted them in good faith.—Humill v. Maysvills & B. S. R. Co., U. S. O. C. (Ky.), 72 Fed. Rep. 745.

114. REPLEVIN — Attaching Creditors. — In replevin against a sheriff for attached property, the attachment plaintiff, his rights being dependent upon the validity of the attachment, after default judgment has been rendered against the sheriff, cannot, by intervention, enforce his rights under the attachment, the default judgment not being set aside.—DUPONT & CO. v. AMOS, IOWA, 66 N. W. Rep. 774.

115. SALE—Principal and Agent—Warranty.—In a joint action by several plaintiffs for a breach of warranty, it appeared that defendants sold them a horse warranted as sound; that defendants sent the horse out in care of their agent, and under an agreement with plaintiff B that if he would introduce the agent to his neighbors, and board him pending a sale, they would give him a share of \$100. Held, that B was not defendant's agent in making the sale.—SNYDER V. BAKER, Tex., 24 S. W. Rep. 361.

116. SCHOOL DISTRICTS — Apportionment of Town Funds.—A newly-formed school district, whose report, made under Supl. Rev. St., § 462, does not show it to have maintained a school, is not entitled to share in the town school fund, the apportionment of which, under Rev. St., § 558, can be made only to such districts as have maintained a school for at least six months during the year past. — Joint School Dist. No. 8, Town of Harmony, V. School District No. 5, Town OF Harmony, Wis., 66 N. W. Rep. 794.

117. SET-OFF AND COUNTERCLAIM—When Allowable.—In an action on a note given by defendant to a corporation in payment for stock, and assigned to plaintiff after maturity as collateral security for a debt, the corporation having afterwards become insolvent and having gone into the hands of the receiver, defendant may properly plead, by way of set-off, a claim against the corporation for services rendered under a written agreement for employment in consideration of the purchase of the stock.—Indiana Novelty Manuf's Co. w. McGill, Ind., 48 N. E. Rep. 464.

118. STATUTES — Enactment.—The journals of the house and senate relating to the passage of an act are inadmissible to show that constitutional provisions in regard to the manner of its passage were not complied with.—COMMONWEALTH V. SHELTON, Ky., 85 S. W. Rep. 128.

119. Taxation^a Corporations—Assessment.—The organization of a corporation to make and sell loans after its articles of incorporation had been filed, and blank applications for loans, notes, and mortgages had been procured for it by the promoters, was abandoned; no stock having been issued or other property than the blanks acquired. These were assigned in blank by the corporation, and divided among the promoters, who never became members of the corporation: Held, that the corporation was not subject to assessment as the owner of notes and morfgages appearing in its iname in the county recorder's office through the blanks being used by the promoters in their own business.—Farmers' Loan & Trust Co. v. City of Newton, Iowa, 66 N. W. Rep. 784.

120. TAXATION—Exemptions—Estoppel.—Where the business manager of a religious order, with others, procured the incorporation of a town, and, at his instance, part of the land belonging to the order was included within the limits of the town, and town taxes thereon paid by him for a number of years, the order was estopped from claiming that the land so included was exempt from taxation, though it had not been laid off into town lots, and was used for farming pur-

poses.—Benedictine Order of Covington v. Town of Central Covington, Ky., 34 S. W. Rep. 896.

121. TELEGRAPH COMPANY — Negligence.—One who delivered a message written on a plain piece of paper to a telegraph company's agent, away from the office, was not bound by printed conditions subsequently attached exempting the company from liability until messages were presented to and accepted at one of its transmitting offices.—WESTERN UNION TEL. Co. v. PRUETT, Tex., 35 S. W. Rep. 78.

122. TRUST—Construction of Deed.—A conveyance of land to a trustee for the sole use and benefit of a daughter-in-law of the grantor and her children, where the trust was passive, no act being required of the trustee, vested both the use and title at once in the beneficiaries, and a mere request contained in the deed that the husband (the grantor's son) should reside on the land during his life does not vest him with any estate therein.—Foster v. Glover, S. Car., 24 S. E. Rep. 870.

123. TRUST—Resulting Trusts—Set-off.—Where money loaned is furnished by the wife, and the note and mortgage therefor is taken in the husband's name, the wife becomes the equitable owner thereof, without any assignment to her; and the borrower cannot set off against his liability thereon an indebted ness from the husband to him.—HOUCK V. SOMBES, N. Car., 248. E. Rep. 429.

124. VENDOR AND PURCHASER—Action for Purchase Money.—Where a contract for the sale of land contained a power authorizing the vendor to sell the land on default in the payment of any one of the notes given for purchase money at maturity, his executor may bring an action of foreclosure without waiting for the maturity of the last note.—McQUEEN V. SMITH, N. Car., 24 S. E. Bep. 412.

125. VENDOR AND PURCHASER — Contract.—A stipulation that the grantor may retain all payments made or secured, in case the grantee fails to perform a contract for the sale of land, containing covenants and conditions, the number and nature of which made it impracticable to fix the actual damage in case of a breach thereof, is not void under section 3581 of the Compiled Laws of this State.—BARNES v. CLEMBRY, 8. Dak., & N. W. Rep. 810.

126. VENDOR'S LIEN.—W sold land to defendant, taking a note from him for \$2,700 in part payment. Subsequently plaintiff sold land to W, agreeing to take the note of defendant, if it was purchase money paper, in part payment. Defendant thereupon executed a sote to plaintiff for the amount of the unpaid purchase price on the sale to W, and another note to W for the balance of the \$2,700 note due W on the purchase by defendant: Held, that the note by defendant to plaintiff carried a vendor's lien on the land sold defendant by W.—UPLAND LAND CO. V. GIMM, Ind., 43 N. E. Rep. 448.

127. VENDOR AND VENDEE—Sale of Land—Dediciency.—Equity has jurisdiction of an action by the purchaser of land based on mutual mistake or fraud to recover back part of the purchase money by reason of the tract containing less land than it was sold for.—Boschen's Ex'x v. Jurgen's Ex'r., Va., 24 S. E. Rep. 880.

128. WILLS — Alterations.—The mere fact that the proofs may establish that, after the testator's death, alterations were made which did not materially change the will, and which were not of such a nature as to justify the presumption that he had revoked it in whole or in part, would not authorize the jury to return a verdict the effect of which would be to set aside the probate.—MCINTIRE v. MCINTIRE, U. S. S. C., 16 S. C. Rep. 814.

129. WITNESS—Effect of Impeachment.—That a witness' moral character and reputation for truth and veracity has been impeached does not require that the jury disregard his testimony if unsupported by corroborating evidence.—STATE v. VAN VLIET, Iowa, & N. W. Rep. 748.



Central Law Journal.

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In February, 1893, Congress passed an act providing that no person shall be excused from testifying before the interstate commerce commission on the ground that his testimony may tend to criminate; but that he shall not be prosecuted or subjected to any penalty on account of any transaction concerning which he may testify. The act is supposed to have been passed in view of the opinion of the Supreme court in Counselman v. Hitchcock, 142 U.S. 547, to the effect that section 860 of the Revised Statutes providing that no evidence given by a witness shall be used against him, his property or estate in any manner, in any court of the United States, in any criminal proceeding, did not afford that complete protection to the witness which the constitutional amendment was intended to guarantee. The Supreme Court of the United States has recently, by a bare majority of its members, declared the act of 1893 constitutional; holding that it completely shields the witness against any criminal prosecution, which may be aided, directly or indirectly, by his testimony, and in effect operates as a pardon for the offense to which it relates, and therefore the act is not in conflict with the provision of the fifth amendment to the constitution of the United States, which declares that no person shall be compelled in any criminal case to be a witness against himself; that although the constitution vests in the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this does not prevent congress from granting amnesty, either before legal proceedings are taken, during their pendency, or after conviction and judgment; and it is therefore competent for congress to provide that a witness who is required to give evidence tending to incriminate himself shall never be prosecuted for the offense to which the testimony relates. The court is also of the opinion, that the constitutional privilege of refusing to give self-incriminating testimony was not intended to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime, but

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only from actual prosecution and punishment; that the protection afforded by the act of February 11, 1893, to persons who are required thereby to give self-incriminating evidence in proceedings before the interstate commerce commission, extends to any possible prosecution in the State courts, as well as in the federal courts, and that even if there is a bare possibility that, by his enforced disclosures, the witness may be subjected to a criminal prosecution in a State court, the danger is so remote and improbable, and of so unsubstantial a character, that it is not within the contemplation of the constitutional immunity, and that the fact that the witness may be prosecuted, and put to the annoyance and expense of pleading his constitutional immunity by way of confession and avoidance, is a detriment which the law does not recognize, and to which the constitutional provision does not extend. The opinion of the court by Mr. Justice Brown is very clear, exhaustive and convincing.

Four of the nine members of the court dissent viz. Mr. Justices Field, Shiras, Grav and White. They hold the act to be unconstitutional upon the ground that the constitutional amendment gives absolute protection to a person called as a witness in a criminal case against any compulsory enforcement of any self-incriminating testimony, whether relating to the offense under investigation, or to any other act which may lead to a criminal prosecution. No statutory substitute for the protection contemplated by the amendment would be valid if its operation were less extensive and efficient than this: that the amendment was intended to protect the witness from all compulsory testimony which would expose him to infamy and disgrace, even though the facts disclosed might not lead to a criminal prosecution, that the power to grant pardons can be exercised, under the constitution, only by the president, and a statute exempting a witness from prosecution for any offense concerning which he may give self-incriminating testimony in effect attempts to grant a pardon, and is therefore beyond the power of congress to enact; that while it is the duty of the courts to uphold any statute passed in the ordinary exercise of legislative power, unless the constitutional objections to it are clear and indisputable,

yet, when it is proposed, by a statute, to avoid, modify, or alter a right or immunity granted by an explicit and unambiguous constitutional provision, the presumption is against the validity of the act, and the courts should enforce the constitutional provision, unless it is clear that such legislative act does not infringe it in letter or spirit. To the dissenting judges it seems that the protection afforded by the fifth amendment extends, not only to furnishing a good plea to a person prosecuted for an offense in respect to which he has been required to give self-incriminating testimony, but to preventing him from being prosecuted at all for such offense; for, if prosecuted, he is not only put to the trouble and expense of making a defense, but there is no perfect assurance that he will be able to maintain his plea, as witnesses may die, and papers and records be lost or destroyed. They also declare that the act of 1893 infringes the fifth amendment by subjecting the witness, not only to the hazard of a prosecution for an act concerning which he has been compelled to give self-incriminating testimony, but also the hazard of a charge of perjury in giving such testimony, which could never have been brought against him if the privilege of silence were not taken away. It is beyond the power of congress, they say, to give to any person immunity from prosecution in the courts of a State for an offense against the State, though that offense be disclosed by self-incriminating testimony, which such person has been required, under an act of congress to give in a tribunal of the United States, and that the probability that a witness may be prosecuted in a State court for an offense discovered through self-incriminating testimony which he is compelled to give before the interstate commerce commission is not so remote or fanciful as to warrant the court in disregarding it, when passing upon the constitutionality of an act of congress which takes away from witnesses the privilege of silence in respect to offenses committed by them. The dissenting judges do not concur in all these grounds of objections, some of them, however, arguing in favor of one or more. Where so many learned men disagree we hardly feel like venturing an opinion, but it strikes us that the only serious point made by the dissenting judges is that which is raised by Mr.

Justice Shiras to the effect that it is beyond the power of congress to grant immunity from prosecution in the courts of a State for an offense against the State and that therefore the protection afforded the witness by the statute in question is not coextensive with the constitutional privilege. As to that, however, it may be said by way of answer that the constitutional protection is solely against prosecutions of the government that grants it; that if the witness is guaranteed against prosecution in the federal courts the constitutional amendment is complied with.

NOTES OF RECENT DECISIONS.

TRIAL-DEMURRER TO EVIDENCE-CONSTI-TUTIONAL LAW .- It is decided by the Supreme Court of Tennessee, in Hopkins v. Nashville C. & St. L. Ry., 34 S. W. Rep. 1029, that to compel plaintiff, in a suit for damages for death of his intestate, to join in a demurrer to the evidence, where the evidence is conceded to be true, and all legitimate and reasonable inferences that may be drawn from it are admitted, is not in violation of Const. art. 1, § 6, providing that the right of trial by jury shall remain inviolate, and that in such case, the demurrer is not in violation of Const. art. 6, § 9, providing that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The opinion of the court by McAllister, J., is very thorough and exhaustive.

MALPRACTICE—PHYSICIANS AND SURGEONS. -The law does not exact from physicians and surgeons the utmost degree of care or the highest attainable skill in the practice of their profession, although they, by virtue of their relation toward patients, impliedly engage that they possess ordinary knowledge and skill, and that they will, in the course of their employment, exercise such proper care and attention as may be reasonably expected from members of their profession. Such is the general rule of law on the subject. It was recently applied by the Supreme Court of Nebraska in Griswold v. Hutchinson, 66 N. W. Rep. 819, citing Barney v. Pinkham, 29 Neb. 350, 45 N. W. Rep. 694; Hewett v. Eisenbart, 36 Neb. 794, 55 N. W. Rep. 252;

Smothers v. Hanks, 34 Iowa, 286; Branner v. Stormont, 9 Kan. 51; Ely v. Wilbur, 49 N. J. Law, 685, 10 Atl. Rep. 385, 441; Small v. Howard, 128 Mass. 131; Ordr. Med. Jurisp. 42. The rule above stated is not limited in its application to physicians and surgeons, but applies with equal force to the members of all professions, including attorneys and counselor at law, who assume to possess technical knowledge or skill.

INSURANCE-VERBAL CONTRACT - PAROL EVIDENCE.—In connection with the opinion of the New York Court of Appeals in Rickerson v. Hartford Fire Insurance Co., lately decided, it may be interesting to read the opinion of the Supreme Court of Iowa, in Farmers' Co-operative Soc. of Geneva v. German Ins. Co., 66 N. W. Rep. 878. the New York case it is held that where a regular documentary policy of fire insurance has been issued, parol evidence is not admissible either to show the intention of an agent of the company in negotiating the insurance. or of the company in writing it, and, furthermore, that parol evidence was inadmissible to authorize the inference by the jury of a prevailing custom in the business, in the absence of proof that the alleged usage was general, or that it prevailed in a particular locality, or that the plaintiff had knowledge of it. In the Iowa case, no documentary policy has been issued, and it was held that in an action at law on a verbal contract of insurance, the issue whether the contract was in fact made is to be determined by a preponderance of the evidence, and that if such evidence is conflicting, the verdict will not be disturbed. The action was upon an alleged verbal contract of insurance against the loss by fire of a grain elevator, grain stored therein, and machinery connected therewith. There was a verdict for the plaintiff for the amount of its loss as determined by the jury, and the judgment thereupon rendered against the insurance company was affirmed on ap-

EVIDENCE—PAROL EVIDENCE—USAGE AND CUSTOM.—In Coulter Manufacturing Co. v. Ft. Dodge Grocery Co., 66 N. W. Rep. 875, the Supreme Court of Iowa held that parol evidence is admissible to show that a guaranty in a contract for sale of goods, reciting "prices guaranteed against the market price

to date of shipment," meant according to business custom and usage, that the purchaser should have the benefit of any decline The dispute arose upon the in prices. proper construction of this guaranty, plaintiff contending that it is to be understood therefrom that the prices to be paid would not be more than those claimed in the contract, while the defendant contended that if the prices were less on the first of June (the date of shipment) the defendant was to have the benefit of the reduction. In other words. if there was a decline in the market, the purchaser was to have the benefit of the reduced market value. The following is from the opinion of the court:

The clause in the contract, was not self-explanatory; hence parol evidence is admissible to the effect that the terms used have a well known meaning in commercial transactions, not as contradicting the language or terms of the contract, but to apply to them the incidents which obtain by usage and custom. It is not necessary that words and terms in a contract should be technical, scientific or ambiguous in themselves, in order to entitle a party to show by parol evidence the meaning attached to them by the parties to the contract.

In the Louis Cook Manufacturing Co. v. Wendell, 62 Iowa, 244, there was a contract for buggies specifying "top buggies with poles." Against the plaintiff's objection the witness engaged in the trade was permitted to testify that these words in the order would be understood to mean a common grade of buggies. The language had a meaning understood by the trade, and that meaning must be understood in enforcing the contract, and it is very common for the courts themselves to obtain the true meaning of the language of contracts.

In Mida v. Geissmann, 17 Ill. App. 208, McAllister. J., held that it was entirely competent to prove that there was a custom or usage of the whisky trade in Chicago, well known to all dealing in whisky house receipts, that in their purchase the seller is never looked to as the responsible party; that the sole reliance is upon the warehouse issuing the receipts. Such evidence of usage does not contravene the provision of an express contract. The cases in the books disclose a variety of instance's of such evidence. Various questions of weight, measurement, quality, etc., in the sale of goods are often determined by the usage of trade, as the best means of ascertaining the intention of the parties, when it is not declared by contract. Persons engaged in a particular trade are presumed to be acquainted with the usages of that trade, and to contract with reference thereto, and such usage under which the contract is made, may be shown to explain the meaning of a particular contract, but not to contradict its plain terms.

In Everingham v. Lord, 19 Ill. App. 569, Moran, J., said. "Ever since the leading case of Wigglesworth v. Dallison, Dougl. 201, it has been the established rule that customs which do not contradict the agreement, but add to it a consequential right or duty, are binding on the parties, without reference to the question whether the agreement is by deed or parol, or whether the undertakings are implied from certain

acts of the parties. All persons dealing in any branch of business are presumed to be acquainted with any usage affecting it, and are presumed to deal in reference to it. Such a usage is evidence of what is reasonable, and what is suitably adapted to secure both parties in their rights." The court also cited Casco Mfg. Co. v. Dixon, 3 Cush. 410; Leach v. Beardslee, 22 Conn. 404; Ala. & Tenn. River R. R. Co. v. Kidd, 29 Ala. 221; Lyon v. Culberston, 83 Ill. 33.

CREDIT INSURANCE—DEATH OF MEMBER OF FIRM.—In American Credit Indemnity Co. v. Cassard, decided by the Court of Appeals of Maryland in March, 1896 (34 Atl. Rep. 703), it was held that where a member of a firm dies after the sale by it of goods on credit, but before the vendees fail in business, the business of such firm is not discontinued by, and on the date of, the death of such member within the meaning of a condition in a credit insurance policy issued to such firm, providing that it shall be void in the event of discontinuance of business by the firm.

The court said in part:

Contracts of this character, like policies of fire insurance, to which they are closely analogous, must receive a reasonable construction, so as to give effect to the intention of the parties thereto, and so as to carry out, rather than defeat, the purposes for which they were executed. They should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability fairly within the scope or spirit of their terms. It is difficult to suggest a satisfactory reason for holding that the death of one member of a creditor firm, long after goods have been sold and delivered, releases the obligor company from its liability to make good the loss arising from a subsequent insolvency of the debtor during the continuance of the bond that would not equally apply to the case of an individual creditor who was not a member of any firm. The object of this peculiar kind of indemnity is to guaranty vendors against loss by reason of the insolvency of their debtors; and if the debt has been contracted during the continuance of the bond of indemnity, and while the firm or the individual protected by the bond is actually engaged in business, though the loss happens after the death of one member of the creditor firm, or after the death of the individual creditor, when there is no firm, the contingency contracted against—the insolvency of the debtor—is precisely the same as though the death of the creditor had not occurred at all. If, in the case of an individual creditor who is indemnified by such a bond, and who, after selling his goods, dies, it be held that the bond is made void because of his death, there would be superadded, by construction, a provision of avoidance beyond the two designated in the eighth clause. The failure of the person indemnified, and his discontinuance of business, are specified. His death is not. In addition, then, to the requirements that he should not fail and should not discontinue business, the obligation of the bond would be made subject to the further condition that the creditor survive the period of time covered by the contract

of indemnity; and thus, by pure implication, there would be written into the eighth condition, heretofore quoted, a contingency not therein expressed, or even necessarily implied. And in the case of a firm precisely the same situation would exist. Undoubtedly, the death of a member of a firm does, by operation of law, dissolve the partnership, but such a dissolution of the firm can in no sense be said to be a discontinuance of business by the indemnified. The surviving partner winds up the concern. The dissolution is by operation of law, and not by the act of the parties; and the discontinuance of business on the part of the firm is not a discontinuance by the firm, but by operation of law, in consequence of an act of God. Obviously, the term "discontinuance by the indemnified" has relation to the act of the indemnified (either his voluntary act, or the consequence of his voluntary act), precisely as the other condition (the failure of the creditor) relates to a situation arising from his own acts or conduct. Had the design been to constitute the death of the creditor a ground for avoiding the bond, the addition of the words "and the death of the indemnified," or words of like import, would have placed the matter beyond dispute, and every individual purchasing such a bond would then have been advised, in plain terms, that the contingencies which he encountered, and was obliged to avoid, so as to enable him to recover on the bond, were not only his own failure in, or discontinuance of business, but his death during the period covered by the indemnity. The construction contended for by the appellant places death (an act of God) in the same category as discontinuance of business by the indemnified (an act of the individual). It does not discriminate between what is the act of the party himself, on the one hand, and the consequence resulting from his death, which, on the other hand, is not his act, but makes the one the equivalent of the other, in so far as respects the continuing validity of the bond. And it does this, too, by ascribing to the words of the bond a meaning which, at best, is both strained and unnatural. In resisting the enforcement of an obligation of this character upon the ground here relied on, the defendant must show that its refusal to fulfill its contract is justified by some term of defeasance contained in the undertaking itself; and, unless this appears with reasonable clearness, the obligor cannot escape liability. If we entertained any reasonable doubt as to the correct interpretation to be placed on words we have been considering in the eighth condition indorsed on the bond, that doubt would be sufficient to solve the question against the defendant, because its contract to indemnify must stand in full force unless more than a doubt exists as to whether the defeasible conditions embrace the particular ground of avoidance relied on.

CONTRIBUTORY NEGLIGENCE PER SE IN ACCIDENTS AT RAILWAY CROSSINGS.

Accidents caused by trains colliding with persons attempting to cross railroad tracks at highway and foot crossings, have on account of their frequency, been a lucrative source of revenue for lawyers making a specialty of non-contract law both in England

and America, since the immense developments in railway systems. In every litigated case, negligence is the cause of the accident whether that of the plaintiff or defendant, but the question of paramount importance in each is, not whether the defendant has been negligent or not, but whether the plaintiff has precluded his right to a recovery by his own contributory negligence. This is almost invariably the contention of the defendant, and no lawyer should go into court without being thoroughly conversant with this phase of the subject of negligence. As defendant may be clearly negligent without incurring liability when plaintiff has also been negligent, proof of defendant's negligence is not nearly so important as proof that plaintiff exercised ordinary care, except perhaps in the States of Illinois and Georgia where the doctrine of comparative negligence obtains.1 The province of this article is not to discuss rules with which to instruct juries in deciding questions of contributory negligence in given cases, but merely to deal with that narrower class of cases in which a judge is justified in entering a non-suit. The rules laid down by supreme courts have differed widely as will be seen by glancing at a few of the leading cases. In considering the rule in England it will be noticed that railway companies are favored more than they are in many American States.2 Lord Coleridge said in Davey v. London & Southwestern Ry. Co., that "at one time the view has been in favor of leaving everything to the jury in such cases, but it seems to be settled now that it is for the judge to say whether there is anything that can reasonably be held to be evidence of negligence for the jury and if there is, it is for the jury to say what the effect of it is." In this case the plaintiff went upon the track in broad day light, and if he had looked, he would have seen the train. The engineer was negligent in failing to give a signal by whistling, and the gatekeeper was negligent in failing to warn the plaintiff of the approaching train. Still it was held that the plaintiff had been the proximate cause of the accident, and the non-suit by the court below was sustained on appeal to the Queen's

Bench Division. This case reviews the earlier English decisions generally, and is accepted now as a good statement of the rule of law in such cases in England.8 To reconcile the American decisions is a more difficult task; there being a wide range of opinion as to what constitutes contributory negligence, per se, as will be seen from the few cases which will be mentioned here. Of all States holding strongly against the plaintiff in negligence cases, Pennsylvania has been rost conspicuous.4 In the leading case of Pa. Ry. Co. v. Beale, the rule is stated by Sherwood, J. thus: There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se and a question for the court." The principle as thus stated has not been followed exactly in any other State, and in the western States especially the rule has been much more favorable to the plaintiff. in no case in the west has it been held that the mere failure to stop, on the part of the person crossing the track, was such negligence as would sustain a non-suit. Cases have been decided in which it is held that a failure to stop, and even a failure to look and listen is not necessarily negligence but a question which is to be decided by the peculiar circumstances of the case and is to be left to the jury.5 The authorities cited in the case of Terre Haute & Indianapolis Ry. Co. v. Voelker, which sustain the decision will on examination be seen to be western cases.6 The cases cited from Maryland in support of this decision are upon facts in which the plaintiff's duty is not so clear as it is in this case, nor do they go quite so far. In a Wisconsin case,7 Mr. Justice Cassoday has laid down the following rule: "It is only when

⁵ Shaber v. St. P. M. & M. Ry., 28 Minn. 103; Voelker v. Terre Haute & Indianapolis Ry. Co. (Ill.), 39 Am. & Eng. R. R. Cases, 615. The state of the s

¹ Chicago, etc. Ry. Co. v. McKean, 40 Ill. 218; Augusta, etc. Ry. Co. v. McElmurry, 24 Ga. 75.

² Davey v. London & Southwestern Ry. Co., 11 Q. B. D. 213, L. R. 2 C. P. 681.

³ 14 Am. & Eng. R. R. Cases. 650, and cases cited.
⁴ N. Pa. Ry. Co. v. Heileman, 49 Pa. St. 60;
Pa. Ry. Co. v. Beale, 73 Pa. St. 504; Pa. Ry. Co. v. Fortney, 90 Pa. St. 323; Reading & C. Ry. Cov. Ritchie, 102 Pa. St. 425; Lehigh Valley, etc. Ry. Co. v. Brandtwein, 113 Pa. St. 610.

⁶ T. & P. R. Co. v. Chaman, 57 Tex. 75; Laverenz v. C., R. I. & Pac. Ry., 56 Iowa, 689; Chicago & E. I. Ry. Co. v. O'Connor, 119 Ill. 586; Chicago & A. R. Co. v. Fennell, 94 Ill. 448.

⁷ Hoye v. C. & N. W. Ry. Co., 19 Am. & Eng. R. R. Cases, 347, 62 Wis. 666.

the influence of negligence, or the absence of it, is necessarily deducible from the undisputed facts and circumstances proved, that the court is justified in taking the case from the jury. If, on the other hand, such facts and circumstances, though undisputed, were ambiguous and of such a nature that reasonable men, unaffected by bias or prejudice, might have disagreed as to the inference or conclusion to be drawn from them, then the case should have been submitted to the jury. This rule does not seem to have been subsequently cited in Wisconsin, and the general tendency now is to be somewhat stricter and to require the person crossing the track to use his eyes in seeing and his ears in hearing,8 and in one case it was held that where the highway had a steep grade down to the railroad track from a point about forty feet away from it, and where it would be impossible for the driver to stop his team after he had started down the grade, it was contributory negligence per se to start down the grade without first stopping.9 In New York the rule seems to have varied somewhat both in favor of and against the railway companies.10 In Glushing v. Sharp, it was held that, where the plaintiff looked both ways when about thirty feet from the track where his view was somewhat obstructed, and did not look again while passing the thirty feet, although during that time his view was unobstructed and he could have seen the train if he had looked. the question as to the plaintiff's negligence was held to have been properly submitted to the jury. The circumstance that the gateman raised the gate, was held to be a substantial assurance to plaintiff of safety; just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would in all probability be influenced by it. It was decided that plaintiff was entitled to recover; thus holding almost directly contrary to the English case of Davey v. London & Southwestern Ry. Co. before cited. But the rule in a case in which the negligence of defendant is not so clearly proven,11 has been laid down that

crossing on defendant's road and there was no obstacle to prevent seeing an approaching train for more than half a mile from the crossing, the failure to look and listen was contributory negligence, and the refusal of the lower court to non-suit was held error on appeal. This decision also held that the burden of proof was on plaintiff to show that he was free from contributory negligence. And it seems to be the rule in a great number of States, that when plaintiff or plaintiff's intestate fails to look and listen before crossing defendant's track, no matter what the particular circumstances may be, the plaintiff will be non-suited by the judge even though the defendant has been clearly shown to have been negligent.12 This rule seems to have sanction of more courts than any other rule which has been formulated, and for cogent reasons, and, though couched in different language in different States, it is stated most succinctly in Maine as follows: rule is established in this State, that it is negligence per se for a person to cross a railroad track without looking and listening for a coming train, if there is a chance for doing so," It would be well if this rule were generally recognized in all these cases. If it were necessary, as it has been held in Pennsylvania to "stop, look and listen" before crossing a railroad track, and if necessary, to get out of the carriage and lead the horses across the track18 it would be well nigh impossible for such accidents to occur at all, and if they did occur, the mere fact that the person crossing was killed or injured would be evidence that he was as a matter of law, negligent, and unable to recover damages. This rule is manifestly harsh towards the injured person, and though it might tend to increased care on the part of the public who use the crossings, it must inevitably lead to carelessness and even recklessness on the part of the railway employees, as then the railway companies would not be liable for damages except in cases of gross negligence, and they would naturally deal leniently with 12 Grostick v. Detroit, L. & N. R. Co. (Mich.), 51 N.

where plaintiff's intestate was killed at a

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W. Rep. 667; State of Maine v. Maine Central Ry. Co., 76 Me. 357; Lesan v. Maine Central R. R. Co.,

77 Me. 85; Hayden v. Missouri, K. & T. Ry. Co. (Mo.

Sup.), 28 S. W. Rep. 74; Tulley v. Fitchburg B. Co., 134 Mass. 499; Magner v. Truesdale, 53 Minn. 426, 55

N. W. Rep. 607; Nelson v. Ry. Co., 88 Wis. 392.

13 Pa. Ry. Co. v. Beale, 73 Pa. St. 504.

⁸ Bowers v. C., M. & St. P. Ry. Co., 61 Wis. 457; Nelson v. Ry. Co., 88 Wis. 392.

 ⁹ Seefeld v. C., M. & St. P. Ry. Co., 70 Wis. 216.
 ¹⁰ Davis v. N. Y. & C. Ry. Co., 47 N. Y. 400; Glushing v. Sharp, 96 N. Y. 676; Weber v. N. Y. & C. Ry.

Co., 58 N. Y. 451, 67 N. Y. 587.

11 Tollman Admx. v. Ry. Co., 98 N. Y. 198.

their employees in case of accidents in which they themselves would sustain no damage. The danger of being discharged for causing a loss to his employer is a wholesome restraint on carelessness on the part of the employee and the number of accidents might be greatly diminished if there was an increase in care on the part of the railway companies on account of their increased liability. it would neither be wise nor just to allow every case to go to the jury, when there has been such pronounced contributory negligence as driving rapidly across a railroad track without either looking or listening for trains, inasmuch as the practical effect of leaving such a question to the jury, is to decide, that there was no contributory negligence. This question should not be decided on grounds of expediency, as some courts have seemed inclined to do, giving as a reason for enforcing a strict rule against plaintiff that the public would take greater care, or when ruling in favor of plaintiff that the railway companies would take greater care, but the rights of the parties to absolute justice should guide. A railroad crossing is, of necessity an unsafe place for a person to be on, either with a team or on foot, and though the right to be on the crossing is concurrent between the railroad company and the public, the railway train has at all times the right of way over the person crossing. train is generally going at a high rate of speed, and it is difficult, if not generally impossible for the engineer to stop the train in time to avert an accident if there is anyone on the track at such places. The collision always results in the injury or perhaps death of the person crossing, and from the circumstances any ordinarily prudent man would and ought to look and listen before crossing the track. Whether he should stop or not would have to depend on the circumstances of the case. If there was a sharp curve on the track near the crossing it would be ordinary care to stop before going across, but in many cases this would be needless and would properly be left to the jury. But under all circumstances the plaintiff should show that he looked and listened for trains, at such a time that he was at a distance sufficient to avoid the accident under ordinary circumstances, and if he fails to show this he should be non-suited. The tendency of the Amer-

ican courts seems to be towards this doctrine, and it would be just alike to the railway companies and the public.

Andrew Lees.

FOREIGN JUDGMENTS-CONCLUSIVENESS.

MUTUAL FIRE INS. CO. V. PHOENIX FUBNITURE CO.

Supreme Court of Michigan, December 31, 1895.

Under Const. U. S. art. 4, § 1, declaring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," a decree of a court of Illinois, ascertaining the assets and liabilities of a corporation, and decreeing the assessments against the members, who were not parties to the suit, required to pay its liabilities, the decree being, in Illinois, conclusive against the members, is also conclusive against the members in an action in Michigan to recover such assessment from a member. McGrath, C. J., and Long, J., dissenting.

GRANT, J.: After a full argument upon the rehearing of this cause, we are satisfied that we were in error in reversing the judgment. The testimony was not returned, and the case is before us on findings of fact and law, to which no exceptions were taken. The sole question therefore, is, do the facts found support the judgment? We held, in Insurance Co. v. Merrill, 101 Mich. 393, 59 N. W. Rep. 661, that the defendants, under such a note, were not liable to an assessment for unearned or return premiums. That case would, of course, control this, unless the decree of the Illinois court is conclusive upon the courts of this State. The constitution of the United States declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Article 4, § 1. In the early case of Mills v. Duryee, 7 Cranch, 481, it was held thatthe decrees and judgments of the courts of one State were conclusive in the courts of sister States. This case has since been uniformly followed. Where a court has jurisdiction of the cause and of the parties, its judgment is conclusive in other courts, and the only remedy is by direct proceeding in the original cause. Hanley v. Donoghue, 116 U.S. 4, 6 Sup. Ct. Rep. 242; Cole v. Cunningham, 133 U.S. 111, 10 Sup. Ct. Rep. 269; Bonesteel v. Todd, 9 Mich. 371. It is conceded that as against the corporation itself, and the directors and officers thereof, the rule applies. It is, however, contended that it does not apply to a stockholder of such corporation who is not made a direct party to the original suit. That is the question in this case. We are not dealing with a case where a stockholder is interposing the defense of payment, or any other defense which was not passed upon in the original suit against the corporation. In such a case there is no judgment or decree of the court of a sister State which other courts must recognize. But the very point

now urged as a defense was involved and determined by the Illinois court. This was an Illinois contract. These notes were choses in action, were first in possession of the company in Illinois, were turned over by it to the receiver, and were under the direct control of the Illinois courts. That court entered a decree, upon evidence placed before it, determining the amount of assets and debts, and the amount of the assessment necessary to liquidate its liabilities. If every stockholder may now contest this decree, the difficulty thus thrown in the way of an orderly and practical settlement of the affairs of the insolvent corporation is apparent. Different courts might adopt different rulings upon the amount of the assessment. We think the better doctrine is that each stockholder or member of the corporation is an integral part thereof, and is represented in such suit through the corporation itself, and that such decree is binding and conclusive upon him. Two courts have so held in regard to the case now under consideration. Rand, McNally & Co. v. Mutual Fire Ins. Co., 58 Ill. App. 528; Parker v. Mill Co. (Wis.), 64 N. W. Rep. 751. In the latter case two points were raised: First, that the receiver in Illinois could not sue in the courts of Wisconsin; and, second, that the assessment was inequitable and unjust, and hence should not be enforced. The distinction between the rights of property situated in other States, and those of choses in action, is there very clearly pointed out. Upon the first point the court say: "There is no question here of transfer of property in this State. No such transfer was attempted. The property in question—that is, the defendant's note and its liability to pay assessments—was in Illinois, at the office of the company. They were choses in action, and their situs was at the residence of the company." Upon the second point the court say: "If a judgment is conclusive in the State where rendered, it is conclusive here. The decree by which the assessment in question was made was undoubtedly conclusive on the members or policy holders of the defunct company, unless attacked in a direct proceeding, notwithstanding they were not present when it was rendered. We can come to no other conclusion than that we are bound, under the constitutional requirement of 'full faith and credit,' to hold that the decree making the assessment in question, being conclusive in Illinois upon all members and policy holders, unless attacked by direct proceeding, is conclusive here, and not open to collateral attack."

The point appears to be expressly decided in Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. Rep. 739. The proceedings in that case were substantially the same as in this. The defense was that the stockholder was not a party to the suit, that the cause of action was barred by the statute of limitations, that he was not responsible on 150 shares, and that interest should not have been allowed. The stockholder was sued in North Carolina. A decree had been rendered in a court of

chancery in Virginia, which had ascertained the extent of the liabilities and assets of the corporation, and decreed the assessment required to pay its liabilities. The court held the decree conclusive, and, in deciding it, speaking through Chief Justice Fuller, say: "A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member, citing Sanger v. Upton, 91 U.S. 56. The same question was again before the court in Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. Rep. 867, and the same conclusion reached, quoting from Hawkins v. Glenn. The same was held in Insurance Co. v. Langley, 62 Md. 211. The learned counsel for the defendant cite Chandler v. Brown, 77 Ill. 333, and Insurance Co. v. Gulick, 102 Ill. 41. These cases are distinguished from a case like the present in Telegraph Co. v. Gray, 122 Ill. 630, 14 N. E. Rep. 214. The two former cases were based upon a statute which provided that stockholders should be made parties to the suit. Rev. St. Ill. 1889, ch. 32, §§ 1-40. The decree of the Illinois court in this case was based upon an act in regard to the dissolution of insurance companies. Rev. St. Ill. 1889, ch. 73, §§ 103-111. This does not provide for any service upon or notice to the stockholders or members. but confers the entire jurisdiction in such cases upon the courts. Upon the question of notice to stockholders, see Wardle v. Cummings, 86 Mich. 400, 49 N. W. Rep. 212, 538. Mr. May, in his work on Insurance (vol. 2, § 557), says "the receiver of an insolvent corporation stands upon no better footing" than would the directors in making an assessment, and cites Jackson v. Roberts, 31 N. Y. 304; Embree v. Shideler, 36 Ind. 423.

If these decisions sustain the rule contended for, we could not follow them, as we think they are opposed to the clear weight of authority. The New York statute is clearly different from that in the present case. It reads as follows: "In case the corporation, in regard to which a receiver has been or shall hereafter be appointed, is or shall be a mutual insurance company, such receiver shall have full power under the authority and sanction of the court appointing him, to make all such assessments on the premium notes belonging to such corporation, as may be necessary to pay the debts of such corporation, as by the charter thereof the directors of such corporation have authority to make; and the notice of such assessment may be given in the same manner as is provided in the charter of said company for the directors of said company to give; and the said receiver shall have the like rights and remedies upon and in consequence of the nonpayment of such assessments, as are given to the corporation or the directors thereof by the charter of said corporation." Laws 1852, ch. 71. It thus appears that the power of the receiver was expressly limited to the power of the board of directors, and to the modus operandi of collecting the assessments. In Embree v. Shideler, it appeared, upon the face of the complaint, that neither the receiver, nor the court to which he had reported his action, had examined and determined upon the validity of the claims against the company. This was expressly required by the charter of the company. It was therefore said that "the assessment is the act of the receiver, and in and with him is the authority to act in the premises." The decree in the present case was erroneous only in that it included some items which, under Insurance Co. v. Merrill, this court would have excluded. Judgments and decrees cannot be attacked collaterally because they include items which courts, other than those by whom they were rendered, might hold to be illegal. See Mor. Priv. Corp. sec. 822. The judgment must be affirmed.

NOTE -The principal case presents two questions: First, whether the decree of the Illinois court is res adjudicata as to the amount of the assessment directed. Second, whether the court is bound, under the constitutional requirement of "full faith and credit" to regard that decree as conclusive. The questions involved in the decision of the case are somewhat close as is evidenced by the fact that two of the judges of the court dissent. There are, as is claimed by the dissenting judges, a number of authorities which hold that in a proceeding against a stockholder under a statute which makes him liable to creditors, and based upon a judgment against the corporation, such judgment is prima facie evidence of the indebtedness of the corporation. Bank v. Warren, 52 Mich. 557, 18 N. W. Rep. 356; Hoagland v. Bell, 36 Barb. 57; Hastings v. Drew, 76 N. Y. 9; Schaeffer v. Insurance Co., 46 Mo. 248. Other authorities hold that the judgment is conclusive, and cannot be attacked, except for fraud. Corse v. Sanford, 14 Iowa, 235; Grund v. Tucker, 5 Kan. 70; Coal-field Co. v. Peck, 98 Ill 139; Conklin v. Furman, 8 Abb. Prac. (N. S.) 161; Milliken v. Whitehouse, 49 Me. 527; Henry v. Railroad Co., 17 Ohio, 187; Wilson v. Coal Co, 43 Pa. St. 424; Bank v. Chandler, 19 Wis. 457; Marsh v. Burroughs, 1 Woods, 463; Stephens v. Fox, 83 N. Y. 313. There is still another class of cases which holds that a stockholder, in the absence of a statute requiring it, is not a necessary party to proceedings to wind up the affairs of the corporation, determine its solvency and appoint a receiver; that a decree of court determining such matter, declaring the necessity for an assessment upon stockholders or for the collection of unpaid subscriptions to the capital stock, and directing the collection thereof, is not open to attack in a suit brought to enforce the collection of the assets of the corporation, the unpaid subscriptions to the capital stock or assessments so ordered. Glenn v. Williams, 60 Md. 93; Insurance Co. v. Langley, 62 Md. 196; Sanger v. Upton, 91 U. S. 56; Glenn v. Springs, 26 Fed. Rep. 494; Hawkins v. Glenn, 131 U. S. 319; Lehman v. Glenn, 87 Ala. 618; Gilchrist v. Land Co., 21 W. Va. 115. Those cases with many others recognize the rule, but some of them carry the rule to an extent which is not warranted by the principle which underlies the rule, and others use language which is inapplicable to the facts of the particular case before the court. A judgment against a corporation is decisive as against a stockholder of that corporation, because the proceeding in which it was obtained was one between the contracting parties -the parties who had the legal right to determine that question. The only question then open is the

amount due from the stockholder to the corporation or if he is liable by reason of a statute the extent of his liability under the statute. In Wilson v. Coal Co., supra, the stockholders were made personally liable for all debts except loans, and the court held that defendant might show either that he was not a stockholder, or that the debt was a loan. In other words, the judgment is conclusive as to the amount due from the corporation to the creditor, but is only conclusive as to the stockholder when his liability is established.

As is said in Union Bank v. Wando Min. & Manuf'g Co., 17 S. C. Rep. 339, 359: "There can be no doubt of the rights of the stockholders in this action to set up any available defense that goes to the question of their liability upon the note upon which judgment has been obtained against the company. The defendants in this action were not, as individuals, parties to the action in which judgment was recovered. That suit was against the corporation, which, in law, is a distinct person from the individual members which compose it. The ground of the liability of the company may not prevail against the stockholders. For it is only when a judgment is obtained against the company upon debts of a certain description, and upon which suits have been brought within a specified time, that the stockholders are liable. In this action it is, therefore, necessary to establish that the conditions of the liability of the stockholders exist. To do this necessarily involves an inquiry in this action into the grounds of the stockholders' liability. Of course, then, it is competent for these defendants to interpose any defense that goes to the question of their liability upon the notes upon which the judgments were obtained."

In Marsh v. Burroughs, supra, it was contended that the unpaid subscriptions of capital stock were not assets for the payment of debts, either legal or equitable; that they existed merely as possibilities; that they were not a debt due, having never been called in; that no one could call them in but the directors, and in them it was a mere discretionary power, which could not be exercised either by the assignee, the receiver, or the court itself, and could not be assigned; that said unpaid subscriptions were no part of the capital stock of the bank; and that the real capital stock was what had been called in. The court held, however, that the amount subscribed, and not the sums actually paid in, was the capital stock; that the authority to make calls was not a mere power vested in the bank, to be exercised or not, in its discretion, but that it was a right; that the mode of calling it in prescribed by the charter was a mere form of remedy given to the bank to enforce the subscription, and that unpaid subscriptions were corporate property, constituting a trust fund which could be reached by creditors.

In Sanger v. Upton, supra, it was held that the order of the bankruptcy court as to the right of the assignee to bring suit was conclusive. The court refers to the application of the rule to an order made by the comptroller of the currency, citing Kennedy v. Gibson, 8 Wall. 505, wherein the court say: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or any part, and, if a part, how much, should be collected. These questions are referred to his judgment and discretion and his determination is conclusive. The stockholders cannot controvert it. Its validity is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him." The court then says: "It was competent for the court to order payment of the stock, as the directors, under the instructions of a majority of the stockholders, might, before the decree in bankruptcy have done. The former is as effectual as the latter would have been." Other questions affecting the liability of the stockholders were raised, and the court determined them.

In Hall v. Insurance Co., 5 Gill, 484, the question arose upon the admissibility in evidence of the equity proceeding in which the order directing the call had been made, and the court held that the order for the institution of the suit was conclusive.

In Glenn v. Williams, supra, it was held that the chancery court of Richmond had power and jurisdiction to make assessments upon the unpaid subscriptions to the capital stock to raise funds with which to pay its debts, and that the decree of the court determining and making an assessment upon the capital stock for such purpose was binding and effective upon stockholders not parties to that cause.

In Parker v. Mill Co. (Wis.), 64 N. W. Rep. 751, a demurrer was interposed to the complaint, on the ground of want of capacity in the plaintiff to sue. The court below sustained the demurrer, and the supreme court reversed that holding. There is no doubt of the correctness of that decision. That question is res adjudicata.

In Hawkins v. Glenn, supra, Mr. Chief Justice Fuller thus states the issues involved: Counsel for plaintiff in error contend that the decree of the Richmond chancery court making the call and assessment was void as against him, because he was not a party to the suit; that the cause of action was barred by the statute of limitations; that he was not responsible upon 150 shares of the stock; and that interest should not have been allowed from the date of the call, but only from the time of the filing of the complaint. While the learned chief justice does say, as to the determination of the Richmond chancery court, that the court may have erred in its conclusions, but its decree cannot be attacked collaterally, the court does not rest its decision upon the adjudication referred to, but proceeds to discuss the question at length, holding that, as between creditor and stockholder, the latter could not protect themselves from paying what they owe by setting up the default of their own agents. The manner in which the dissenting judges distinguish these cases from the principal case is best shown by the following from the dissenting opinion of McGrath, C. J.: "It must be borne in mind that that case (Hawkins v. Glenn, supra) was one for an unpaid subscription to stock. It was a sum which was a part of the capital stock of the company-a trust fund, held for the benefit of creditors, and the obligation to pay which could not be discharged, as against creditors, by the corporation itself. The contract to pay the sum sought to be recovered was one arising under the charter at the outset. It could not be affected, as to creditors, by the acts or laches of the corporation. In the present case the limit of the liability of the defendant member is not only expressed in the note upon which suit is brought but in the charter of the corporation as well. No act of the corporation could extend that liability. Defendant pleads no release from his undertaking nor does he seek to escape by reason of the laches of the corporation in their failure to enforce the contract, nor have creditors any demand upon defendant except such as arise from his undertaking. The receiver on behalf of the creditors is simply subrogated to the claim of the corporation against defendant. No assessment made by the corporation in excess of his liability would have been binding upon him. This is a proceeding against the stockholder as an adversary party. He has the same right to insist that the class of debts for which he has been assessed are not such as he contracted to pay as a stockholder would have, under our own statute, in respect to labor claims, if sued upon a judgment against the corporation.

In view of the conclusion reached, it is unnecessary to discuss the question as to whether the finding of facts supports plaintiff's contention that the note in question is an Illinois contract. No attempt was made to show that the charter and by-laws of the plaintiff corporation enlarged the defendant's liability. The adjudication which, it is insisted, is binding upon us, was not one involving the validity of a contract, or the validity or construction of a local charter statute, or constitution; nor was it a question of construction, dependent upon the intent of the parties, as affected, at the inception of the contract, by any fixed local rules of law; nor did it involve a rule of prop-The federal judiciary act provides that the laws of the several States, except in given cases, shall be regarded as rules of decision in trials at common law in the courts of the United States; yet, at an early day, the Supreme Court of the United States held that this provision did not apply to the decisions of the State courts in the construction of ordinary contracts on questions of general commercial law. Swift v. Tyson, 16 Pet. 1. And it has been held that the federal courts were not bound by decisions of the State courts construing and determining the legal effect of insurance contracts (Carpenter v. Insurance Co., 16 Pet. 95); nor by decisions of State courts as to rights of the parties to negotiable paper, such rights depending on the law of negotiable paper (Oates v. Bank, 100 U. S. 239; Railroad Co. v. National Bank, 102 U.S. 14); nor by a decision on the construction of a contract of carriage (Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. Rep. 425); nor by a decision construing a deed by the rules of the common law. Foxcroft v. Mallett, 4 How. 353. See also, as to the application of this doctrine, cases cited in 23 Am. & Eng. Enc. Law, 40, 41. The question here presented is whether the determination of the Illinois court, made after the insolvency of the corporation, as to the legal effect of defendant's promise, is conclusive upon the defendant, and binding upon us. I think not. There was no law of place that attached to and formed a part of the contract at its inception."

CORRESPONDENCE.

CONSTITUTIONAL POWER OF STATES.

To the Editor of the Central Law Journal:

The article by Mr. Percy Edwards on "Judicial Discretion in Divorce," in your 21st number (May 22d), near the commencement, has a heretical statement to which attention should be drawn, as it may give young readers a false notion on an important point. I refer to the statement that "the power of each State is derived from the federal constitution, which concedes to the separate States power to regulate the domestic relations of their subjects." This inverts the source of power. The States derive none of their sovereignty from the federal constitution. Their people conferred on the United States, by the federal constitution, all the limited soveregnity the United States possess, and retained to themselves all not so granted. The failure to make this explicit, was one

of the objections urged against the adoption of the federal constitution; and the principle being generally recognized as true, it was inserted as the tenth amendment, which reads: "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This was adopted by the first congress which met 4th March, 1779, and was promply ratified by the State legislatures.

R. G. H. K.

BOOKS RECEIVED.

The Works of James Wilson, Associate Justice of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia. Being his Public Discourses upon Jurisprudence and the Political Science, including Lectures as Professor of Law, 1790-2. Edited by James De Witt Andrews. Vols. I and II. Chicago: Callaghan &-Company. 1896.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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- 1. ACTIONS—Cutting Timber from Public Lands.—An action against a railroad company to recover damages for the destruction of cord wood, piled near the road, by fire originating from locomotives, is not an action of trespass de bonus asportatis, but rather an action of trespass on the case.—NORTHERN PAC. R. CO. v. LEWIS, U. S. S. C., 16 S. O. Rep. 831.
- 2. ADMINISTRATION Collateral.—While the creditor of a decedent holds collateral security for his claim he may collect dividends on his entire claim, even to the extent of payment in full, and the security inures to the benefit of the unsecured creditors.—ERLE v. LANE, Colo., 44 Pac. Rep. 591.

- 3. Administration Executors Sale of Land.—Executors empowered by testator's will to sell his real estate, and directed to hold part of the proceeds as a trust fund and to distribute the residue, may appeal from an order refusing to confirm a safe, and directing a resale.—Warrhime v. Graf, Md., 34 Atl. Rep. 364.
- 4. ADMINISTRATORS Failure to Distribute Assets.—
 Under Code Civ. Proc. § 1687, an administrator is not entitled to his final discharge until after payment and delivery of all the property of the estate to those entitled, and in the meantime the probate court has jurisdiction to compel him to comply with the order of distribution.—CLARY'S ESTATE, Cal., 44 Pac. Rep. 569.
- 5. Administration Sale of Homestead.—The superior court having been given jurisdiction over the homestead of a deceased husband or wife for some purposes, by Code Civ. Proc. § 1475, a sale of the homestead of a deceased wife as a part of her estate, by order of the court, on application of the husband as administrator, and where the record did not disclose the homestead character of the property, though erroneous, is not void, and cannot be collaterally attacked by the husband or his subsequent grantee.—Ions v. Harbison, Cal., 44 Pac. Rep. 572.
- 6. Animals—Construction of Statute Diseased Cattle—Unlawful Introduction.—The act of congress of May 29, 1884, entitled "An act for the establishment of a bureau of animal industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," does not in any manner repeal or nullify the various acts of the legislature of this State designed to protect domestic cattle against the introduction and communication of Texas, splenic, or Spanish fever.—Missouri, K.& T. Ry. Co. v. Haber, Kan., 44 Pac. Rep. 632.
- 7. APPEAL.—A bill proceeded on the grounds (1) that a certain sale for taxes was void, and (2) that, if valid, complainant had redeemed. Two of several grounds contained in a demurrer were to the paragraphs of the bill which related alone to redemption, and the other grounds were all to the whole bill, on the ground that the tax sale was valid. The court sustained the demurrer on such two grounds, and overruled it on all others: Heid, that the legal effect of the ruling was to overrule the whole demurrer, and complainant could not appeal.—Southern Pine Co. v. Mitchell, Miss., 19 South. Rep. 583.
- 8. Arbitration and Award Conclusiveness.—Where the parties, by agreement in writing, submit their "differences" to arbitrators mutually chosen, whose award shall be "final and conclusive," the courts, in the absence of fraud or misbehavior on part of the arbitrators, will not inquire whether the award was warranted by the evidence submitted.—HUCKESTEIN V. KAUFMAN, Penn., 33 Atl. Rep. 1028.
- 9. Assignment for Benefit of Creditors—Preferences.—A transfer by an insolvent of all his property to one of several of his creditors, to be applied to the payment of a bona fide debt, is valid, not being a general assignment for the benefit of creditors, within the meaning of Laws 1897, ch. 508, providing that, in all general assignments of the estates of debtors for the benefit of creditors, no preference shall be valid, except to the amount of one-third of the value of the assigned estate.—FOMPKINS v. HUNTER, N. Y., 48 N. E. Rep. 532.
- 10. Assignments—Validity Extraterritorial Force.

 —The voluntary assignment laws of Oklahoma have no extraterritorial force or operation, and must be so construed as to embrace and operate upon deeds of assignment executed in Oklahoma, and not elsewhere.

 —WILLIAMS V. KEMPER, HUNDLEY & McDONALD DRY GOODS CO., Okla., 43 Pac. Rep. 1148.
- 11. ATTACHMENT—Of Mortgaged Chattels—Damages.
 —Under Pub. St. ch. 161, § 74, authorizing personal property of a debtor subject to mortgage to be at

tached if the attaching creditor pays to the mortgagee the amount for which it is liable within 10 days after it is demanded, and section 75, providing that, if it is not so paid to the mortgagee, the attachment shall be dissolved, and the property restored to him, and the attaching creditor be liable to him for any damages he has sustained by the attachment, the mortgagee's measure of damages, where payment is not made to him, though demanded, and the property is not restored to him, is the full value of the goods, though it exceeds the amount of the debt secured.—HANLEY V. DAVIS, Mass., 48 N. E. Rep. 528.

- 12. ATTACHMENT Recitals in Affidavit.—Where an officer justifies the seizure of goods under a writ of attachment valid on its face, the recitals of indebtedness in the affidavit, or in the complaint annexed and made a part thereof, are prima facie evidence of such indebtedness.—HOWARD V. DWIGHT, S. Dak., 66 N. W. Rep. 985.
- 18. BUILDING AND LOAN ASSOCIATION Pleading.—In an action against a building and loan association by a withdrawing member to recover the amount paid upon his shares, under Comp. St. div. 5, ch. 33, § 648, authorizing such a recovery against associations formed under that chapter, a complaint failing to allege that the association was formed under such chapter, so as to subject it to such provision, is demurrable.—WHITEFOOT v. NATIONAL FRATERNITY BUILDING & LOAN ASS'N, Mont., 44 Pac. Rep. 514.
- 14. BUILDING ASSOCIATIONS—Mortgages.—A bond and mortgage executed to a building association by one of its members, to secure an anticipated loan, cannot, if the loan is not made, be retained as security for items owing by the mortgagor, which were to be deducted from the gross amount of the loan when made, where they were neither given nor received as security for such items.—Furby v. Knights of Pythias Building & Loan Ass'n, N. J., 34 Atl. Rep. 380.
- 15. Caeriers—Collision with Train of Another Road.

 —A railroad company running a train in charge of its own servants on the track of another company by its permission, under an arrangement that the train dispatcher and operators employed by such other company may stop the train at pleasure at any telegraph station, is nevertheless liable in damages for injuries resulting in the death of a passenger on the train of such other company by reason of the negligence of the engineer in running his engine into it, although the negligence of such train dispatcher and operators and of the crew of the train of such other company may have been greater than that of such engineer.—Chicago, R. I. & P. Ry. Co. v. Groves, Kan., 44 Pac. Rep. 628.
- 16. CARRIERS OF GOODS—Restrictions on Liability—Stipulations in Bill of Lading.—Where a carrier, receiving goods for transportation beyond the terminus of its line, relies on a stipulation in the bill of lading restricting its liability for safe carriage beyond its terminus, the burden is on the carrier to show that such stipulation was assented to by the shipper. Acceptance by the shipper of a bill of lading containing such stipulation, without notice of the restriction, is not an assent thereto.—CHICAGO & N. W. RY. CO. V. SIMON, Ill., 43 N. E. Rep. 596.
- . 17. CHATTEL MORTGAGE Description.—A chattel mortgage, duly filed, which described a colt correctly, except in calling it a yearling when in reality it was but about six months old, but which further stated that it was the only colt owned by the mortgagors, was sufficient to charge a subsequent purchaser with notice, it being shown that the mortgagors owned no other colt during the year.—FIRST NAT. BANK OF REDFIELD V. KOECHEL, S. Dak., 66 N. W. Rep. 983.
- 18. COMPROMISE What Constitutes.—The rule that, when a certain sum is due from one to another, the payment of a lesser sum is no discharge as to the remainder, notwithstanding an agreement to that effect, is founded upon the fact that the later agreement is without consideration. Such rule dees not apply

- where the amount due is disputed or unliquidated.— TREAT v. PRICE, Neb., 66 N. W. Rep. 834.
- 19. CONSTITUTIONAL LAW—Mining Regulations.—The act in force July 1, 1887, as amended by the act in force July 1, 1891, requiring owners of coal mines paying their employees by weight, to weigh all coal mined, for the purpose of fixing the wages of the employees, is unconstitutional, as violating the rights of the employees to contract as to the manner in which their wages shall be fixed.—HARDING v. PEOPLE, Ill., 43 N. E. Rep. 624.
- 20. CONSTITUTIONAL LAW—Statute Imposing Tax on Laundrymen.—By Const. art. 12, § 1, which, after suthorizing the legislative assembly to provide revenue for the support of the State by the levy of taxes, provides that such assembly "may also impose a license tax both upon persons and upon corporations doing business in the State," the imposing of such license tax is not restricted to the single purpose of raising revenue for State purposes.—STATE v. CAMP SING, Mont., 44 Pac. Rep. 516.
- 21. CONTEMPT.—One who, knowing of an order of court and its contents, intentionally does an act which constitutes a violation of the order, is guilty of contempt.—FREEMAN V. CITY OF HURON, S. Dak., 66 N. W. Red., 928.
- 22. CONTRACT Construction—Sale.—A contract reciting that piaintiff "agrees and hereby sells" to defendants a certain amount of sacked wheat, and "25,000 bu, wheat bulk" in its warehouse at F, at a specified price per bushel, "f. o. b. cars at F, all of which is to be delivered and paid for in thirty days from date of sale, and in case such delivery is not made," defendants agree to pay 15 cents per ton per month "on such amounts as remained undelivered, the above wheat to be merchantable"—does not constitute a present sale, but is an executory contract of sale.—Pacific Coast Elevator Co. v. Bravinder, Wash., 44 Pac. Rep. 545.
- 28. CONTRACT—Parol Evidence.—Ordinarily, a clear and explicit written instrument supersedes all contemporaneous oral negotiations concerning the subject to which the same relates, and parol evidence is inadmissible to show that the parties intended that time should be of the essence of the contract.—STRUNK V. SMITH, S. Dak., 66 N. W. Rep. 926.
- 24. CONTRACTS—Tillage of Farm on Shares.—Where plaintiff contracted to farm defendant's land, and sow certain crops thereon supply all seeds, labor, machinery, etc., and deliver one fourth of the crop to a certain elevator, title to the crops to remain in defendant who, on his part, agreed, outthe faithful performance of his part of the contract, to deliver to plaintiff three fourths of the crops so produced, such contract is not one of hire, but in the nature of an adventure.—Bowers v. Graves & Vinton Co., S. Dak., 66 N. W. Rep. 981.
- 25. CORPORATIONS Transfer of Stock Notice of Transfer.-In an action by a corporation to enforce a lien on shares of its capital stock under a by-law providing that no transfer of stock should be made when the registered holder is indebted to the company, defendant testified that he told officers of the plaintiff company that he was about to make a loan on certain stock, and asked information as to its value, and that no claim of lien was then made. Plaintiff's officers testified that they had no recollection of any such disclosure. The holder of the stock testified that he told an officer of plaintiff that he was about to pledge the stock, and that no lien was asserted at that time. stock so transferred was presented to plaintif as sotice of the transfer, and an indorsement made on the stubs in the stock book stating that the stock was held by defendant as collateral: Held, that plaintiff was estopped from now claiming any lien under the by-law. -Des Moines Loan & Trust Co. v. Des Moines NAS. BANK, Iowa, 66 N. W. Rep. 914.
- 28. COUNTERCLAIM—Same Transaction—In an action to foreclose a mortgage on land given to secure a self-



a counterclaim alleged that, at the time the note was given, defendant executed to plaintiff a chattel mortgage as security for the note; that thereafter, before filing it, plaintiff materially altered it, without the consent of defendant, that thereafter plaintiff pretending to foreclose the altered mortgage, unlawfully took the chattels and converted them, defendant knowing nothing of the alteration till plaintiff had disposed of the chattels: Held, that the cause of action set out in the counterclaim arose out of the transaction set out in the complaint, or was connected with the subject of the action.—MCHARD v. WILLIAMS, S. Dak., 66 N. W. Ren. 230.

- 27. COUNTIES—Limit of Indebtedness Contracts.—Where a county contracts for the erection of a building, the payment to be made in installments each year as the work progressed, the debt or liability created is not the aggregate amount of such installments, but only that which arises from year to year on the separate installments; and, if the installment is within the income each year it is not illegal, under the provisions of county government act of 1891 (sections 5, 36,) forbidding counties to incur an indebtedness or liability exceeding in any year the income and revenue provided for that year.—SMILIE v. FRESNO COUNTY, Cal., 44 Pac. Rep. 556.
- 28. CRIMINAL LAW.—A prosecution for the commonlaw offense of keeping a disorderly house may be sustained by proof that such house was resorted to by immoral persons for the purpose of prostitution, without evidence that it was otherwise disorderly.—COM-MONWEALTH V. GOODALL, Mass., 43 N. E. Rep. 520.
- 29. ORIMINAL LAW-Burgiary-Recent Possession.— Under certain circumstances, when burgiary and farceny are charged, the possession of stolen property recently after the theft may be some evidence of burglary against the possessor; but generally an instruction as to the prima facte evidence of guilt arising from such possession should be limited to the larceny.— STATE V. CONWAY, Kan., 44 Pac. Rep. 627.
- 30. CRIMINAL LAW Homicide—Train Wrecking.—Where the defendants do an unlawful act, such as the wrecking of a train, with felonious, intent, and death ensues, in order to convict the defendant of murder it is not required that they should be primarily convicted of train wrecking. It is competent to prove the wrecking of the train by the defendants, not only as the means which occasioned the death, but to establish the degree of defendants' guilt.—STATE v. THIBODEAUX, La., 19 South. Rep. 680.
- 31. CRIMINAL LAW Immoral Publications—Indictment.—An indictment under Act June 3, 1889, forbidding the exhibition or distribution to minors of publications "devoted to the publication, or principally made up of criminal news, police reports," etc., need not set out the prohibited matter in hac verba, but is sufficient if it describes the publication in the language of the statute.—STROHM V. PEOPLE, Ill., 43 N. E. Rep. 529
- 32. CRIMINAL LAW Larceny Former Jeopardy.— Where, on the same expedition, there are several distinct larcenies, as taking the goods of one person at one place and of another person at another place, each taking is a separate crime, a prosecution for one of which does not bar a prosecution for another.—STATE V. EMERY, Vt., 34 Atl. Rep. 482.
- 33. CRIMINAL LAW-Misconduct of Jury.—During the trial of defendant for murder, the jury were taken to view the premises where the murder was committed, neither defendant nor his attorney being with them. One of the witnesses of the State was in possession of the premises, conversed with the jury, gave them cigars, and gave them information regarding disputed questions in the testimony, and it also appeared that during the view the jury were separated: Held, this was misconduct of the jury affecting substantial rights of the defendant.—People v. Gallo, N. Y., 48 N. E. Rep. 529.

- 34. CRIMINAL LAW Murder and Manslaughter.—If there is any evidence which tends to show such a state of facts as may bring the crime within the grade of manslaughter, it is then a proper question for the jury whether this evidence is true, and whether it showed that the crime was manslaughter instead of murder; and it is then error to refuse an instruction upon that subject.—STEVENSON V. UNITED STATES, U. S. S. C., 16 S. C. Rep. 889.
- 35. CRIMINAL LAW-Murder and Manslaugter-Self-defense.—Where a difficulty is intentionally brought on for the purpose of killing deceased, the fact of imminent danger to the accused constitutes no defense. But where the accused embarks in a quarrel with no felonious intent or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger, inflicts a fatal wound, it is not murder.—WALLACE v. UNITED STATES, U. S. S. C., 16 S. C. Rep. 859.
- 86. CRIMINAL LAW—Trial without Counsel for Defendant.—Where, in a criminal prosecution, defendant aunounces, in open court, that he is ready for trial, and makes no mention to the court of the fact that his counsel is absent, or that he has engaged counsel, or that he desires counsel, and the trial proceeds without counsel for defendant, there is no violation of Rev. St. § 992, which declares that "every person shall be allowed to make his full defense by counsel," and that, "immediately upon his request," the court shall assign defendant such counsel as he shall desire.—STATE v. PERRY, La., 19 South. Rep. 686.
- 87. CRIMINAL PRACTICE Rape—Indictment.—An indictment for carnally abusing a female child, whose surname is shown by the indictment to be the same as that of defendant, need not negative the idea that the child is the wife of defendant.—STATE V. HALBERT, Wash., 44 Pac. Rep. 588.
- 38. DESCENT—Construction of Statute.—Under Rev. St. 1831, § 2473 (Rev. St. 1894, § 2628), providing that an estate which shall have come to an intestate by gift or conveyance in consideration of love and affection shall, if the intestate die without children, revert to the "donor," subject to the rights of the husband or wife of the donee, a person in possession of land under a contract of sale, having paid the price, and made valuable improvements thereon, who procures the land to be conveyed directly by his grantor to his married daughter, takes a two-thirds interest in the property on the death of his daughter intestaté and without children, as helr of the daughter, and not as reversioner or remainder-men.—Dolin v. Leonard, Ind., 43 N. E. Rep. 569.
- 39. DOWEE—Alienation by Husband Alone.—Where a husband conveyed land in 1867 without joining his wife, the latter's dower right being then, as at common law, a life interest in one-third the husband's real estate, the fact that Code 1873, § 2440, in force at the time the husband died, provided that "estates of dower and curtesy are hereby abolished," did not prevent the widow from recovering her interest in the land conveyed by the husband, as fixed by the statute in force when the same was alienated.—PURCELL v. LANG, Iowa, 66 N. W. Rep. 887.
- 40. EASEMENT—Way of Necessity.—Where the original owner of adjoining tracts of land conveyed one of the tracts to plaintiff's grantors, retaining the other, to which there was no access save over the lands so conveyed, no right of way being expressly reserved in the deed, such reservation will be implied from the necessities of the case.—WILLEY v. THWING, Vt., 34 Atl. Rep. 428.
- 41. EMINENT DOMAIN—Public Use.—In an action by a railroad company to condemn defendant's property for a side track, where defendant objected to the proceeding on the ground that the land was to be taken for private use for the benefit of a certain mill, and officers of the company testified as to the intended use of the track for storing cars, and for allowing cars to

stand to be loaded and unloaded, as a convenience for merchants and the public, testimony on the part of defendant that the strip which the company proposed to take was not wide enough to accommodate a side track and a wagon track was not sufficient to show that it was not intended for public use.—HODGERSON v. St. Louis, C. & St. P. R. Co., Ill., 43 N. E. Rep. 614.

- 42. EQUITY—Final Judgment Appeal.—After an appeal from a final judgment in an equity cause, and a determination thereof, successive appeals cannot be prosecuted from that same judgment by other parties.—HILL v. Sawyer, Wash., 44 Pac. Rep. 587.
- 43. EQUITY—Jurisdiction.—Where purchasers of machinery rely on expert agents to determine its quality and sufficiency for the purposes for which it is wanted, and such agents are corrupted by the sellers, so that the purchasers are led by them to purchase machinery not suitable, and which fails to fulfill the seller's warranty, a court of equity has jurisdiction of an action by such purchasers brought on discovery of such fraud, after the principal part of the purchase money has been paid, to annul the contract of purchase, and to enjoin a suit at law by the sellers for the balance of the price, on the ground of fraud practiced upon the purchasers by their agents and such sellers.—Baltimore Sugar-Refining Co. v. Campbell Zell Co., Md., 34 Atl. Rep. 369.
- 44. EQUITY—Jurisdiction in General.—Where plaintiff sought to compel the conveyance of certain property to which defendant held the title, but as trustee
 only for plaintiff, and it was shown that defendant, at
 the special request of plaintiff, had expended a large
 amount of money and labor in making repairs on the
 premises, but that his claim therefor was barred by the
 statute of limitations, a court of equity will make the
 payment of defendant's claim a condition precedent
 to a conveyance by him to plaintiff, such claim being
 an equitable right growing out of the subject-matter
 of the action.—De Walsh v. Braman, Ill., 43 N. E.
 Rep. 597.
- 45. EQUITY—Mistake of Law.—The fact that a person subscribed for stock in a proposed company in the belief that it was an organized and existing corporation, through ignorance of the laws of the State where it was located, does not constitute grounds for equitable relief.—WILLIAMS V. THWING ELECTRIC CO., Ill., 48 N. E. Rep. 595.
- 46. EQUITY—Pleading Encroachments upon Highways.—A bill, by a property owner abutting on a turn. pike, to enjoin the turnpike company from tearing up the sidewalks in front of the owner's property, alleging that the company has not acquired title to the portion of the land bounding on plaintiff's property, either by condemnation, purchase, agreement, or otherwise, unless the same was acquired by certain condemnation proceedings, does not, when attacked by demurrer, sufficiently plead want of title on the part of the company to the road bounding on plaintiff's property.—ULMAN v. CHARLES ST. AVE. Co., Md., 84 Atl. Rep. 366.
- 47. EQUITY Reformation of Contract.—A bill in equity for the reformation of the description of premises in a lease will not lie where it appears that the effect of the reformation prayed for would be to show an eviction from a portion of the premises, and work a forfeiture of the rent due on the entire leased premises.—MORRIS V. KETTLE, N. J., 34 Atl. Rep. 376.
- 48. EQUITY Setting Aside Conveyances.—The purchase of land by an uncle from his niece, living in his family, who had barely attained her majority, and whose guardian he had been, for an inadequate price, will be set aside as fraudulent, although the uncle advised his niece against selling, the relations between the parties being such as to require him, if he purchased, to pay the fair value of the land.—EARHART V. HOLMES, IOWA, 66 N. W. Rep. 598.
- 49. EVIDENCE-Declaration of Testator.—In the contest of a will, on the ground of undue influence, decla-

- rations of testatrix as to statements and acts of those by whom it is alleged that she was induced to make the will are inadmissible to prove such statements or acts.—CALKINS' ESTATE v. CALKINS, Cal., 44 Pac. Rep. 577.
- 50. EVIDENCE Documentary Evidence.—Plaintiff shipped certain wheat to P, to be sold, and the proceeds placed to his account. The proceeds were afterwards attached as the property of a third party: Held that, on evidence of such shipment, entries in the books of P in relation to the transaction, made in the ordinary course of business, and in the handwriting of a book-keeper since deceased, were admissible as part of the res gestæ.—SMITH v. HAWLEY, S. Dak., 66 N. W. Rep. 942.
- 51. EVIDENCE—Exhibits to Depositions—Receipt and Book Accounts.—Copies of account books of original entry and of a receipt attached to depositions, are not objectionable on the ground that the originals, instead of copies, should be attached, where the originals are the private property of the witnesses, and they have no interest in the litigation, and they are produced before the commissioner taking the depositions.—HAUENSTEIN V. GILLESPIE, Miss., 19 South. Rep. 678.
- 52. EVIDENCE Parol Evidence.—Plaintiffs took the note of a corporation for the amount of their claims, giving defendant a receipt in full settlement: Held, that parol evidence was admissible to show that it was taken with the understanding that the original holders should pay the same.—TRYMBY V. ALEXANDER, Penn., 34 Ati. Rep. 347.
- 53. EVIDENCE—Parol Evidence to Vary Written Contract.—Parol evidence cannot be received to show that, at the time a written contract of sale was made, the parties verbally agreed that title to the goods should remain in the vendor till the notes executed for the price were fully paid.—MILLBURN GIN & MACHINE CO. v. RINGOLD, Miss., 19 South. Rep. 675.
- 54. FEDERAL COURTS—Jurisdiction of Supreme Court.

 —A decision of the highest court of a State that, when an Indian tribe avails itself of the privilege given by a State statute to maintain suits in the State courts in the tribal name, such tribe is bound by a limitation in the statute as to the time in which the suit must be brought, involves no federal question, and is not reviewable in the Supreme Court of the United States.—SENECA NATION OF INDIANS v. CHRISTY, U. S. S. C., 168. C. Rep. 528.
- 55. FRAUDS, STATUTE OF Sale of Goods.—Where plaintiff or ally contracted to buy a car load of wheat from defendant, and agreed, as payment, to credit an account due from defendant, and to send him goods to make up the balance, the agreement as to credit to be allowed on defendant's account was not such a partial payment as would take the transaction out of the statute of frauds, there being no receipt or actual credit given at the time.—Galbraith v. Holmes, Ind., 43 %.
- 56. FRAUDULENT CONVEYANCES.—A voluntary conveyance to a wife, with intent to defraud creditors, may be avoided by a subsequent or antecedent creditor, though she did not participate in the fraud, and the grantor has sufficient other property to satisfy the debt.—Wilson v. Spear, Vt., 84 Atl. Rep. 429.
- 57. FRAUDULENT CONVEYANCE Tort Right of Action.—In an action to set aside a conveyance as in fraud of creditors, it appeared that the tort which was the basis of plaintiff's recovery was committed, at least in part, prior to the time the conveyance in question was made: Held, that plaintiff's cause of action accrued prior to the execution of the deed.—CARRIENER V. MONTGOMERY, IOWA, 66 N. W. Rep. 900.
- 58. FRAUDULENT CONVEYANCE What Constitutes.—In an action by a judgment creditor to set aside a conveyance as fraudulent as made to hinder and delay creditors, where it appears that the land conveyed by the debtor was his homestead, and that a portion of

the purchase money received was devoted to the payment of debts, there was nothing indicating fraud, and, plaintiff's judgment not being a lien on the land, he has no ground for complaint.—WHEELER & WILSON MANUF'G CO. v. BJELLAND, IOWA, 66 N. W. Rep. 885.

- 59. Garnishment.—Subscribers advanced money to a land company to purchase and improve land, under an agreement that the company should pay the proceeds of the land, when resold, to a trustee to repay the subscribers: Held, that a creditor of the land company could not, as against the subscribers, reach money by garnishment, paid to the trustee by the land company for the subscribers.—Baltimore & O. R. Co. V. Kensington Land Co., Penn., 34 Atl. Rep. 345.
- 60. GUARDIANS—Action on Bond—Limitations. Under Prob. Prac. Act, § 404, declaring that action against the sureties on a guardian's bond must be commenced within three years from the "discharge or removal" of the guardian, the statute commences to run from the death of the ward, not from the accounting by the guardian.—BERKIN v. MARSH, Mont., 44 Pac. Rep. 528.
- 61. HOMESTEAD—Possession under Contract of Purchase.—The right of homestead may attach to land in possession of a vendee, though the vendor retains the legal title till full payment of the purchase price.—LESSELL V. GOODMAN, IOWA, 66 N. W. Rep. 917.
- 62. HUSBAND AND WIFE—Community—Administrator of Deceased Member.—The administrator of the succession of a deceased wife is without right or authority to take possession or assume control of property held in community between the deceased and the surviving husband and usufructuary, or to sell the same for the purpose of paying debts of the community, notwithstanding they are debts which the community owes to the separate paraphernal estate of the wife.—Verrier v. Lorio, La., 19 South. Rep. 677.
- 63. HUSBAND AND WIFE Community Rights of Widow. The widow who takes possession of movables of the community exercises her legal usufruct, and such property being consumable by use, and actually used by her, her liability to heirs of the husband is for one-half the value of the property, subject to the reduction of the community debts.—Succession of BLANCAND, La., 19 South. Rep. 683.
- 64. INJUNCTION Erection of Building Nuisance.—
 The erection of a building not in itself a nuisance will
 not be enjoined on the ground that certain uses to
 which it is alleged that it is to be devoted will constitute it a nuisance, where it is neither alleged nor
 proved that the building could not be devoted to other
 uses which would not constitute it a nuisance.—DALTON V. CLEVELAND, C., C. & St. L. RY. Co., Ind., 48 N.
 E. Rep. 180.
- 65. INSURANCE—Brokers.—A broker through whom insurance is procured, though at his solicitation, is the agent of the insured, and his acts will not bind the insurer.—AMERICAN FIRE INS. Co. v. BROOKS, Md., 34 Atl. Rep. 373.
- 66. INSURANCE—Misrepresentations—Fraud. A policy of insurance contained a clause that the policy should be void if the insured has concealed or misrepresented any material fact or circumstance concerning the insurance, or in case of any fraud or false swearing touching any matter relating to the insurance, or the subject thereof. In such case false swearing consists in knowingly and intentionally stating upon oath what is not true.—LINSCOTT v. ORIENT INS. Co., Me., 34 Atl. Rep. 405.
- 67. INSURANCE Ownership of Property Misstatement in Policy.—Where, on the expiration of a policy of insurance on a homestead, payable to the husband, a new policy in renewal was written by the agent of the company, on the oral application of the wife, in which the ownership of the property was stated to be in the husband, as in the former policy, when in fact it was then in the wife, the fact that the wife stated, when making the application, that the property had been conveyed to her, may be shown, to charge the company with notice of the fact; and, having issued

- the policy with such knowledge, the husband may maintain an action to recover thereon, he having an insurable interest in the property.—CAREY v. HOME INS. CO. OF NEW YORK, IOWA, 66 N. W. Rep. 920.
- 68. INSURANCE—Verbal Contract.—In an action at law on a verbal contract of insurance the issue whether the contract was in fact made is to be determined by a preponderance of the evidence.—FARMERS' CO-OPERATIVE SOC. OF GENEVA V. GERMAN INS. CO., IOWA, 66 N. W. Rep. 878.
- 69. INTOXICATING LIQUOR—Lien for License Tax.—Under the "Mulct Law" (Acts 25th Gen. Assem. ch. 62, § 1), providing that the "tax" for the privilege of selling liquors shall be a lien upon all property, both real and personal used in carrying on the liquor business, such lien is not superior to a mortgage existing at the time the lien attaches.—SMITH v. SKOW, Iowa, 66 N. W. Rep. 893.
- 70. JUDGMENT AGAINST EXECUTRIX. A judgment against an executrix in her representative capacity only does not bind her personal estate, and an order reviving such judgment against her personal representative, made after her death, is unauthorized.—MENDENHALL V. ROBINSON, Kan., 44 Pac. Rep. 610.
- 71. JUDGMENT—Insane Person.—Though a judgment confessed by an insane person may, at the suit of his personal representative, be set aside, the rights of a third person buying at execution sale thereunder, without notice, before proceedings to set it aside, cannot be disturbed.—CRAWFORD v. THOMSON, Ill., 48 N. E. Rep. 617.
- 72. LANDLORD AND TENANT—Lien on Crops for Rent.—Under an oral contract for lease of a farm at an annual cash rental, with the agreement that title to crops raised thereon should be in the landlord, that the crops should be stored in his name, and sold by him, and the proceeds applied first to pay therent reserved, the surplus being paid over to the lessee, the landlord acquired merely a lien on the crops for the rent, and not title thereto as against creditors of the lessee.—Stockton Savings & Loan Soc. v. Purvis, Cal., 44 Pac. Rep. 561.
- 73. LIFE INSURANCE—Assignment of Policy.—Where a beneficiary of a life policy assigned it to defendant with a condition that, at maturity, \$1,500 of the proceeds should be paid to the assignor, and the assignee paid assessments amounting to \$2,800, and the total sum due on the policies was \$2,774, the assignee was only entitled to the \$1,500.—LIGHT v. LAUSER, Penn., 84 Atl. Rep. 350.
- 74. LIFE INSURANCE—Statements of Insured.—In an action on a life insurance policy, by the beneficiary, statements of insured, prior to his application for the insurance, in regard to his age, made in applications for membership to societies—such statements being immaterial to the applications in which they were contained—are inadmissible against the beneficiary, to prove the falsity of insured's representations as to his age.—Supreme Lodge of Knights of Honory. Wollschlage, Colo., 44 Pac. Rep. 598.
- 75. Malicious Prosecution—Burden of Proof.—To render a prosecuting witness liable in an action for malicious prosecution, it must be alleged and proved that his conduct in the premises was inspired by malicious motives, and was without probable cause. RIDER V. MURPHY, Neb., 66 N. W. Rep. 837.
- 76. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, a presumption of the existence of probable cause is established by proof that the plaintiff was convicted in a criminal action. But this presumption may be rebutted.—NEHER V. DOBBS, Neb., 66 N. W. Rep. 864.
- 77. MALPRACTICE—Evidence.—A physician is required to exercise only the average degree of skill possessed by physicians practicing in his locality.—WHITESELL V. HILL, Iowa, 66 N. W. Rep. 894.
- 78. MASTER AND SERVANT—Fellow-servants.—The employees of an extra freight train are the fellow-serv-

ants of section hands going to their work upon a hand car, so that the negligence of the former in failing to give proper signals, whereby a collision results, does not render the company liable for injuries to one of the section men.—NORTHERN PAC. R. R. CO. V. CHARLESS, U. S. S. C., 16 S. C. Rep. 848.

- 79. MASTER AND SERVANT—Injury to Employee—Negligence.—The evidence in an action against a master for injury to an employee, showing that the cause of plaintiff's injury was his attempt to get on an elevator while it was in motion, without his duty demanding it, and there being an entire want of evidence of negligence on the part of the person in charge thereof, verdict was properly directed for defendant.—BLOCK v. SWIFT & CO., Ill., 43 N. E. Rep. 591.
- 80. MECHANIC'S LIEN—Architect.—An architect who prepared plans and specifications for improvements on a building, which are made in accordance with such plans, is entitled to a mechanic's lien on the property.—Parsons v. Brown, Iowa, 66 N. W. Rep. 890.
- 81. MECZANIC'S LIEN-Owner.—A party in possession of real estate under a bond for a deed will be deemed "the owner" thereof for the purpose of creating a mechanic's lien thereon, as against a subsequent mortgagee of the same party.—MULVANE V. CHICAGO LUMBER CO., Kan., 44 Pac. Rep. 618.
- 82. MECHANIC'S LIENS—Who are Contractors.—The seller, in a contract whereby he agrees to furnish the "purchaser" the electrical machinery for an electric power house under construction by the purchaser, who was to furnish the motive power and connections necessary to connect the electrical machinery with the motive power, title to the electrical machinery to remain in the seller until paid for, is not an "original contractor." but is merely a material-man, though he is required to place the machinery in position, such work requiring the constructions of foundations for the dynamos and other technical work necessary to the proper installation of the machinery; and one furnishing the seller with material? is entitled to no lien.—John A. Robbling's Sons Co. v. Humboldt Electric Light & Power Co., Cal., 44 Pac. Rep. 568.
- 83. MORTGAGE—Foreclosure—Receiver. Although § 55, ch. 78, Comp. St., provides that, "in the absence of stipulations to the coutrary, the mortgagor of real estate retains the legal title and right of possession thereof," yet it does not abrogate the power of the court to appoint a receiver, in a proper case, to collect the rents and profits from mortgaged premises, notwithstanding the mortgage contains no stipulation as to the right of possession.—PHILADELPHIA MORTGAGE & TRUST CO. V. GOOS, Neb., 66 N. W. Rep. 848.
- 84. MORTGAGES—Foreclosure.—Where a creditor accepts a deed from a debtor in full payment of its claim, but elects to treat the conveyance as a mortgage, conditioned on the payment of certain notes thereafter made by the debtor, and on default forecloses and takes a decree of foreclosure merely, and surrenders the notes to the clerk of the court for cancellation, without having sought or obtained any personal judgment, his remedy against the debtor is exhausted.—BANK OF CALIFORNIA V. DYER, Wash., 44 Pac. Rep. 534.
- 85. MORTGAGES—Foreclosure.—Under Comp. Laws, § 4932, subd. 1, authorizing the joinder of causes of action arising out of "the same transaction, or transactions connected with the same subject of action," the holder of a note secured by a trust deed may in one action seek to foreclose the trust deed, to set aside a prior foreclosure made by the trustee without plaintiff's knowledge or consent, to enjoin the county treasurer from issuing to the trustee a tax deed for the mortgaged premises, and to adjust the equities of the various parties.—Bush v. Froelick, S. Dak., 66 N. W. Red. 1989.
- 86. MORTGAGES—Merger.—Where the holder of both a first and second mortgage on land forecloses the second mortgage and buys in the land, the senior

- mortgage is merged in the fee, and the debt secured thereby is extinguished.—McDoMALD v. MAGIRL, Iowa, 66 N. W. Rep. 904.
- 87. MUNICIPAL CORPORATIONS—Assessments for Public Improvements.—Under the charter of the city of Spokane, giving the city power to improve streets and defray the expenses thereof by special tax assessed against the property benefited thereby, the general fund of the city is not liable for the payment of warrants drawn against the special fund created by the assessment, unless it appears that the city has failed to take steps to provide such special fund, or has been so negligent in its attempts to create the fund that the right thereto has been lost.—Stephens v. City of Spokane, Wash., 44 Pac. Rep. 541.
- 88. MUNICIPAL CORPORATIONS—Changing Course of Natural Stream.—A city is liable for damages to property caused by its changing the course of a natural stream flowing within its limits so as to make it flow along a public street on which the property abuts, in such a manner as to prevent free access to it.—GEURKINK V. CITY OF PETALUMA, Cal., 44 Pac. Rep. 570.
- 89. MUNICIPAL CORPORATIONS Control of Parks.—Under Laws N. Y. 1882, ch. 410, § 688, giving the department of public parks power to control surface constructions on any street within 350 feet of a public park, it is within the power of the department to permit the erection of a residence on such a street with bay windows extending beyond the building line, but within the stoop line of said street.—WORMSER V. BROWN, N. Y., 43 N. E. Rep. 524.
- 90. MUNICIPAL CORPORATIONS Grading Streets—Before the mayor and council of a city of the first class can grade a street at the cost of the owners of the lots abutting thereon, they must be specially authorized so to do by a petition signed by a majority of the resident owners of a majority of the front feet of the street to be graded. The presentation of such petition is jurisdictional, without which the proceedings are void.—STEINMULLER v. CITY OF KANSAS CITY, Kan., 44 Pac. Kep. 600.
- 91. MUNICIPAL CORPORATIONS Negligence in Constructing Sidewalks.—The law of this State devolves upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public; and no municipal corporation, by any act of its own, can devolve this duty on another, so as to relieve itself from a liability resulting from its failure to perform such duty.—Davis v. City of Omaha, Neb., 66 N. W. Rep. 859.
- 92. MUNICIPAL CORPORATIONS—Special Assessment.—While it is essential to the validity of special assessment proceedings that notices to the property owners should have been mailed 10 days before the hearing, the judgment of confirmation, reciting proper notice, cannot be attacked in a collateral proceeding, and the presumption in its favor will not be overcome by the fact that the affidavit of the mailing of the notices was made less than 10 days before the hearing.—DICKEY V. PEOPLE, Ill., 43 N. E. Rep. 606.
- 98. MUNICIPAL IMPROVEMENTS Land Taken for Streets.—In determining the damages sustained by a lot owner by the taking of a portion of his property for street purposes, and opening the street at a grade which leaves the rest of the property in a depression, evidence of the amount of the cost of filling to make the lot conform to, and be available for use at, the new grade, is competent as the element to be considered by the jury, in connection with the other circumstances, in determining the value of the lot before and after the street was opened.—Patton v. City of Philadelical Penn., 34 Atl. Rep. 344.
- 94. MUNICIPAL IMPROVEMENTS Ordinances. The clause, attached to and filed with plans and specifications for improvement of a street, that the contractor shall furnish a bond as a guaranty that he will faithfully perform the work, and will, without further com-



pensation, keep in good repair, for five years, the pavement laid under the contract, forms no part of the plans and specifications adopted by and made part of the ordinance.—COLE v. PBOPLE, Ill., 48 N. E. Rep. 607.

- 95. MUNICIPAL IMPROVEMENTS—Petition for Assessment—Ordinance.—Though the statute requires a petition for an assessment to recite the ordinance for the proposed improvement, it is not necessary that the ordinance be certified.—ADCOOK v. CITY OF CHICAGO, Ill., 43 N. E. Rep. 569.
- 96. MUTUAL BENEFIT INSURANCE—Forfeiture of Policy.—Where a mutual benefit certificate, and the application for it, provide that if the monthly dues, assessments, etc., required to be paid, are not paid to the company on the day due, the certificate shall be void, the payment of such dues and assessments is a condition precedent to any subsequent liability of the company; and it need not take any action declaring a forfeiture in order to relieve it of liability.—PITTS v. HARTFORD LIFE & ANNUITY INS. Co., Conn., 84 Atl. Red. 95.
- 97. NEGLIGENCE Contributory Negligence—Pleading.—In an action for negligence defendant has the right to deny the matters upon which the claim of negligence is based, and also plead further, in case the contrary should be established, that the person injured was chargeable with contributory negligence.—Pugh v. Oregon Imp. Co., Wash., 44 Pac. Rep. 547.
- 98. NEGLIGENCE—Dangerous Building.—The owner of real property, in exercising his own tastes and inclinations as to the character of a building he will erect thereon, has no right to build and maintain a structure which, by reason of defects or inherent weakness either in material or construction, is liable to fail and do injury to an adjoining owner or the public.—KITCHEN V. CARTER, Neb., 65 N. W. Rep. 855.
- 99. NEGOTIABLE INSTRUMENTS—Bona Fide Holder—Pledge.—Where a person, a few days after the execution of a note payable on demand to the maker's order, and indorsed by him in blank, has had the same transferred to him in good faith, for a valuable consideration, in due course of trade, and without notice, as collateral security for a note due to him by a third person, to whom the maker had delivered it, the equities existing between the original holder and the maker are cut off so far as they affect the second holder, and they are not thrown open because, at a later date, the party holding the note as collateral accepts it in absolute ownership, and credits its amount upon the main or principal note.—MCPHERSON v. BOUDERSAU, La., 19 South. Rep. 550.
- 100. NEGOTIABLE INSTRUMENTS—Maturity.—A promissory note payable "after my death date" is not void for uncertainty of maturity, but becomes due at once after the death of the maker.—SHAW V. CAMP, Ill., 48 N. E. Hed. 606.
- 101. NEGOTIABLE INSTRUMENT—Note—Negotiablity.—A promissory note for \$2,246.50, otherwise negotiable, is not rendered non-negotiable by the addition of stipulations for the payment of interest on interest after maturity, and reasonable costs of collection, including attorney's fees, and that judgment may be entered thereon by any justice of the peace; nor, by reason of a separate written agreement of the maker, of which the indorsee has no knowledge, to apply the proceeds of certain sales toward the payment of the note.—GILMORE V. HIEST, Kan., 44 Pac. Rep. 608.
- 102. NEGOTIABLE INSTRUMENT—Notes—Notice of Non-payment—Evidence.—Under Pub. St. ch. 77, § 22, providing that the protest of a note, duly certified by a notary public, shall be prima facie evidence of the notice given to the indorser, such protest is prima facie evidence of the notice of non-payment; to a person becoming a party by signature on the back of the note, in blank, before delivery, who is, under Pub. St. ch. 77, § 15, entitled to notice of non-payment, as an indorser.—LEGG v. VINAL, Mass., 48 N. E. Rep. 518.

- 108. PARTMERSHIP—Firm and Private Oreditors.—The assets of an insolvent partnership will, in equity, be treated as a trust fund for the payment of the firm creditors, and cannot be applied in satisfaction of the personal obligations of the individual partners, to the prejudice of those to whom it equitably belongs.—STEELE V. KEARNEY NAT. BANK, Neb., 66 N. W. Rep. 841.
- 104. PARTNERSHIP—What Constitutes.—An agreement by several persons to unite in procuring a sale of property, each one to receive a specified part of the commission earned does not constitute a partnership.—Mason v. Sieglitz, Colo., 44 Pac. Rep. 588.
- 105. PRINCIPAL AND SURETY—Contractor's Bond.—P and 8 entered into a contract with the State to erect for it a building at a stipulated sum. The contract required, inter alia, that the contractor should pay for all labor performed or materials furnished, and a bond for the faithful performance of the contract was given: Held, that the sureties on such bond are liable to a subcontractor for materials furnished by him and used in the construction of the building.—FITZGERALD v. McClay, Neb., 66 N. W. Rep. 828.
- 106. RAILEOAD COMPANIES—Accident at Crossing.—In an action by one injured at a crossing by a train of defendant, where it appears that all the trains at the crossing in question were operated by the defendant, and that it was just as responsible for one as the other, the fact that a train other than the one described in the complaint committed the wrongful act is immaterial, if defendant permitted it to be done at all, and the consequences ensued which are charged in the complaint.—INDIAMAPOLIS UNION RY. CO. V. NEUBACHER, Ind., 48 N. E. Rep. 576.
- 107. RAILROAD COMPANIES—Crossing Accident.—It is the duty of a railway company to give reasonable and proper warnings for the protection of travelers on the highway when its train approaches a crossing. The number and kind of signals required depend upon the character of the crossing, the speed of the train, and the surrounding circumstances.—Missouri Pac. Ry. Co. v. MOFFATT, Kan., 44 Pac. Rep. 607.
- 108. RAILEOAD COMPANIES—Crossings—Contributory Negligence.—It appeared that plaintiff, while crossing defendant's tracks near a station, had been struck by the north-bound train; that the south-bound train was then standing on the track, waiting for the other to pass; that plaintiff saw the south-bound train, and knew that the other train was due; that, before reaching the tracks, plaintiff had looked, but had seen no train coming because of obstructions; that, after reaching the tracks, there was a clear view in the direction of the approaching train, but plaintiff did not again look: Held, that plaintiff was guilty of contributory negligence precluding recovery.—HINKEN V. IOWA CENT. Ry. Co., IOWA, 66 N. W. Rep. 882.
- 109. RAILBOADS— Easement in Orossing. An ordinance authorizing the crossing of the streets of a city by the tracks of a railroad company confers upon the corporation therein named no exclusive use of such crossing, but a use to be enjoyed in common with the general public.—CHICAGO, B. & Q. R. CO. V. BEATRICE RAPID TRANSIT & POWER CO., Neb., 66 N. W. Rep. 830.
- 110. REMOVAL OF CAUSES—Federal Question.—Under the judiciary acts of March 3, 1887, and August 18, 1888, a case cannot be removed, as one arising under the constitution, laws or treaties of the United States, unless the fact that it so arises appears by the plaintiff's statement of his claim. If it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent proceedings.—OREGON SHORT LINE & U. N. RY. CO. V. SKOTTOWE, U. S. S. C., 16 S. C. Rep. 869.
- 111. REPLEVIN BOND—Action—Liability of Sheriff—Measure of Damages.—Where it is shown in an action on a redelivery bond in replevin that one of the persons appearing thereon as surety did not in fact exe-

cute the same, plaintiffs are not precluded from maintaining an action against the sheriff and his sureties for taking said bond.—MAGNUS v. WOOLERY, Wash., 44 Pac. Rep. 189.

112. Sale—Guaranty — Parol Evidence. — Parol evidence is admissible to show that a guaranty in a contract for sale of goods, reciting: "Prices guarantied against market price to date of shipment," meant according to business custom and usage, that the purchaser should have the benfit of any decline in prices.—COULTER MANUF'S CO.V. FT. DODGE GROCERY CO., Iowa, 66 N. W. Rep. 875.

118. SALE — Warranty — Rescission.—The defendant purchased of the plaintiffs two road machines, in Boston, with special warranty as to quality and effectiveness in operation. The sale was absolute, and the title passed to the vendee upon their delivery to the carrier in Boston: Held, that if the defendant would rescind the sale for breach of warranty, it must return the machines to the vendors in Boston. This it did not do, nor offer to do.—TYLER V. CITY OF AUGUSTA, Me., 24 Atl. Rep. 406.

114. SCHOOL DISTRICTS — Right to License Fees. — Moneys arising from a license granted by a village for the sale of intoxicating liquors belong to the school district in which such village is located, and must be applied to the support of the common schools in said district.—GUTHRIE V. HESTER, Neb., 66 N. W. Rep. 858.

115. SPECIFIC PERFORMANCE.—Where the person, to whom a city has granted the exclusive franchise to maintain waterworks in the city, with option on the part of the city of purchasing the same at a reasonable price, to be fixed by the parties, or, on disagreement, by arbitrators appointed by them, refuses to sell, or to appoint an arbitrator to fix the price, the court has the power to provide for fixing such price, in order to compel conveyance of the works to the city.—Town of Bristol v. Bristol & Warren Waterworks, R. I., 34 Atl. Rep. 359.

116. SPECIFIC PERFORMANCE—Marketable Title.—It is not error to refuse, at the instance of the vendor, specific performance of a contract to purchase land, where it appears that the building upon the premises encroached upon adjoining lands, the title of the vendor to which rested in parol, being by adverse possession, the evidence to support which was conflicting, and also that a portion of the land to be conveyed had been used by the vendor in common with others as an alley way for 20 years.—MCPHERTON v. SCHADE, N. Y., 48 N. E. Rep. 527.

\$17. TAXATION—Exemption. — Gas wells, pipe lines, pumping stations and machinery owned by a municipal corporation, and used by it for the conveyance of gas to be consumed by it and by its citizens generally, are used exclusively for a public purpose, and are exempt from taxation. — CITY OF TOLEDO V. HOSLER, Ohio, 43 N. E. Rep. 583.

118. TRIAL—Challenge to Jurors.—In the impaneling of a trial jury in a criminal case, where the defendant has double the number of peremptory challenges given the State, the State making the first challenge, the defense is required to make two before the State is again called upon to exercise its next peremptory challenge.—STATE v. BROWNE, Idaho, 44 Pac. Rep. 552.

119. TRIAL—Motion to Direct Verdict.—A motion to direct a verdict should be sustained when, considering all of the evidence, it clearly appears to the trial judge that it would be his duty to set aside a verdict if found in favor of the party on whom the burden of proof rests.—BARNHAET V. CHICAGO, M. & St. P. Ry. Co., Iowa, 66 N. W. Rep. 902.

120. TRUST AND TRUSTEE—Estoppel.—A bank president, trustee of property, to prefer claims of his own bank and a note due another bank on which he was liable as indorser, on maturity of the note notified said other bank to send it through the clearing house, and that his own bank would pay it. The note was so sent and paid, and the trustee subsequently paid his

own bank the amount thereof out of the trust funds: Held that, the trust funds proving insufficient to pay the preferred claims in full, the trustee's own bank was estopped from claiming that its co-claimant had received more than its share of the fund.—FIFTH NAT. BANK V. DURHAM, Mich., 66 N. W. Bep. 870.

121. TRUST — Express Trust in Land — Creation by Parol.—Evidence of a verbal agreement by an administrator to buy at execution sale, on a judgment against his decedent, for the benefit of the heirs, and to convey to them when the rents equaled the price paid at the sale, is inadmissible to establish an express trust, since Code, § 1934, provides that trusts in realty, other than resulting trusts, must be executed in the same manner as deeds.—MAROMEY v. MAROMEY, Iowa, 66 N. W. Rep. 911.

122. TRUST—Voluntary Trusts—Judgment. — On distribution of intestate's estate, defendant was declared the distributee, as grantee of her mother, who was declared sole heir. Afterwards, in a letter written to an aunt, she stated that, "some time after intestate's property was deeded to me, I heard that P (another heir), was still living; and I resolved that he should have half the estate, though the law does not compel the division. Still, I feel that, in justice, it belongs to both:" Held, that under Civ. Code, § 2221, the letter created a voluntary trust in favor of P and his heirs, as to an undivided share in intestate's property. — LYMCH v. ROOMBY, Cal., 44 Pac. Rep. 565.

123. VENDOR AND PURCHASER—Vendor's Lien.— The holder of a contract for the purchase of realty, who has it conveyed directly to another, to whom he has sold, is entitled to a vendor's lien for unpaid purchase money due him from the grantee, and such lien is not affected by the fact that, at the time of the conveyance, he had not paid the consideration to his vendor.— SMITH V. MILLS, Ind., 43 N. E. Rep. 564.

124. WATERS—Irrigation—Water Rights.— In an action against a ditch company, where the issue was the right of the defendant to take water from a river, the findings and judgment of the court must determine the quantity of water allowed to the party whose claim is paramount; and a finding that defendant is entitled to take water to the full capacity of its ditch, and, during the irrigating season, to the extent of all the water in the river, when only 1,000 inches is claimed in the pleadings, is erroneous.—RIVERSIDE WATER CO. V. SARGENT, Cal., 44 Pac. Rep. 560.

126. WILL—Widow.—Where a widow received from the executor of the will of her deceased husband all the personal property and money remaining after settlement of the estate, in accordance with the terms of the will, she will be held to have consented to take under the will, and in the absence of proof it will be presumed that such consent was properly entered on the records of the court, as provided by Code, § 2452.—IM RE FRANKE'S ESTATE, IOWA, 66 N. W. Rep. 918.

126. WILLS—Execution — Attestation. — That one of the witnesses to a will went to testatrix's bedside with the other witness, the scrivener of the will, for the purpose of witnessing the will; that testatrix in their presence acknowledged the will; and that the witnesses signed their names to the usual attestation clause, at the time, upon a dresser which was only distant about four feet from the bed on which testatrix lay, without proof that testatrix actually saw the witnesses sign—is sufficient to prove attestation by the witnesses in the "presence of testatrix."—CAMPBELL V. McGuiggan, N. J., 24 Atl. Rep. 288.

127. WILLS—Witness—Competency.—St. 1894, § 2349, requires that a will shall be "attested and subscribed by three or more credible witnesses," and section 2852 provides that, "if the witnesses attesting the execution of a will are competent at the time of attesting, their becoming subsequently incompetent shall not prevent the probate and allowance of the will:" Held, that witnesses attesting the execution of a will must be both credible and competent at the time of the execution.—SMITH V. JONES, Vt., 34 Atl. Rep. 424.

Central Law Journal.

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Our subscribers will, doubtless, be pleased to learn that we have prepared and will, in a few days, be ready to issue, an index-digest, embracing vols. 31 to 41 inclusive of this JOURNAL, being from July, 1890, to Jan. 1, 1896. It will follow and be supplementary to the larger index-digest of vols. 1 to 30, and the two together will constitute a complete index-digest of all the volumes to January 1st, 1896. The supplemental digest has been carefully prepared, the subjects arranged under heads and subheads. Those who have the unbound numbers of the Jour-NAL covered by the supplementary digest will do well to have them bound and supply themselves with the digest. In no volumes, we dare say, will the important substantive law, for the period of time covered by this digest, be found so fully and satisfactorily covered.

In a recent issue we called attention to some late cases on the subject of the constitutionality of acts prohibiting barbering on Sunday. (42 Cent. L. J. 473.) To these may be added the case of Ex parte Jentzsch, since decided by the Supreme Court of California. The court there held the statute unconstitutional, upon much the same ground as the Missouri and Illinois courts, viz.: that such enactment is special or local legislation, within the purview of the constitution.

The case of Crain v. United States, recently decided by the Supreme Court of the United States, afforded Mr. Justice Peckham an opportunity to show that he is imbued with the more liberal and modern idea, which discourages mere technical defenses in criminal cases, without impairing the protection of substantial rights of defendants. case was an appeal from a conviction under the United States statutes for preparing papers, containing fictitious statements with forged signatures, and transmitting them to the commissioner of pensions for the purpose of defrauding the United States through an unfounded claim for a pension. It was held Vol. 42-No. 25.

by the Supreme Court of the United States that, before a conviction of an infamous crime can be affirmed, it must appear from the record that the accused was called upon to plead or did plead to the indictment. The court held that this is a matter of substance and not merely of form; that "due process of law" requires that an accused plead or be ordered to plead, or, in a proper case, that a plea of not guilty be entered for him, before his trial can rightfully proceed: that the record of his conviction must show distinctly, and not by inference merely, that every step involved in due process of law. and essential to a valid trial, was taken in the trial court: otherwise the judgment will be erroneous. Justices Peckham, Brewer and White dissented from the opinion of the court. The following language of Mr. Justice Peckham is well worth perusal: "At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punishments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe, if not cruel penalty, should be accorded great weight, and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defense against prosecutions which might otherwise be successful, and which at the same time ought not to succeed. These times have passed, and the reasons for the strict and slavish adherence to mere form have passed with them.

In this case there cannot be a well founded doubt that the defendant was arraigned, and pleaded not guilty. The presumption of that fact arises from a perusal of the record, and it is, as it seems to me, conclusive. There is no presumption in favor of defendant upon a criminal trial excepting that of innocence. Error in the record is not presumed, but must be shown. A presumption that proper forms were omitted is not to be made. There must be at least some evidence to show it. And yet, because the record fails to make a statement in terms that the defendant was thus arraigned and did so plead, this judgment is to be reversed, and

that, too, without an allegation, or even in pretense, that the defendant has suffered an injury by reason of an alleged defect of the character in question. I think such a result most deplorable."

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW - MORTGAGE-EX-TENDING TIME FOR REDEMPTION.—The Supreme Court of Montana decides in State v. Gilham, 44 Pac. Rep. 394, that Act July 1, 1895, extending the time for redemption of premises sold on mortgage, merely operates upon the remedy and does not impair the obligation of contracts, within the inhibition of the State and federal constitutions, following the decisions of the Kansas and Oregon courts in Beverly v. Barnitz, 42 Pac. Rep. 731, and State v. Sears, 43 Pac. Rep. 482, which are upheld by the following decisions of the United States Supreme Court: Sturges v. Crowninshield, 4 Wheat. 122; Bronson v. Kinzie, 1 How. 311; Terry v. Anderson, 95 U. S. 628; Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. Rep. 91; Insurance Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. Rep. 236; Morley v. Railway Co., 146 U.S. 162, 13 Sup. Ct. Rep. 54; Ogden v. Saunders, 12 Wheat. 215; Louisiana v. New Orleans, 102 U. S. 203; Curtis v. Whitney, 13 Wall. 68; Edwards v. Kearney, 96 U. S. 595; Seibert v. Lewis, 122 U.S. 284, 7 Sup. Ct. Rep. 1190; Clark v. Reyburn, 8 Wall. 318; Von Hoffman v. City of Quincy, 4 Wall. 535; Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. Rep. 420.

Partnership — Dissolution — Receiver —Sale.—An interesting point of partnership law was decided by the Supreme Court of California recently in the suit of Wulff v. Law. The action arose out of a suit for dissolution of a partnership between one Parsons and Wulff. Wulff applied for a writ of certiorari to review an order of Judge Law, directing a sale of the partnership property in the hands of a receiver. It was contended by Wulff that until the entry of a decree dissolving the partnership the court had no authority to order a sale of the partnership business, but the Supreme Court decided against this contention, and denied the ap-

plication of Wulff. On this point the court said: "A litigous partner, by means incident to litigation, might be able to delay the entry of a decree of distribution for years, and thereby encompass the utter destruction of the entire partnership assets, and it would seem, in the interests of parties having claims upon these assets, that a court of equity was vested with the right to give relief by converting them into money." The court commented upon the small number of authorities which had been cited on the point involved. In all the cases found, however, the court held itself possessed of the power to sell, by reason of an actual necessity of sale, in order that the assets might be preserved to the final good fortune of the interested parties. There was no more reason for a sale in those cases, said the supreme court, than in the case at bar. "The assets of the present partnership," says the opinion, "are rapidly depreciating in spite of the exercise of skill and care in their management, and it would appear to be a mere matter of time when they will be wholly lost. We conclude that the facts in the present case are such that a power of sale in the court pendente lite existed."

CRIMINAL LAW-MISCONDUCT OF COUNSEL -WITNESS.-In State v. Hatcher, 44 Pac. Rep. 584, decided by the Supreme Court of Oregon, it appeared that on the trial of an indictment for murder, defendant's counsel in their argument maintained that deceased was killed while attempting to commit a forcible felony on defendant's wife. The prosecuting attorney denied the contention, and in his closing argument said that there were but three witnesses to the homicide, defendant, his wife and deceased; that the State could not call the wife as a witness, but that defendant could produce her; that her testimony would have been adverse to defendant, otherwise he would have called her; and that his failure to do so was proof that her testimony would have been unfavorable to him. It was held that since the wifecannot, under the statute, be compelled to become a witness for her husband, and the record is silent as to whether she had given her consent thereto, the remarks of the prosecuting attorney constituted reversible error. On this point the court says:



The defendant's counsel objected to this language. for the reason that the absence of the defendant's wife was no evidence of his guilt, but, the objection having been overruled, an exception was allowed. As an excuse for the use of the language complained of it is insisted that it was provoked by the argument of the defendant's counsel in which they claimed that the felony attempted by the deceased on the defendant's wife was forcible, which fact was denied by the prosecutifig attorney. The privilege of counsel, as the representative of a party, to address the jury upon the evidence introduced at the trial of a cause has become firmly fixed in our jurisprudence. It is the duty of the advocate, as an officer of the court, to present to the jury a word panorama of the facts proven before them, and in doing so he is often liable to paint in too glowing colors the scenes that are most favorable to the party whom he represents, or shade in deepest black those views that seriously affect the adverse party. Having done so, the court, out of a spirit of fairness to each side, often permits the opposing counsel to answer such an argument, which he frequently does by shifting the scenes, hoping thereby to be able to obliterate or distort the picture so presented, and exhibit to the jury an entirely different view of the evidence. In this the party whose counsel provoked the reply can find no just cause of complaint. Mr. Elliott, in his work on Appellate Procedure (section 672), speaking on this subject, says: "Where the opposite counsel provokes the misconduct of his adversary, and opens the door to improper argument, he cannot, as a general rule, successfully complain of the error which he himself invited." This rule, however, can be invoked only in favor of an argument based on the facts introduced in evidence. 1 Thomp. Trials, § 978; State v. Abrams, 11 Or. 169, 8 Pac. Rep. 327. If counsel, in argument, go outside the record, and comment on facts not in evidence, the proper method of correcting the error is by objection to the misconduct, and an exception to the court's ruling, if permitted; but the misconduct of one party will not authorize the other to commit a like error. In this case it clearly appears from the language complained of that the prosecuting attorney did not predicate his argument upon any disputed fact, but sought to invoke inferences and presumptions of law from the failure of the defendant to produce his wife as a witness. Such failure did not tend to show that the felony attempted by the deceased was not forcible, and hence the argument cannot be excused or justified upon the theory that it was provoked by that of the defendant's counsel. The rule is universal that it is error to allow an attorney in argument, over his adversary's objection, to go outside the evidence, and comment on facts assumed to have been proven, and that an exception to the action of the court in permitting it will be reviewed on appeal. Elliott, App. Proc. § 672; Proff. Jury, § 250. In Tenny v. Mulvaney, 8 Or. 513, Lord, C. J., in discussing this question, says: "It is held to be the strict duty of the court to arrest an argument not based on evidence. And, if objection be made to this course of argument, it is error for the court to permit it, and a new trial will be granted." It has been held, however, that no error could be predicated upon an objection to such misconduct unless the court was requested to rule thereon. State v. Lee Ping Bow, 10 Or. 27; State v. Anderson, Id 448; State v. Drake, 11 Or. 396, 4 Pac. Rep. 1204; State v. Abrams, supra. All the authorities agree that it is within the discretion of the trial court to supervise the argument of counsel, to limit its duration, and to say what

comments upon the facts introduced in evidence shall be permitted or prohibited; and it is only when this discretion is abused that appellate courts will interfere, but there is an irreconcilable conflict of judicial opinion as to what constitutes an abuse of such discretion. In Mercer v. State, 17 Tex. App. 452, the prosecuting attorney maintained in argument that it was within the power of the defendant to produce his wife as a witness in his behalf, while the State was powerless to call her as a witness against him, and that the defendant's failure to produce his wife as a witness was corroborative of the incriminating evidence appearing against him. An objection to this language having been made, and an exception allowed, it was held on appeal that, the defendant's wife having been within reach of the process of the lower court, the prosecuting attorney was justified in the use of the remarks complained of, and that the court did not errin relation thereto. In Long v. State, 56 Ind. 182, the defendant having failed to testify in his own behalf, counsel for the State, in making the closing argument, said: "It is true, gentlemen of the jury, the evidence in this case is not as clear as it might There were but two parties to the transaction. You have heard the evidence of one of them. We would have been pleased to have heard from the other, to see what light he could have thrown upon this transaction." An objection to this language having been sustained, the court admonished the counsel that the failure of the defendant to testify in his own behalf was a subject not to be referred to before the jury, and also instructed the jury that they should pay no attention to what had been said concerning it. The defendant, having been convicted, appealed, and the court, in reversing the judgment, held that a violation of the statute which provided that the failure of a defendant, in a criminal action, to testify, should not be the subject of comment before the jury, was not cured by an instruction to disregard the improper language of counsel. In State v. Degonia, 69 Mo. 485, the prosecuting attorney, in his closing argument, commented on the fact that the defendant had not called as witnesses his two brothers, who had been indicted as accessories, but, the court having promptly rebuked the counsel, and commanded him to keep within the record, it was held on appeal that the error was cured. It will thus be seen that the courts are not in harmony upon the question of the proper method of correcting the error caused by the misconduct of counsel in the argument of a cause. If the rule announced in Mercer v. State, supra, is to prevail, and such argument as there used is permissible, the remarks of the prosecuting attorney in the case at bar were improper for two reasons: First, the record falls to disclose that the defendant's wife was, at the time of the trial, within the reach of the process of the court; and, second, it is also silent as to whether she had consented to become a witness for her husband, for without such consent upon her part she could not be compelled to testify. Hill's Ann. Laws, Or., § 1366. In criminal actions the accused shall, at his own request, but not otherwise, be deemed a competent witness, provided his waiver of said right shall not create any presumption against him; but when he offers himself as a witness he becomes subject to the ordinary rules of cross-examination. Id. § 1865; State v. Abrams, supra. If no presumption of the defendant's guilt can be invoked by reason of his failure to testify in his own behalf, how can such a presumption be created by his failure to produce his wife as a witness, when she cannot be compelled to testify without her consent? If the defendant in a criminal action, by becoming a witness in his own behalf, thereby consents to his wife's testimony, and is obliged to produce her to rebut an alleged presumption of his guilt, what an anomalous position he would be placed in if, after having called her as a witness, she should refuse to testify for him. Her refusal in such case would doubtless be construed by the jury as evidence of her knowledge of his guilt, when perhaps, her real motive for refusing to testify was to secure his conviction of a felony for a selfish purpose, and thus make her silence serve the purpose of the incriminating evidence, which she is prohibited by statute from giving. The case of Mercer v. State, supra, is not in point, for no such presumption or inference as the prosecuting attorney sought to apply can be indulged in under a statute like ours and it was error to permit his argument to go to the jury under the sanction of the court.

ACCIDENT INSURANCE—DEATH FROM "TAKING POISON."—In Travelers' Ins. Co. v. Dunlap, it is held by the Supreme Court of Illinois that an accident insurance company, whose policy insures against death from injuries through "external, violent and accidental means," unless it is caused from "taking poison," "suicide," etc., is liable for death from the accidental taking of poison. The court says:

It is settled by the judgments below that the death of the insured was caused by accident. Mistaking a bottle of carbolic acid for peppermint, which he wished to take for some ailment, he poured a portion of the acid into a glass of water, drank it, and died from the poison. The only question presented for our decision is, is the appellant exempted from liability on the ground that the insured died from "taking poison" within the meaning of the policy? Appellant contends that it is so exempt by the terms of the contract; that the term "taking poison," as used in the policy, and according to its ordinary signification, includes accidental, as well as intentional taking; and cites Pollock v. Accident Assn., 102 Pa. St. 230, which so holds. Appellee, however, contends, and in this she is supported by the appellate and circuit courts, that the words "taking poison," as employed in the policy, and in view of the rules of construction applied by the courts to such instruments, mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning; and counsel contend that this court has, in effect, so decided in Healey v. Accident Assn., 133 Ill. 556, 25 N. E. Rep. 52. While the precise point here at issue was not discussed in the opinion in the Healey Case, yet it was involved in the decision, and is within the reasoning there employed. The leading cases on this subject were reviewed in the Healey Case, including Paul v. Insurance Co., 112 N. Y. 472, 20 N. E. Rep. 847, and Pollock v. Accident Assn., 102 Pa. St. 230, and it was then said: "While we recognize the high ability of the court in which the case (the Pennsylvania case) was decided, we are not disposed to follow the rule there adopted. We think the rule established by the Court of Appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question." See also Pickett v.

Insurance Co., 144 Pa. St. 79, 22 Atl. Rep. 871; Menneilley v. Assurance Corp. (N. Y. App.), 48 N. E. Rep. 54. We are inclined to the opinion that the term "taking poison" would also, in common parlance, when used without any qualifying words, be understood to mean an intelligent and conscious act. If, in speaking of the cause of the death of another, we should say, "He took poison," we would most com-monly be understood to mean that his act in taking poison was intentional, rather than accidental, and it would hardly be deemed necessary to say "he intentionally took poison;" and if it were designed to avoid such understanding, we would naturally say "he ac-cidentally took poison," or would use some other qualifying words indicating that the act was accidental, or its cause doubtful or unknown. It must, however, be conceded that the meaning of the term in the respect mentioned is not free from doubt. Able and learned arguments have been made on each side of the question by counsel, and cases are cited showing that courts of high authority do not agree on the subject. It would, therefore, seem to be eminently proper in such a case to apply the well-known rule of construction applicable to such instruments, that where there is doubt or uncertainty as to the meaning of the terms employed, the language, being that of the insurer, must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim, to indemnify which, in making the insurance, it was his object to secure. Healey v. Accident Assn., supra; Insurance Co. v. Scammon, 100 Ill. 644; May, Ins. § 175. Counsel for appellant insist that, using their own language: "An exception from an accident policy can only be of some accident otherwise included within it; for, if the cause of injury or death be not accidental, it is manifestly not within the scope of the policy at all. Hence, an exception of 'taking poison' means, ex vi termini, the exception of an accidental taking of poison." It is clear, however, that the so-called "exception" is something more than a mere exception excluding what would otherwise be included as accidents, for suicide-by a sane person could not be said to be an accident, yet it, with other causes of death and injury not accidental, are embraced in the exception. It is also said that the term "taking poison" cannot be limited in its meaning to the intentional taking of poison, for the reason that death so caused is covered by the clause relating to suicide, and to so construe it would give no force whatever to the words "taking poison." Counsel are mistaken also in this contention. When the entire provision in which those words occur is considered, it is too clear for argument that it is recognized that death may result wholly or partially, directly or indirectly, from voluntarily taking poison, without any suicidal intent; and that death so caused, while excepted from the risks covered by the policy, would not be so excepted by the suicide clause. Besides, different kinds of accidents and injuries not resulting in death caused by the voluntary taking of poison might be excluded from such risks by this provision. It would not be difficult for the insurer to use language which, in respect to the question here under consideration, would be free from doubt. A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent, and of quite a different one in the hands of the adjuster.

MASTER AND SERVANT—TRADE SECRETS— DETENTION OF EMPLOYEE'S BOOKS.—The SE-



preme Court of Pennsylvania holds, in Dempsey v. Dobson, 34 Atl. Rep. 459, that a carpet manufacturer has a right to the continued use, in his own business, of recipes for mixing colors, prepared by an employee whose duties require him to prepare mixtures of colors which will reproduce the shades indicated by designs submitted to him, and to enter the recipes in a book furnished for that purpose, and which are necessary for the immediate manufacture of the carpet designed, and its subsequent reproduction. And that where a color mixer in a carpet manufactory, without the knowledge of his employers, entered the recipes in his own, instead of his employers', color books, and, on the employee's discharge, his employers, believing the books their own, refused to let the employee take them away, the jury should be instructed, in an action by the employee for the detention, that the value of the recipes could not be considered in estimating the damages, and that, in considering violence in the detention as an element of damages, they must consider the negligent conduct of the employee, and that his employers were led thereby to believe that he was carrying away their own books. Upon the law of the case the court says:

The designer and the color mixer, like the printer and the weaver, are employed, and their wages adjusted, with reference to their skill and experience in the department of work to which they are assigned. They are not independent contractors, producing designs or shades of color by a secret process of their own, which they sell, as patterns or colors, to the manufacturer for a fixed price; but they are employees, bringing their skill and experience, in the use of the materials furnished by their employer, into his service, for his benefit in the production of his goods. The designs and recipes so made for him are, as between his employees and himself, his, for the purposes of his own manufacturing business. Even if his employee had obtained letters-patent for his formula, protecting himself thereby against the public, still the employer's right to continue its use would be protected by the United States courts. Solomons v. U. S., 187 U. S. 342, 11 Sup. Ct. Rep. 88. The same conclusion was reached by this court in Slemmer's Appeal, 58 Pa. St. 155, where we said: "If one employed by another, while receiving wages, experiments at the expense of his employer, constructs an invention and permits his employer to use it without compensation paid or demanded, and then obtains a patent, a license to the employer to use the patent will be presumed." But this case is much stronger than that of one who obtains a patent, as in Slemmer's Case, for here the experiments resulting in the recipes were not only made at the expense of the employer, but for him, and with a view to the immediate use of their results in his business. It was the sole

and only purpose for which the color mixer was em ployed and paid.

In the manufacture of carpets, the spinning of the yarn is no more a part of the process than is the preparation of the colors to be made use of in working out the pattern. The fact is that the spinner and the weaver, the color mixer and the printer who uses the colors, are all alike in their relation to their common employer. The labors of all are necessary to the production of a carpet, and the results of the labor of all belong to the employer, who pays for the labor. The recipes prepared by the color mixer, for the use of his employers in the manufacture of their carpets, belonged to them, so far, at least, as to give them the right to continue the use of the various colors and shades produced by them. The plaintiff had a right if he chose so to do, to preserve them for his own use in the future; but his right was not an exclusive one. It was his duty, by virtue of his employment, and by reason of the relation his work bore to his employers' business, to enter all these recipes in his employers' color book; for none of the patterns of carpet manufactured during the twenty years of the plaintiff's service could be reproduced without the use of the same recipes, for the preparation of the colors to be employed, that had been used when the pattern was first produced. This duty, to put it in the mildest form, the plaintiff had improperly neglected. His employers were left under the belief that their color books had been used, and that the books he was attempting to carry away were, in every sense of the word, their own property. Had this been true, their conduct in requiring him to leave them in the mill would have given the plaintiff no cause of action. In respect to this subject the mistake under which they labored was due to the plaintiff's failure in duty as an employee. He had pushed the blanks furnished to him to one side, and had used only his own, and had left his employers in ignorance of his conduct. Now, let it be conceded that the books he was attempting to carry away were his own. It is, nevertheless, true that they contained the only record of the recipes used in the mill for twenty years, and that these recipes were a part of the stock in trade of his employers. Not, perhaps, the particular copy of them which the plaintiff had entered in his own books, but the processes and combinations they represented, belonged, for the purposes of their business, to them; and, as between him and them, they had a right to some record or register of recipes.

If the plaintiff had a right to recover in this action, because of the ownership of the books in which the recipes had been entered, and the manner of their detention, when he attempted to take them away, the jury should have been instructed that the value of the recipes were not to be considered in estimating the damages. As between these parties, as we have already said, the plaintiff had no exclusive right to them. It was his duty, as a color mixer, to enter each formula in his employers' book. They had a clear legal right to the knowledge which such a record would afford them, and the copies they have made from his books should have been made for them by the plaintiff, as the several colors were compounded during his long term of service. The plaintiff's claim for damages must rest on the fact that he owned the books that were kept from him. In addition to this, anything in the manner of the detention that shows unnecessary violence or disregard for the sensibilities or the self-respect of the plaintiff may be considered. But the jury should be told, in this connection, that they should also consider the conduct of the plaintiff,

his disregard of his duty and his instructions in making no entries in his employer's color books, and his failure to disclose this fact to them, and leaving them under the honest belief that he was removing from their mill their own color books.

CARRIERS OF PASSENGERS-BAGGAGE.-In Beers v. Boston & A. R. Co., 34 Atl. Rep. 541, decided by the Court of Errors of Connecticut, it was held that where a carrier received baggage for transportation, mistakenly supposing that the owner thereof had purchased tickets over its road when in fact they had purchased tickets over another road, it owed to the owners the duty of abstaining from anything amounting to willful or wanton injury to their property while in its possession, and hence was not liable for the destruction of the baggage, in common with its own property, caused by attempting to run the train in which the baggage was placed upon an unguarded bridge, which was, and long had been, so defective that it could not sustain such a burden. The court said, in part:

Actionable negligence is the neglect of a duty. What duty did the defendant owe to the plaintiffs? Simply that of abstaining from anything amounting to willful or wanton injury to their property in its possession. Gardner v. New Haven & Northampton Co., 51 Conn. 143, 150. That cannot be deemed a wanton exposure of it to destruction which consisted only in running a train of cars upon an unsafe bridge, by which its own property, as well as theirs, was involved in a common loss. "Negligence signifies a want of care in the performance of an act by one having no positive intention to injure the person complaining of it." Pitkin v. Railroad Co., 64 Conn. 482, 490, 30 Atl. Rep. 772. It is true that this definition might not exclude the liability, in some instances, of a principal, on the ground of negligence, for damage consequent upon a direct act of violence or trespass on the part of servants, but this is not a case of that description. The gross negligence with which the defendant was chargeable consisted wholly of omissions. There was no willful wrong, nor yet such reckless misconduct as can be deemed its equivalent. Had the defendant voluntarily assumed the position of a "depositary" (taking this term in its strict meaning of a bailee without reward), it would not have been bound under the rules of the Roman law (which have become a part of the common law) to treat the plaintiff's property with any more care than it gave to its own. Coggs v. Bernard, 2 Ld. Raym. 909; Dig. 163,"Depositivel Contra." Good faith would have been the measure of its obligations. Dig. 16, 3, 20. He who intrusts his property to a careless man, if loss ensues, must lay it to the account of his own imprudence in putting it into such hands Inst., 3, 15, Quibus Modis Re Contrahitur Obligatio," 8. But in the case before us the elements of a bailment are wanting, for there was no contract, express or implied, between the parties 2 Kent. Comm. •780. The defendant's obligations, not being contractual, were less than those attaching to bailees of any class. No man can have the care of another's property thrust upon him,

without his invitation or consent, in such a way as to raise a duty calling for the performance of positive acts of protection. He might be bound to refrain from acts of direct injury. This is a mere negation of wrongdoing. A man acts at his peril; but he is never liable for omissions, except in consequence of some duty voluntarily undertaken. Holmes' Com. Law, 82. Had the defendant willfully thrown the plaintiffs trunks from the bridge into the stream below, a liability would have been incurred; but this would have been an act of violence, not an absence of care. Gross negligence is not actionable where not even slight care was due. Dunlap v. Steamboat Co., 98 Mass. 371. 379. However blameworthy, it is still essentially different from intentional wrongdoing. "Magna negligentia culpa est, magna culpa dolus est." Dig. 50, 16, "De Verborum Significatione," 226. Had the checks indicated that the trunks were to be sent over the river route, their reception by the defendant for carriage over its route would have presented a very different question. Fairfax v. Railroad Co., 73 N. Y. 167, 170.

FORECLOSURE OF BUILDING AND LOAN ASSOCIATION MORTGAGES.

The purpose of this paper is to collate authorities which shall indicate the proper method of drawing a bill in equity to foreclose a mortgage given to a building association and secured by collateral pledge of stock issued to the mortgagor. By way of introduction it may well be pointed out that there are three principal classes of building and loan association mortgages: (1) that in which the condition calls for regular stock payments of fixed amounts and the performance of membership duties generally, together with the payment of redemption money, or dues or interest on the loan up to the end of the association's existence; (2) that in which in addition the sum advanced is made repayable; (3) that in which the nominal amount of the loan, the par value of the shares advanced, thus including the premium, is made payable, with interest (upon the whole sum or only an actual sum advanced, as the statute permits or sanctions), stock payments, etc., being stipulated as in other cases. It is the stipulation of the payment of dues and performance of certain membership duties which constitute the differentia of the building and loan association mortgage, but the class in which the stipulation is simply for dues, etc., without any superfluous adjuncts concerning repayments is to be regarded as the proper type of building and loan association mortgages. In case the stipulations for the pay



ment of dues and interest are not complied with by the mortgagor, there is a provision inserted in the mortgage for the foreclosure and sale of property mortgaged, and the proper course of procedure is a bill in equity for the purpose of taking a preliminary account of the actual arrears and charges standing against the borrower up to the time of decree; and the charges consist of the items enumerated in the mortgage, monthly interest, installments, fines, rents, taxes, insurance, costs, etc., if any such be in arrears1 deducting therefrom all credits to which the borrower is entitled. If the borrower pays the amount thus found against him the sale will be prevented and the decree will stand as security for future payments.2 If he fails to pay them, the sale must take place and the premises mortgaged will be discharged of the incumbrance.8 As to the amount to be credited to the borrower on his stock payments, in the leading case on this subject,4 the rule is stated thus: "Ascertain by proof the probable duration of the society, then estimate the aggregate amount of the weekly and monthly installments payable during that time, from that sum rebate a just amount of interest, and add thereto the arrearages due, after allowing for payments made to the society, and the sum thus ascertained is the amount which the mortgagee is entitled to receive in præsenti in satisfaction of the mortgage." The same principle seems to be expressed in Ohio.⁵ The rule in the Maryland case has been approved, recognized or referred to in many cases,6 but the rule stated is not followed in Kansas, as there the transaction is regarded as a mere loan.7

⁸ Endlich on Law of Bldg. Ass'n, sec. 428.

In Alabama, also, the transaction is viewed as a loan, and all payments are applied first to the reimbursement of expenses incurred by the association in the conservation of the property held as security for the loan.8 In Texas it has been held that a stockholder cannot have his payments on stock applied in satisfaction of a loan until the stock has matured.9 In New Jersey fines imposed by an association on default in payment of dues on stock cannot be collected by foreclosure of a sum borrowed or even on foreclosure of a mortgage or bond given to secure dues and interest unless the parties have agreed fines might be so collected. 10 A bill to foreclose should show the condition of the shareholder's stock and the series to which it belongs and how near shares are to maturity.11 A shareholder may set off as against the amount due by him to the association under a mortgage claims held by him against it, such as balances due from the association to members who had withdrawn and had assigned their claims to the mortgagee. 12 It has been held that in ascertaining the amount due the court is bound by the terms of the mortgage and cannot look beyond into the articles of association, unless the instrument refers to the articles in such a manner as to make them part of the mortgage or call the attention of the court to them. 18 But the court may examine the articles of association to determine when the mortgage contract terminated.14 A sale under foreclosure of the mortgaged premises and an application of the previous stock payments made by the mortgagor to the extinguishment of the mortgage debt, terminates the mortgagor's membership in the association and his obligation to continue payment of dues until the organization ceases.15

¹² Hennighausen v. Fischer, 50 Md. 583.

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Endlich on Law of Bldg. Ass'n, secs. 428-440.
 Robertson v. Homestead Ass'n, 10 Md. 399; Hagerman v. Ohio B. & L. Ass'n, 25 Ohio St. 186. See, also, Somerset County B. C. & L. Ass'n v. Verderverve, 3 Stock. (N. J.) 383.

⁴ Robertson v. The Am. Homestead Ass'n, 10 Md. 397.

⁵ Cinn. German Bldg. Ass'n No. 3 v. Floch, 1 Rep. Cinc. Super. Ct. 468, approved in Hagerman v. The Ohio B. & L. Ass'n, 25 Ohio St. 186; see, also, Risk v. Delphos Bldg. & L. Ass'n, 31 Ohio St. 517, 29 Ohio St.

⁶ Home Mut. Bldg. Ass'n v. Thursby, 58 Md. 288; Hoboken Bldg. Ass'n v. Martin, 2 Beas. (N. J.) 428; City B. & L. Co. v. Fatty. 1 Abb. App. Dec. (N. Y.) 847; Citizens' Mut. L. & A. F. Assoc. v. Webster, 25 Barb. (N. Y.) 263; Richards v. Bibb Co. L. Ass'n, 24 Ga. 198.

⁷ Hekelnkaemper v. German Bldg. & Sav. Ass'n, 22 Kan. 549; Glynn v. Home Bldg. Ass'n, 22 Kan. 746.

⁸ Mut. Loan Ass'n v. Robinson, 69 Ala. 418. Compare Sec. Loan Ass'n v. Lake, 69 Ala. 456.

⁹ Blakely v. El Paso B. & L. Ass'n, 26 S. W. Rep.

¹⁰ Bowen v. Lincoln B. & L. Ass'n, 51 N. J. Eq. 272. 11 Chas. Tyrell B. & L. Ass'n v. Haley (Pa.), 20A. 1063, 27 W. N. C. 244.

¹⁸ Robertson v. Am. Homestead Ass'n, 10 Mo. 397, 69 Am. Dec. 150.

¹⁴ McCahan v. Columbian Bldg. Ass'n of E. Balt. No. 2, 40 Md. 234-6.

¹⁵ McCahan v. Columbian Bldg. Ass'n of East Balt. No. 4, 40 Md. 239. See also, 10 Md. 897; 86 Mo. 883; Watkins v. Workingmen's Bldg., etc., Ass'n, 97 Pa. St. 514.

If, however, neither the building association nor the borrower applies the previous stock payments toward the extinguishment of the debt, and the association collects the whole sum due from the sale of the mortgaged premises, the whole debt undiminished by any stock payments is returned to the society. The stock remains intact and the member continuing to hold it retains his membership,16 and is entitled upon final distribution to his share in the association's profits. It is a well recognized doctrine that payment of dues upon the stock are not payments upon the mortgage debt, and do not ipso facto work an extinguishment pro tanto of the mortgage.17 The stock and the debt exist distinctly and independently of each "The stock is a collateral security for, and not a credit on, the bond."18 This rule is still adhered to in Texas where, in the absence of a direct contract provision, the borrower has not the right to have stock payments applied to the extinguishment of the loan. There are two relations, one as borrower and one as stockholder.19 But, notwithstanding, the borrower by virtue of his membership has a right at any time to apply his stock payments toward the extinguishment of his mortgage debt and in case of default by the borrower, the association may make a like application.²⁰ Statutes in most of the States provide for the manner in which repayment of loans should be made, and control the amount of premium to be re-In Illinois the statute governing repayment of loan and refunding of premium provides: "A borrower may repay a loan at any time, and in the event of the repayment thereof before the expiration of the eighth year after the organization of the association or the date of issue of the series of stock in such association on which the loan may have been made, there shall be refunded

16 N. American Bldg. Ass'n v. Sutton, 85 Pa. St. 463. 17 Overby v. Fayetteville B. & L. Ass'n, 81 N. C. 56; 84 N. C. 838; 35 Pa. 463; Barker v. Bigelow, 15 Gray (Mass.), 130; Mechanics' B. & L. Ass'n v. Conover, 1 McCart. (N. J.) (219; Hekelnkaemper v. Ger., etc., Ass'n, 22 Kan. 549.

18 Dodd, J., in State Washington B. & L. Ass'n,

Pros. v. Hornbacker, 13 Va. (N. J.) 635.

to such borrower one-eighth of the premium paid for every year of the said eight years then unexpired: provided that where the said premium has not been deducted from the loan, but paid in installments, there shall be no premium refunded." The rule for ascertaining the absolute value of the stock at any given time which may be used in reducing the mortgage debt, is to find the total gross amount of all the stock payments made by the member up to the time of default or repayment, allowing no interest on any of them, the interest he has paid on his loan standing as interest to his credit.22 "Those who take loans may apply them (stock payments) on the final adjustment of the loans, to the discharge of the loans; but they are to be applied in a gross sum, without any allowance of interest thereon."28 Unless expressly provided by the governing statute of the State or the by-laws of the association, the borrower upon voluntary repayment cannot obtain a proportionate share of the profits of the association up to the time of repayment.24 And even where express provision exists in the constitution or by-laws, a defaulting member of an association cannot claim the benefit of a proportionate share in the profits up to the time of such default. Inasmuch as the relations of the mortgagor as debtor of the building association appear in two aspects: (1) as a debtor whose debt is evidenced by a note or bond secured by a mortgage; (2) as a stockholder in a corporation (the mortgagee) which has accepted his stock as a collateral security for the debt, it follows that the bill to foreclose such a mortgage must be not alone and strictly a bill of foreclosure, but likewise a bill upon the basis of which issues may be made and evidence taken concerning the amount and value of the shareholder's stock, so that it can be ascertained what sum of money representing such value shall be set-off against or applied upon

¹⁹ Blakely v. El Paso B. & L. Ass'n, 26 S. W. Rep. 294; Ass'n v. Lane, 81 Tex. 369; Ass'n v. Abbott, 85

²⁰ Spring Garden Ass'n v. Tradesmens' Bidg. Ass'n, 46 Pa. St. 493; Early & Lane App., 89 Pa. St. 411, 35 Pa. St. 463, 97 Pa. St. 514, 93 Pa. St. 258.

²¹ R. S. Illinois, ch. 32, sec. 77.

²³ Endlich on Law of Bldg. Ass'ns, sec. 456.

<sup>Barker v. Bigelow, 15 Gray (Mass.), 130-137.
Mechanics' Bldg. & L. Ass'n v. Conover, 1 Mechanics</sup>

Cart. (N. J.) 219; Link v. Germantown Bldg. Ase'n, 89 Pa. St. 15; McGrath v. Hamilton Bldg. Ass'n, 44 Pa. St. 883; Watkins v. Workingmens, Bldg. & L. Am'n. 97 Pa. St. 514.

²⁵ Endlich on Law of Bldg. Ass'ns, secs. 175, 156; Anderson B. & L., F. & Saving Ass'n v. Thompson, 4 Am. & Eng. Corporation Cas. 196; 88 Ind. Rep. 445; Barry on Law of Bldg. Ass'n, sec. 26; 15 W. N. C. (Pa.) 340.

the mortgage debt, and as stated this should be done by taking a preliminary account. As a bill to foreclose a mortgage, it should set up the fact of the debt having been created, the execution and delivery of the mortgage conditions making foreclosure proper. Considered in the aspect of a bill to adjust the relations between the stockholder and the association, it should set up the issuance of the stock payments made upon it, the condition of the stock and charges properly accrued against it and pray an accounting between the stockholder and the association and an application of the balance found to represent the value of the stock in satisfaction of the debt secured by the mortgage, so that the mortgage sale shall be only to secure from the proceeds of the property enough money to satisfy the mortgage debt after deduction has been made of the value of the shareholder's (mortgagor's) stock in the building association. But if the proceeds of the sale are found insufficient to liquidate the whole amount appearing due to the association, the debt is not discharged, and if the balance unpaid should be for dues, fines, etc., the association might maintain an action at law against the mortgagor accordingly.26 Chicago, Ill. Morton John Stevenson.

28 McCahan v. The Columbian Bldg. Ass'n, etc., 40 Md. 237. This was an action in assumpsit. For the most pecent case on foreclosure of building and foan mortgages see Rowland v. Old Dom. B. & L. Ass'n (N. Car.), 24 S. E. Rep. 366, holding as follows: In an accounting on foreclosure of a building association mortgage, the contract being usurious, the borrower should be charged with the principal of the loan, with legal rate of interest, and credited with payments made on account of principal, interest, fines and penalties, and payments on account of stock should go to holders of the stock.

ATTACHMENT — NON-RESIDENCE — HOME-STEAD—FUGITIVE FROM JUSTICE.

CHITTY V. CHITTY.

Supreme Court of North Carolina, April 21, 1896.

A husband who has left the State to escape a prosecution, with the intention of returning as soon as he can succeed in having the prosecution dismissed, his wife and children remaining in the State upon his home place, is a "resident" of the State (Const. art. 10, \$1, et seq.), so as to entitle him to a homestead.

FAIRCLOTH, C. J.: The facts found by the referee and sustained by the court are as follows:
(1) That plaintiff, in November, 1887, owned and

occupied, as his home place, the land now in controversy, and left the State in that month to avoid a warrant out against him for false pretense, with the intention of returning as soon as the case against him should be thrown out of court, and that his wife and children remained on the place until plaintiff returned, about Christmas, 1889; that the plaintiff spent his time in visiting relatives in various States, intending to return to this State when he believed the charge against him to be buried. (2) That during his absence an attachment issued, and the land was sold, and the defendant purchased it; no homestead having been assigned to the plaintiff. His honor held that the plaintiff, during his absence, was not a resident of this State, and therefore not en-titled to a homestead. This is the only question presented.

The constitution guaranties the right to a homestead to every resident on the land occupied by him, and whoever denies the right must show that the case falls within the constitutional exceptions, which is not the case in this instance, or that the owner has lost it by non-residence. Residence and domicile are so nearly allied to each other in meaning that it is difficult sometimes to trace the shades of difference, although in some respects they are distinct; and the definitions of residence are sometimes apparently conflicting, owing mainly to the nature of the subject with which the word is used, the purpose being always to give to it such meaning and force as will effectuate the intention of that particular statute. The great bulk of cases in the books are cases of statutory residence, as applied to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce proceedings, probate and administrations, limitations, attachments, and the like cases. The word is frequently used in the sense of bodily presence in a place, sometimes a mere temporary presence, and sometimes the most settled and permanent abode in a place, with all the shades of meaning between these extremes, and also with reference to the distinction between an actual and legal residence. So it seems entirely proper to consider its meaning in connection with the subject-matter and the purpose of the statute in which it is found, as well as the relation of the citizen to the subject-matter. The leading purpose of the constitution (article 10, §§ 1-3, 8), is to secure the homestead to the debtor and his family, and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary. Absence from the State does not necessarily mean a change of residence, in the legal sense, as that question depends upon the intention and other facts. A protracted residence in another State, engaged in a permanent business, with no home in this State, would be at least inconsistent with a residence here. "Residence," strictly construed, would defeat the object of the constitution (article 10) in relation to

homesteads. If a citizen of Raleigh should go to Baltimore on business, he could not be said to literally reside in Raleigh during his absence; but by allowing the doctrine of animo revertendi its reasonable force, the business is attended to. and the purpose of the law is secured. The question of domicile and residence has been so fully and frequently discussed by this court that it would be superfluous work to repeat what has been decided. We will only refer to Finley v. Saunders, 98 N. C. 462, 4 S. E. Rep. 516; Fulton v. Roberts, 113 N. C. 421, 18 S. E. Rep. 510; State v. Grizzard, 89 N. C. 115, and the several cases therein referred to; and to State v. Johnston (at the present term), 23 S. E. Rep. 921. The general rule from the cases is that when one leaves the State with the intention of returning he does not lose his residence here. This will do for the present case; but, to avoid any extreme conclusions from the above statement, we will say that circumstances may easily lead to a different result; for instance, if the lapse of time should be long enough to rebut such intention, or if a residence should be acquired in another State, or by engaging in permanent business elsewhere, without the animo revertendi, or by assuming the duties and privileges of a citizen in such other State. The question is one of law, and not of morals, and we could not inquire into the latter. · Our opinion is that the court below committed error, and that the plaintiff is entitled to recover on the facts now in the record before us. Reversed.

NOTE.—The decision of the court in the principal case is, to say the least, startling. The sole question is, as fairly stated by Clark, J., who dissents, whether a fugitive from justice, wandering about in other States, without intention of returning until a criminal indictment against him in this State can be procured to be dropped, and upon, whom therefore personal service of summons cannot be made, is liable to be brought into court in a civil action by attachment of his property and publication, and if he can set aside the sale under such attachment proceedings on the ground that his homestead was not set apart. The question is in reality a simple one, because unless such fugitive is a non-resident the attachment will not lie, and if he is a non-resident he is not entitled to the homestead. The North Carolina decisions, as cited by the dissenting judge, would seem to be conclusive against the very novel and ingenious plan on the part of the plaintiff in the principal case to save his homestead, and at the same time escape criminal prosecution. In Wheeler v. Cobb, 75 N. C. 21, it was held that one voluntarily removing to another State for the purpose of discharging the duties of an office of indefinite duration, though he may occasionally visit the State, and may have the intent to return at some future day, is a non-resident for the purposes of an attachment. In Carden v. Carden, 107 N. C. 214, the court, after citing the case last noticed, adds: "The prominent idea is that the debtor must be a non-resident of this State, not that he must be a resident elsewhere. The essential charge is that he is not residing or living in this State, where process may be served so effectually as to reach him. In other words, his property is attachable if his residence is not

such as to subject him personally to the jurisdiction of the court and place him upon equality with other residents in this respect." The court then goes on to say that "visiting this State only once or twice a year, and with a general intention of returning at some indefinite time and making his home here," would not exempt his property from attachment. The court further adds: "Non-residence, within the meaning of the attachment law, means the actual cessation to dwell within a State for an uncertain period, without definite intention as to a time for returning, although a general intention to return may exist." For these propositions the opinion cites, besides Wheeler v. Cobb, supra; Wap. Attachm. 35; Weitkamp v. Loehr, 58 N. Y. Super. Ct. 79. In Mayor, etc. v. Genet, 4 Hun, 487, it is held that a fugitive from justice who leaves the State is a non-resident, and his property is liable to attachment. Brady, J., says: "The effect of such an act must be to deprive the person committing it of his character as a resident. He places himself designedly beyond the reach of the power of the State by leaving its territory, and in terror of its laws. He abandons deliberately his residence. When a man thus conducts himself, he waives acquired rights which depend upon his presence within the State, or circumstances which warrant its presumption, and is to be treated as if he were not present, and had no rights founded upon that legal attitude. He became, in other words, to all intents and purposes, for the enforcement of remedies, a non-resident of this State." On appeal this decision was affirmed by the New York Court of Appeals by a unanimous bench. 63 N. Y. 646. The same ruling was made as to another fugitive from justice in Insurance Co. v. Dimmick (Sup.), 22 N. Y. Supp. 1096. See also Kneel. Attachm. §§ 182-198; Stout v. Leonard, 37 N. J. Law, 495; Hanson v. Graham, 82 Cal. 631; Long v. Ryan, 30 Gratt. (Va.) 720; Swaney v. Hutchins, 13 Neb. 266; Clariton Co. v. Moberly, 59 Mo. 238. A debtor may remain out of the State such a length of time and under such circumstances as to be a non-resident, such as is meant by the term "non-resident" in statutes relating to attachments, even though by reason of his intention to return his domicile is still in the State, yet a mere temporary absence of a debtor, on business or for pleasure, will not constitute him a non-resident, although he may not have a house of usual abode in the State where a writ of summons may be served upon him during such absence. Keller v. Carr, 40 Minn. 428. Compare Haggart s. Morgan, 5 N. Y. 422, 55 Amer. Dec. 350, and note; Dorsey v. Kyle, 30 Md. 512, 96 Amer. Dec. 61, and note. In cases where an attachment of property is authorized, when the defendant is not a resident of the State, it is generally considered that residence and not domicile determines the operation of the statute, residence is defined in such cases as a permanent abode for the time being. In re Thompson, 1 Wend. (N. Y.) 48; Mayor of New York v. Genet, 63 N. Y. 646; Morgan v. Nunes, 54 Miss. 308; Mann v. Taylor, 78 Iowa, 355. If, therefore, the plaintiff in the principal case was a nonresident the attachment was valid, and for the reason his claim of homestead was untenable. In North Carolina the claimant of a homestead must be an actual and not a constructive resident of the State. Baker v. Legget, 98 N. C. 804; Finley v. Saunders, 98 N. C. 462; Munds v. Cassiday, 98 N. C. 558; Lee v. Mosely, 101 N. C. 311; Fulton v. Roberts, 113 N. C.



CORRESPONDENCE.

COMPARATIVE NEGLIGENCE IN ILLINOIS.

To the Editor of the Central Law Journal:

We hoped lawyers generally were aware of the fact that the Supreme Court of Illinois had abolished the doctrine of comparative negligence, and while we think the article of Andrew Lees in last week's JOURNAL a good article, we must protest against his classification of Illinois as one of the States where the doctrine of comparative negligence is continued. In the case of the C., C., C. & St. L. Ry. Co. v. Baddealy, 150 Ill. 328, and the Lake Shore Ry. v. Hesson, 150 Ill. 546, this doctrine was repudiated, and we are no longer burdened with the doctrine of comparative negligence. We merely mention this to you so you will give publicity to the fact. Yours truly, W. East St. Louis, Ill.

SURVIVAL OF ACTION.

In Missouri A, by written lease, rented certain premises to B for a period of three years. A few months after B had taken possession of the premises under his lease, A was found to be of unsound mind, and a guardian took charge of his affairs. A, temporarily, and with no intention of abandoning his leasehold, moved his family from the premises and C at once intruded himself into the possession of the same. B brought wrongful detainer proceedings against him for the possession, and on trial before a justice of the peace, the jury took judicial notice of the fact that the lease was void on account of the inability of A to make it, and for that reason that B had no rights in connection with the premises that they were bound to respect, and found for the defendant. B appealed, and while the case was pending in the circuit court C departed this life, intestate, without issue, and leaving nothing on which to bottom an administration other than liabilities. While his mortal remains were being lowered to their last resting place, his relict became non compos mentis, and emphasized that fact by at once, and permanently, quitting the wrongfully detained tenement, and D, an execution proof individual, immediately intruded himself into the wrongful possession theretofore held by C, and still holds that possession. The guardian of A, and the adult members of his family, were accessories to the wrongful intrusions both of C and D into their respective wrongful possessions. Now, does the action against C survive? If so, against whom is it to be revived? Also, what is the status in the premises, under the law, of the guardian of A and that of the adult members of A's family? S. J. E.

BOOK REVIEWS.

AMERICAN CORPORATION LEGAL MANUAL.

This is vol. 4 to Jan. 1, 1896, of a series which contains compilation of the essential features of the statutory law regulating the formation, management and dissolution of general business corporations in North, Central and South America, and other countries of the world, with special digests of the United States Street Railway Laws; also synopses of the patent, trade-mark and copyright laws of the world, prepared expressly for this work by members of the bar in the different localities. It is intended for the use of attorneys, officers of corporations, investors and business men. Published by Honeyman & Co. Plainfield, N. J.

MAXWELL ON PLEADING AND PRACTICE.

The first edition of this work was published in 1880, and it has now reached the sixth edition. It should

not be confounded with the work on "Code Pleading," written by the same gentleman and published in 1892. The present treatise is devoted principally to the subject of practice of court, in all its, phases, from the institution of an action until its determination, and in reference to all kinds and classes of actions or proceedings in courts. The author was for years one of the supreme judges of Nebraska and enjoys a reputation as a jurist of marked ability. His qualification for work of this character is of the highest, and the manner in which the book has been prepared is without criticism. To the practitioner, especially in the western States, it will be found invaluable. It is published by State Journal Company, Lincola, Nebraska.

BLACK ON INTERPRETATION OF LAWS.

The Hornbook series of law books, published by the West Publishing Company, is now well and favorably known to the profession. Though originally designed for, and probably of more value to, the student of law, the admirable manner in which the elementary doctrines of law are set forth in that series commends it as well to the practitioner, and, as a result, the series is finding lodgment in most law libraries. The volume before us is the latest Hornbook. The author has written a half dozen acceptable treatises and enjoys a good reputation as a careful painstaking law book writer. Like all of the series the subject is reduced to concise and clear rules somewhat after the manner of a code, followed by discussions thereof from the standpoint of the authorities. We have given this work careful examination and find it an accurate and well prepared statement and exposition of the accepted canons and rules for the construction and interpretation of the written laws, whether constitutional or statutory. It is a volume of five hundred pages, published by the West Publishing Co.,

THOMPSON ON PRIVATE CORPORATIONS, VOL. 6.

We have heretofore published an extended review of this admirable treatise. The present is the last volume of the set, and embraces the subjects of Receivers of Railroads, Insurance Companies, National Banks, Foreign Receivers, Power of Corporations to Sue and be Sued, Actions by and Against Corporations, Jurisdiction as Defendant Upon Residence and Citizenship, Removal of Such Actions From State to Federal Courts, Jurisdiction as Depending Upon Process and its Service, Pleadings in Actions Against Corporations, Questions Relating to Corporate Existence, Evidence in Actions Against Corporations, Attachment, Garnishment of, and Mandamus and Injunction Against Corporations, and finally an exhaustive discussion, in ten chapters, of the subject of Foreign Corporations. We can add nothing to what we have previously said by way of commendation of this work. It is able, philosophical and exhaustive. In the rear of the present volume is a brief index compiled by Mr. Chas. T. Boone. It is good enough as far as it goes, but no such index as a work of this character and scope requires. It is to be hoped that the publishers will, at an early date, issue a more detailed and thorough index, which, in a note printed in this volume, they promise to do. Until this is done there will necessarily be much complaint from those having occasion to use the volumes.

THE WORKS OF JAMES WILSON.

Is the United States a nation? This question was settled for all time by the Civil War, which gave to the old constitution a new interpretation. The doctrine of the indissolubility of the Union, which was finally set-

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tled only after years of sacrifice and bloodshed, was taught in 1791 by the first law professor in America, James Wilson of Philadelphia. The new edition of the works of this remarkable man, is in some respects the most notable publication of the year. For many years he has been forgotten, or known only to that limited number of men who delve beneath the surface for the treasures of the past. It is nearly a century since the only previous edition of "Wilson's Works" was given to the world. These books, discol. ored with age and dilapidated from frequent use, are to be found in the library of congress, in the office of the attorney-general of the United States, in large libraries selected with unusual care, and hardly anywhere else. It has been said, as indicative of the greatness and usefulness of Alexander Hamilton, that his ideas have been appropriated and adopted by generations of financiers, economists and statesmen. So it may be said of James Wilson that his inexhaustible brain has furnished the stock-in-trade of many of our prominent politicians, orators and statesmen. Perhaps the chief reason why the usefulness of Wilson's work has not been heretofore acknowledged, is the fact that he was ahead of his times. The theories which he advocated, the views which he took as to the effect of the compact between the States, the nature of our institutions, and the fundamental idea of our system of government, have only recently come to be acknowledged in their fullness. As one reads the story of this man's life and examines the treasures which he has bequeathed to his country, there is recalled a long list of the names of men who have deeply impressed their personality upon our history, the fame of whom is one of our proudest possessions, and the result of whose labors is the admiration and the wonder of the world. "There were giants in those days." And the list which includes the names of Washington, Franklin, Hamilton, Jefferson, Samuel Adams, John Adams, Gallatin, Jay and Marshall, is not complete without the name of James Wilson.

Wilson was of Scotch birth and was widely read in the civil law, he was perhaps the most learned lawyer of the revolution. Washington acknowledged his worth and appointed him to a place on the National Supreme Bench. His opinion in the first great constitutional case is a masterpiece. In Chisholm v. Georgia, to quote from Judge Cooley, "Justice Wilson, the ablest and most learned of the associates, took the national view and was supported by two others. The chief justice was thus enabled to declare as the opinion of the court that, under the constitution of the United States, sovereignty belonged to the people of the United States." In his opening lectures the author examines critically Blackstone's notions of sovereignty, and clears away many ancient errors in regard to the nature of law, government and sovereignty. The discussion of this subject is prefaced by an examination of the general principles of law and obligation, and an explanation of the idea of consent. It is shown later on that the protection of the life, liberty and property of the individual is the chief concern of our constitution, and that in this respect this republic differs from the republics of antiquity. The dignity, the obligation and the duty of the individual are shown to be the central thought in our institutions. The chapter on the "Nature and Philosophy of Evidence" is one of the best things in legal literature. The writer has had occasion to use this chapter and believes there can be nowhere found a more valuable introduction to the study of evidence. Another valuable chapter is the one which treats of "man as an individual," and which sets forth the rela-

tion between religion, morality, public opinion and law. But it is nearly all valuable. One who would have the good things contained in these volumes must read them for himself. The aim of the editorial work has been to show briefly the development of the principles expounded, with citation of later authorities, and to point to the present tendency in fundamental features as bearing on our institutions. The writer regrets that the editor did not extend his annotation a little more, especially in the chapter comparing our constitution with that of Great Britain. But the difficulty is to know where to stop, and in this respect it seems that the judgment of the editor differs from ours. These volumes cannot be too highly recommended. They should be in the hands of every student of our laws, history and institutions. And to every young man who seeks to serve his country, either as a private citizen or as one upon whom are devolved the duties and responsibilities of official position, we would say, study the speeches and lectures of James Wilson, orator, jurist, statesman and patriot. The work is in two volumes and published by Callaghan & Company, Chicago, Ill. A. P. W.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and Bistriot Courts of the United States, except these that are Published in Fail or Commented upon in our Betes of Recourt Beristons.

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- 1. ACCIDENT INSURANCE Action Jurisdiction.—Failure to pay a loss under a contract of a foreign insurance company with a non-resident, where the loss is payable in the State, creates a cause of action "within the State," under Code, § 423, giving circuit courts jurisdiction of actions by non-residents against foreign corporations.—Carpenter v. American Acc. Co., S. Car., 24 S. R. Rep., 500.
- 2. ACCIDENT INSURANCE Death by Poisoning.—An accident insurance policy contained on the part of the assured, the provision, I agree that this insurance shall not be held to extend to poison in any way taken, administered, absorbed and inhaled: Held that, the words in any way related to the mode or manner in which the poison was taken, and not to the motive of the assured in taking it, and that death by involuntary poisoning was therefore within the policy.—METRO-POLITAN ACCIDENT ASS'N V. FROILAND, Ill., 48 N. E. Red. 766.
- 8. ACTION AGAINST RAILEOAD COMPANIES—Venue.—Neither Act March 22, 1817, § 1, which provides that suits may be brought against corporations "before any court or magistrate of competent jurisdiction" by summons served on an officer, nor any subsequent law, authorizes the commencement of an action against a railroad company for personal injuries in a county where it has no office, agent, or property, by service of an officer temporarily within such county.—BAILEY. WILLIAMSPORT & N. B. R. Co., Penn., 84 Atl. Rep. 556.
- 4. ADMINISTRATION Personal Liability of Administrator.—An administrator is personally liable for the fees of an attorney employed by him to prosecute a claim on behalf of the estate, and a suit against him in his representative capacity will not lie.—PIKE V. THOMAS, Ark., 35 S. W. Rep. 212.
- 5. ADMINISTRATION Action by Administrator.—In a suit by an administrator to recover money belonging to his intestate's estate, where the judgment against defendant, if rendered, would be collectible out of the community property, defendant's wife is an incompetent witness as to transactions between defendant and deceased, by reason of interest, within Sayles' Civ. St. art. 2248.—PADDOCK V. LEWIS, Tex., 35 S. W. Rep. 350.
- 6. APPEAL—Change of Defense.—Cases will, as a rule, be reviewed in this court upon the theory upon which they prosecuted or defended in the court of original jurisdiction. One who, in an action for the conversion of personal property, defends upon the sole ground of his alleged superior sitle, and by his conduct disclaims any special interest in such property, or lien thereon, will not, on petition in error in this court be heard to complain on the ground that he should have been permitted to recoup the amount of a lien existing in his favor upon the property in controversy against the damages awarded for its conversion.—OMAMA Brewing Ass'n v. Wuetherloj, Neb., 66 N. W. Rep. 990.
- 7. Assignment for Benefit of Creditors Trust Deed.—An instrument by which an insolvent debtor conveys all his property to a trustee for the purpose of selling the same, applying the proceeds to the payment of the grantor's debts, and then returning the surplus, if any, to such grantor, is a trust deed in the nature of a mortgage, and not an assignment for the benefit of creditors.—H. T. SIMOM-GREGORY DRY GOODS CO. V. DEAN, Tex., 85 S. W. Rep. 805.
- 8. Banks and Banking Liens—Notes in Bank.—A bank has a general lien on notes in its possession, belonging to its debtor, for the payment of the debt, whether the debtor deposited such notes to his general account, or delivered them to the bank for collection.—Cockeble v. Joyce, Ark., 85 S. W. Rep. 221.
- 9. Banks—Authority to Employ Subagent.—A bank at which a note is payable, and to which it is sent for collection, has no implied authority to employ a bank in another city as its subagent to collect the mote, so as to make a payment to such subagent a pay-

- ment to the owner of the note.—Sherman v. Port Huron Engine & Thresher Co., S. Dak., 66 N. W. Rep. 1077.
- 16. BASTARDY Evidence.—In bastardy proceedings, evidence of an existing engagement to marry between the relatrix and defendant is admissible to show the relation on which they stood to each other.—GEMMILL v. STATE, Ind., 48 N. E. Rep. 909.
- 11. CARRIERS OF GOODS Pledge of Bill of Lading. The shipper of goods consigned them to himself, and received a bill of lading from the railway company accordingly. The railway company delivered them, with a proper waybill, to the next connecting railway company, who, at the shipper's request, delivered the goods to him in transit at an intermediate point, without the surrender or cancellation of the bill of lading, which he thereafter, and before the goods would have arrived at their original destination if the transit had continued, pledged, in the usual course of business, to an innocent pledgee, for value: Held the latter railway company is liable to the pledgee for failure to deliver the goods at the place of destination, and is estopped from showing such intermediate delivery to the shipper.—RATZER v. BURLINGTON, C. R. & N. RY. Co., Minn., 66 N. W. Rep. 988.
- 12. Carriers of Goods—Bill of Lading Delivery.—Where a bill of lading deliverable to order is attached to, and forwarded with, a time draft sent to an agent for collection, without special instructions, an acceptance of the draft by the drawee entitles him to the bill of lading, and a delivery of the goods to him discharges the carrier from liability.—Commercial Bank of Mamitoba v. Chicago, St. P. & K. C. Ry. Oo., Ill., 48 N. E. Rep. 756.
- 18. Carriers of Passengers Degree of Oare.—A carrier of passengers is required to exercise the utmost care "which can be exercised, under all the circumstances, short of a warranty of the safety of the passengers."—FT. WORTH & D. C. RY. CO. V. KENNEDY, Tex., 85 S. W. Rep. 385.
- 14. Carriers of Passengers Baggage.—Where a carrier received luggage under the mistaken supposition that it belonged to passengers who had bought tickets over its road, and that the transportation of the luggage was consequently paid for, and without intending to make any charge for the transportation, and the owners of the luggage erroneously supposed that in purchasing tickets to the destination of the baggage, over another road, they had paid for the transportation by the carrier to which they delivered the baggage, there was no implied contract for the transportation of the baggage.—Beers v. Boston & A. R. Co., Conn., 34 Atl. Rep. 342.
- 15. Carribrs Who are Passengers.—A postal clerk engaged on a train in the service of the government, whom the railroad company was bound to carry by contrast with the gevernment, is a passenger.—Louisville & N. E. Co. v. Kingman, Ky., 35 S. W. Rep. 264.
- 16. CARRIERS—Passengers—Personal Injury.—A person who is riding on a freight train in charge of stock in shipment, with the consent of the railroad company, whether on a regular ticket or on a drover's pass, is a passenger, and the carrier owes him the same duty as to other passengers traveling on passenger trains, which requires it to use the highest reasonable and practicable skill and diligence to protect him from injury.—New York, C. & St. L. R. Co. v. Blumenthal, Ill., 48 N. E. Rep. 809.
- 17. CERTIORARI Scope of Writ.—Code Prac. Civ. Cas. § 857, providing that the object of the Code is not to amend the system of pleading and practice prevailing at the time of its adoption, but as a substitute for any case provided for by it or inconsistent with its provisions; and Sand. & H. Dig. § 1125, which is an amendment of the Code, giving circuit courts power to issue writs of certiorari to any officer, board of officers, etc., and to correct "any erroneous or void proceeding,"—do not enlarge the office of the writ at com-

mon law, so as to authorize thereby the review of city ordinances which are purely legislative.—PINE BLUFF WATER & LIGHT CO. V. CITY OF PINE BLUFF, Ark., 35 S. W. Rep. 227.

- 18. CHATTEL MORTGAGES Change of Possession.—A mortgage on a stock of liquors and saloon supplies held void as to creditors, on the ground that, under the agreement between the parties, the mortgagor was to retain possession, with the power to use the proceeds of the property in maintaining the business and in his own support and for his own benefit, without satisfying the mortgage debt.—PIERCE v. WAGNER, Minn., 66 N. W. Rep. 977.
- 19. CHATTEL MORTGAGES Recording.—Under Mill's St. \$ 887, providing for the recording of mortgages in the county where the personal property "shall" be situated, a mortgage of cattle which are to be taken by the mortgagor to some other county is properly recorded in the county in which the cattle were at the time the mortgage was executed, and not the county to which they are subsequently taken.—MUMFORD v. HARRIS, Colo., 44 Pac. Rep. 772.
- 20. CHATTEL MORTGAGES—Conditional Sales.—An instrument executed by a buyer, reciting that the buyer is indebted to the seller in a certain sum, evidenced by notes given for the price of goods—the conditions of the purchase being that the possession of the property is to remain in the seller until payment of the price, is a chattel mortgage, as the buyer is unconditionally liable for the payment of the price.—TUPTS v. BEACH, Colo., 44 Pac. Rep. 771.
- 21. CONDEMNATION PROCEEDINGS—Practice.—Where, in condemnation proceedings, the judgment is, on appeal by the landowner, reversed, without a remandment (the proceedings being void on account of the purpose for which the land was condemned being unlawful), the court, on petition, properly directs the clerk of the court to return to the party for whose use the land was condemned the security for payment of damages awarded the landowner, deposited by the party to enable him to take possession of the landowner (it not appearing that the depositor was insolvent) for damages caused by the entry being an action for the trespass.—Ligare v. Chicago, M. & N. Ry. Co., Ill., 48 N. E. Rep. 734.
- 22. CONSTABLE—Illegal Levy—Evidence.—Where the lock of a barn is broken, and horses taken by force, against the repeated protests and personal efforts, and resistance of the plaintiff, by a constable, it was proper for the court to instruct the jury that, if they found the trespass uplawful, malicious, and perpetrated with a design to oppress the plaintiff, they might give plaintiff punitive damages.—FARR v. SWIGART, Utah, 44 Pac. Rep. 711.
- 23. CONFLICT OF LAWS—Jurisdiction by Comity.—Under the rule of comity, the State courts will assume jurisdiction of causes of action transitory in their nature, arising under the statutes of a foreign State where their own States have statutes similar to those of the foreign State under which the actions arose.—St. Louis & S. F. Ry. Co. v. Brown, Ark., 35 S. W. Rep. 226.
- 24. CONSTITUTIONAL LAW Trial by Jury—Suits in Equity.—The enforcement of the liability of a subscriber to the stock of a corporation by an auxiliary suit in equity, brought by the receiver of the corporation appointed in a creditors' suit instituted upon its insolvency, does not infringe the constitutional right of such subscriber to a trial by jury.—ROSS-MEEHAN BRAKE SHOE FOUNDRY CO. v. SOUTHERN MALLEABLE IRON CO., U. S. C. C. (Tenn.), 72 Fed. Rep. 957.
- 25. Constitutional Law—Regulating Price of Gas—Reasonableness.—Under an act of a State legislature authorizing a taxing district to regulate the price of gas furnished by gas companies within such taxing district, provided the price shall not be fixed below a certain minimum, such power to regulate cannot be

exercised arbitrarily, without investigation of the facts bearing upon the reasonableness of the rate to be fixed, or in such a manner as to bring about a destruction or confiscation of the property of the gas companies; but due regard must be given to the right of such companies to receive such an income from their business as to pay operating expenses, legitimate fixed charges, and a reasonable profit.—New Memphis Gas & Light Co. v. City of Memphis, U. S. C. C. (Tenn.), 72 Fed. Rep. 362.

- 26. CONSTITUTIONAL LAW—Constitutionality of Stat utes.—The constitutionality of a statute cannot legally be passed upon by a court in an action in which it is not the foundation of some right asserted, or of some defense made, nor should it be passed upon unless its determination is unavoidably involved in the decision of the case.—Kansas Citt, M. & B. R. Co. v. White-Head, Ala., 19 South. Rep. 705.
- 27. CONSTITUTIONAL LAW—Jury Trial.—The charter of the city of Watertown (sections 25, 27), authorizing a police justice to try certain cases for violation of ordinance without a jury, and allowing an appeal in such cases only when imprisonment exceeding 10 days or a fine exceeding \$20 is imposed, violates Const. art. 6, § 6, declaring and extending the right of trial by jury to all cases at law irrespective of the amount in controversy, and section 7, declaring the right to trial by an impartial jury in all criminal proceedings.—BELAITIV. PIERCE, S. Dak., 66 N. W. Rep. 1068.
- 28. Constitutional Law-Opium Traffic.—Laws, 1897, p. 87, prohibiting any person not a licensed physician or pharmacist from having in his possession opium and certain other poisonous drugs unless prescribed by a licensed physician or pharmacist, does not infringe on the rights of liberty and property guarantied by fundamental law.—Luck v. Sears, Oreg., 44 Pac. Rep. 688.
- 29. Constitutional Law—Animals Running at Large.—A city ordinance providing for the impounding of animals running at large, and sale thereof after reasonable notice, and also providing for the release of the animals on payment by the owner of a reasonable fee, and that the owner may recover the net proceeds of the sale on application to the city within a certain time, is not unconstitutional as a deprivation of property without due process of law.—CITY OF PARIS V. HALE, Tex., 35 S. W. Rep. 883.
- 30. CONTINUANCE—Attorney.—Litigants are entitled to a speedy trial of the issues involved. Where there are no unusual or extraordinary features in the case, the fact that an attorney is professionally engaged elsewhere, in the trial of another action, cannot be regarded as an absolute right to a postponement or continuance of the cause. Generally, the continuance of the action is discretionary with the trial court, which discretion this court will not undertake to control.—ADAMEK v. PLANO MANUF'G CO., Minn., 66 N. W. Bep.
- 81. ACTIONS—Damages.—Whether an action is excontractu or ex delicto is to be determined by the pleadings. Damages recoverable upon a breach of contract are only those damages which are the direct and proximate result of the wrong complained of.—UNION PAC. RI. CO. V. SHOOK, Kan., 44 Pac. Rep. 685.
- 52. CONTRACT—Damages.—Where one employed for alterm of months as a farm hand abandons his employer before the end of the term, the damages sustained by the employer in the loss of his wheat crop are too remote to be recovered in an action for a violation of such contract.—MACY v. PEACH, Kan., 44 Pac. Rep. 687.
- 33. CONTRACT—Breach Measure of Damages.—On the failure of the State to deliver its bonds to a parchaser in accordance with its contract, the measure of damages is the difference in the market value of the bonds at the date of the contract and the time fixed for their delivery, or the date of the breach of the contract.—COFFIN v. STATE, Ind., 48 N. E. Rep. 664.

- 84. CONTRACT OF AGENCY-Assignability.-A contract by which a bookseller was constituted the sole and exclusive agent of a publisher, to sell, by subscription only, a certain book, and to collect payment therefor, required the agent to use his best efforts to procure as many subscriptions as possible, to exercise a minute personal supervision over all canvassers, to remit within 80 days after shipment a sum equal to the subscription price, and to remit for 10,000 copies within one year after the complete publication of the work. The contracts of subscription were to be directly with the publishers, the agent to have compensation by commissions only, and the publishers required the agent to give them a personal letter stating that he could not fulfill all his engagement: Held, that this contract was purely one of agency, resting upon confidence in the personal skill, energy, and resources of the agent, and that it was therefore not assignable without the consent of the publishers .- BANCROFT V. SCHRIBNER, U. S. C. C. of App., 72 Fed. Rep. 989.
- 35. CONTRACT—Rescission for Fraud.—An action will not lie to rescind for fraud a contract under which part of the consideration has been received, unless the plaintiff has restored or offers to restore the consideration he has received, as required by Comp. Laws, § 8591.—LOVELL V. MCCAUGHEY, S. Dak., 66 N. W. Rep. 1085.
- 36. CORPORATION—Action against Directors—Joinder of Causes.—It is not a misjoinder of causes of action to join in the same action, brought against bank directors individually, a cause of action for gross negligence in the discharge of their duties, whereby the plaintiff was injured, with causes of action for the fraud and deceit of the directors in making false statements and misrepresentations of the condition of the bank, whereby the plaintiff was induced to deposit his money in the care of the bank.—Solomon v. Bates, N. Car., 24 S. E. Rep. 478.
- 37. CORPORATION—Effect of Purchasing its Own Stock.

 —The purchase by a corporation of a part of its own stock, until it is reissued, in effect reduces its stock to that extent.—TULARE IRRIGATION DIST. V. KAWEAH CANAL & IRRIGATION CO., Cal., 44 Pac. Rep. 662.
- 38. CORPORATION Foreign Corporations Stockholders' Liability.—An action by an individual creditor of a Kansas corporation cannot be maintained in Pennsylvania, against a resident thereof, to enforce his stockholder's liability, where it appears that a receiver for the corporation was appointed before the commencement of the action, at least, in the absence of a decision of the Supreme Court of Kansas that in such case the receiver is not the proper party to sue.—Cushing v. Perot, Penn., 34 Atl. Rep. 447.
- 59. CORPORATION Officers.—A vice-president of a banking corporation is not entitled to compensation for his services, in the absence of a governing statute, by-law, regulation, or contract to which his own vote was not essential, providing for it.—BLUE v. CAPITOL NAT. BANK, Ind., 43 N. E. Rep. 655.
- 40. CORPORATIONS—Charter—Implied Powers.—When a company is incorporated, either by a special act, or under the general laws of a State, with the power to manufacture and sell gas, the power to charge and collect reasonable rates for the gas manufactured is implied, and forms a part of its contract with the State.—Capital City Gaslight Co. v. City of Des Moines, U. S. C. C. (Iowa), 72 Fed. Rep. 829.
- 41. CORPORATIONS—Agreement to Pool Stock—Public Policy.—An agreement between stockholders holding a majority of the shares to pool their stock by transferring it to trustees, and authorizing them to vote all such stock at corporate meetings, and to piedge it as collateral for loans, is void, as against public policy.—HARVEY v. LINVILLE IMP. Co., N. Car., 24 S. E. Rep. 489.
- 42. CORPORATIONS—Estoppel to Deny Corporate Existence.—Where a corporation has had a *de facto* existence for a considerable time, its corporate character

- cannot be collaterally assailed by persons contracting with it in such capacity, relying upon the corporate credit in order to hold stockholders thereof individually liable on account of the failure to observe the statutory requirements essential to constitute a technical de jure corporation.—Hogue v. Capital Nat. Bank of Lincoln, Neb., 66 N. W. Rep. 1086.
- 48. COUNTY RECORDER—Fees.—A county recorder is not liable to the county for fees earned in recording notices of location of mining claims, the work being outside his official duties. Such records are not known to the statute, being regulated entirely by the mining districts, and a county recorder is not compelled to keep them.—San Bernardino County v. Davidson, Oal., 44 Pac. Rep. 659.
- 44. COUNTY TREASURER-Liability for Public Funds. An outgoing county treasurer turned over to his successor a certificate evidencing the deposit of county funds in a bank for safe-keeping, and the same was received by the incoming treasurer as a payment to him, to its amount, of such funds. The certificate of deposit was, by the new treasurer, delivered to the bank which had issued it, and was canceled, and the treasurer received in lieu thereof a certificate of deposit for a like sum, payable to him as county treasurer: Held, that the incoming treasurer and his bondsmen were chargeable on his bond for the amount of such payment, and a subsequent failure of the bank during the time the bank was continued, and his consequent inability to realize the money, did not relieve them of the liability .- Bush v. Johnson County, Neb., 66 N. W. Rep. 1028.
- 45. COURTS—Property in Custodia Legis.—Third parties, claiming property levied on by the marshal, will not be permitted to take it out of his possession, under color of process, by means of a separate suit, even in the same court. The remedy is by ancillary proceedings in the same cause.—St. PAUL, M. & M. RY. CO. V. DRAKE, U. S. C. C. of App., 72 Fed. Rep. 945.
- 46. CRIMINAL EVIDENCE—Homicide—Insanity Conversation. Where the defense was insanity, commencing some months before the homicide, and continuing up to the time of trial, an expert physician, who had examined defendant in prison, should have been allowed to testify as to the conversation he had with defendant; the jury being entitled to the facts upon which the physician's opinions were based.—PEOPLE V. NINO, N. Y., 43 N. E. Rep. 853.
- 47. ORIMINAL LAW-Selling Property Twice.—To render a person subject to punishment under Gen. St. § 200, making it a criminal offense, after having once sold, bartered or disposed of land or lots, to again knowingly and fraudulently sell, barter or dispose of the same property to another for a valuable consideration, it must be shown that the second sale was for a valuable consideration.—CLEMENT v. MAJOR, Colo., 44 Pac. Rep. 776.
- 48. CRIMINAL LAW—Assault with Intent to Kill.—In a prosecution for an assault with intent to kill, evidence that the person shot wanted to swap knives with a third person, for the purpose of obtaining a longer one than his own; that he told such person that he was going to have a row with the accused, and that there was only one man in the world whom he wanted to kill, and that was accused—is admissible as tending to show who was the aggressor.—PRIME v. STATE, Miss., 19 South. Rep. 711.
- 49. ORIMINAL LAW Assault with Intent to Kill. Where, on a trial for assault with intent to kill, there was evidence that the prosecuting witness had made threats against defendant, which were communicated to defendant; that the witness struck defendant, and made a movement with his hand as though about to draw a pistol, whereupon defendant drew a pistol, and shot him—a charge which failed in any instruction to state the doctrine of reasonable doubt was erroneous.—Godwin v. State, Miss., 19 South. Rep. 712.
- 50. CRIMINAL LAW—Larceny—Ownership.—Any one has a special ownership, sufficient to sustain an indictment

- for larceny, who has the care, control and management of the property, except in the case of servants having only temporary custody and use of the property subordinate to the owner, or person having the actual care, control and management of the same.—MURRAY V. UNITED STATES, I. T., 35 S. W. Bep. 240.
- 51. CRIMINAL LAW Indictment Variance. In a prosecution under an indictment for assault with intent to kill, alleged to have been committed by shooting the person assaulted with a pistol, where there was evidence that prosecutor was shot in the head, defendant cannot be convicted of an assault by striking the person with a pistol. COMMONWEALTH V. HEATH, Ky., 58 S. W. Rep. 277.
- 52. ORIMINAL LAW—Larceny.—On a trial for theft, an instruction that the possession of recently stolen property is prima facie evidence of guilt, unless other evidence raises a reasonable doubt thereof, was not objectionable, as assuming that the property was stolen, where instructions for defendant left the question whether it was stolen or not to the jury.—Keating v. People, Ill., 43 N. E. Rep. 724.
- 58. CRIMINAL LAW-Murder—Possession of Deceased's Property. Possession of articles apparently taken from the deceased at the time of his death authorizes a prima facie presumption of guilt, which the jury may act upon unless it is rebutted by the evidence or explanation offered by the accused. WILSON V. UNITED STATES, U. S. S. C., 16 S. Q. Rep. 895.
- 54. CRIMINAL LAW—Larceny by Public Officer.—Under Hill's Ann. Laws, § 1772, providing that any person having in his possession public money, who shall convert the same to his own use, "or" who shall loan the same without interest, "or" who shall neglect to pay over the same as by law directed, shall be guitty of larceny, the conversion, loaning and refusal to pay over are each prima facie separate crimes.—STATE v. HOWE, Oreg., 44 Pac. Rep. 672.
- 55. CRIMINAL LAW—Homicide—Misconduct of Attorney.—In a murder case the verdict will not be disturbed, where there is evidence which, if without conflict, would support the conviction. To save an exception to alleged improper conduct of the prosecuting attorney, defendant must invite and insist upon some action of the trial court with reference to the alleged misconduct, and base his exceptions on the court's ruling.—ROBB v. STATE, Ind., 43 N. E. Rep. 642.
- 56. CRIMINAL LAW—Homicide—Evidence. Where a witness charged with a murder twice denied any knowledge, her evidence incriminating accused, delivered under threats and the influence of intoxicants, was insufficient for conviction. DODSON v. STATE, Tex., 35 S. W. Rep. 151.
- 57. CRIMINAL LAW—Conduct of Trial.— Where, in a criminal case, the witnesses are placed under the rule, but by some omission one is not sworn, and remains in the court room while several witnesses testify, it is not an abuse of discretion to permit such witness to testify, it appearing that the witnesses who had testified in his presence did not give any testimony on the point as to which he testifies.—BISHOP V. STATE, Tex., 85 S. W. Rep. 170.
- 58. DEDICATION—Evidence to Establish.—The fact that a railroad company allowed the public to make a short cut between two avenues over one of its lots was insufficient to show a dedication, though allowed for the necessary length of time, where the lot was fenced, and during that period had been constantly used by the company for its own purposes.—Frankford & S. P. CITY PASS. RY. CO. V. CITY OF PHILADELPHIA, Penn., 24 Atl. Rep. 577.
- 59. DEED—Record Priority. A prior unrecorded deed, passing the legal title, made in good faith, for a valuable consideration, will take precedence of a title based on a judicial sale made under an attachment or execution, if such deed be recorded before the evidence of the title based on the judicial sale is recorded. Sheasley v. Keens, Neb., 66 N. W. Rep. 1010.

- 60. DEED—Construction—Rule in Shelley's Case.—A grant to P for life, "and, at her death, then the same shall go and descend to the heirs of said P, which have been or may be begotten on the body of said P by her present husband, the said L, to them, the heirs of said P and L, their heirs and assigns, forever," confines the remainder to the children of P and L, who take by purchase, not by inheritance, and the rule in Shelley's Case does not apply.—Dawson v. Quinnerly, N. Car., 24 S. E. Rep. 483.
- 61. DEED Delivery. Where a voluntary deed, signed by the grantors, ready for delivery, is given to the grantee, with the present intention of passing title, but with a mutual verbal understanding that the deed should subsequently become inoperative, if other grantors should refuse to sign, there is a delivery, and the grantors cannot set up, thereafter, non-performance of the condition to defeat the deed.—STANLEY v. WHITE, Ill., 48 N. E. Rep. 729.
- 62. DEED—Delivery.—On an issue as to the delivery in escrow by a father of deeds to children by a former wife of their portion of the estate, there was evidence that the grantor told the notary before whom they were executed that, as long as he lived, he was going to leave them with D, who had a good safe, where they could be kept safely, and if he wanted them at any time he could get them; that the grantor, some little time afterwards, delivered them to D, on what conditions was not shown; that the father subsequently sold part of the land, got back the deeds, and destroyed them: Held, no sufficient delivery to pass title.—Shults v. Shults, ill., 48 N. E. Rep. 800.
- 68. DEED OF TRUST—Power of Sale.—A note and trust deed securing it provided for interest; that, in the event any three interest installments were due and unpaid, the whole debt should be due; and that, in case of default in payment of such indebtedness, principal and interest, at maturity, the trustee might sell, etc.: Held, that the trustee was empowered to sell when there were more than three interest installments overdue.—JOURTT V. GUMN, Tex., 35 S. W. Rep. 194.
- 64. DESCENT AND DISTRIBUTION—Title.—S, by a certain instrument, divided all his estate among his three daughters and two grandsons, and declared that he held his land in trust for such children and grand-children, subject to a life estate in himself: Held that, on the death of S, such children and grandchildren held title by purchase, and not by descent.—LATROBE V. CARTER, Md., 84 Atl. Rep. 472.
- 65. EASEMENT—Parol Grant.—A court of equity will give effect to a parol grant of an easement, where there has been a valid consideration, where the grant is certain in its terms, and where there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds.—Gilmors v. Armstrond, Neb., 66 N. W. Rep. 996.
- 66. EJECTMENT Right of Partner to Maintain.—A partner, being a tenant in common with his copartner, may recover possession of the whole of the firm real estate, as against one holding the same without title.
 —BRADY V. KREUGER, S. Dak., 66 N. W. Rep. 1063.
- 67. ELECTION—Contest.—Proceedings in chancery to contest an election being purely statutory, under the election law of 1872 (Rev. St. 1874, ch. 46, § 118 et seq.), providing that such proceedings shall be tried in like manner as cases in chancery, and for review of the decree therein by appeal, the court in which the proceedings are instituted has no jurisdiction to review, by bill of review, a decree, in such proceedings, after the term at which it was rendered.—ALLERTON v. HOPEMINS, Ill., 48 N. E. Rep. 753.
- 68. EMINENT DOMAIN—Public Use—Extent of Title.—
 The owner of the fee of land to which a city has acquired title by condemnation proceedings, duly authorized, for a particular public use, has no right to enter on and use any portion of the land without exastent of the city, though his use does not interfere with

the use of the land by the city for the purpose for which it was appropriated.—CITY OF PHILADELPHIA V. WARD, Penn., 34 Atl. Bep. 458.

- 69. EMINENT DOMAIN—Damages to Abutting Property.—In an action for permanent injuries to realty whereby the value of the property was depreciated, plaintiff, in order to sustain his action, must show fee-simple title to the premises, and in default of such proof a nonsuit is properly granted.—SOHECHTER V. DENVER, L. & G. R. Co., Colo., 44 Pac. Rep. 761.
- 70. EMINENT DOMAIN—Damages.—In an action for damages for taking a right of way and constructing a railroad across a tract of land used for farm purposes, and across which no streets were opened, it is error to admit in evidence a street plan of the borough in which the land is situate, prepared after the location of the railroad, and not completed or approved by the borough authorities till after completion of the railread, and showing streets across the land, the measure of damages being the difference in value of the whole property before and after the construction of the railroad, and its value before the injury being shown by the actual condition thereof at the time condemnation proceedings were begun. WALKER V. SOUTH CHESTER R. Co., Penn., 24 At1. Rep. 550.
- 71. EMINENT DOMAIN-Damages.—In condemnation proceedings by a city the value of the interest of the lessee in the property to be taken, from whose lease, by mistake, a provision giving the lessee the right to an extension of the lease was excluded, was assessed as though the lease was only for the term stated in the lease: Held, that the remedy of the lessee was by appeal in the condemnation proceedings, as provided for by statute, and not by bill in equity against the city to reform the lease.—LOBLE V. CITY OF PHILADELPHIA, Penn., 34 Atl. Rep. 554.
- 72. Equity—Estoppel.—There can be no equitable estoppel to an assertion of title, where the party claiming to have been influenced by the conduct of another to his injury had convenient and available means of ascertaining the true state of the title.—Mountain Lake Park Ass'n of Garrett County v. Shartzer, Md., 24 Atl. Rep. 526.
- 73. ESTOPPEL IN PAIS—Sale.—In an action for the price of yarn sold defendant, the latter claimed that he was a broker merely, and that the sale was made to one B, to whom plaintiffs delivered the yarn: Held, that defendant was not estopped from denying that he was the purchaser by the fact that he made no objection to the bills for the yarn rendered to him by plaintiffs.—Shaw v. Fleming, Penn., 24 Atl. Rep. 555.
- 74. EVIDENCE—Master and Servant—Declarations of Agent.—In an action by a mill employee for injuries caused by the breaking of a shafting hanger which he was placing, declarations of the mill superintendent, made after the accident, that the hangers had been condemned, and should not have been used, are inadmissible.—GIBERSON V. PATTERSON MILLS CO., Penn., 34 Atl. Rep. 568.
- 75. EXECUTION AGAINST THE PERSON—Validity.—Under Pub. St. ch. 171, § 55, which authorizes an officer to complete the service of an execution after the return day, when the service was begun before that day, where a debtor is arrested, and enters into a recognizance, and submits himself to examination, and the poor debtor's oath is denied him, and a certificate to that effect is annexed to the execution, the execution resumes its former power, and the officer is empowered to arrest him.—IN RE RUBBERG, Mass., 48 N. E. Rep. 911.
- 76. FEDERAL COURTS—State Courts—Conclusiveness of Decisions.—The decision of the highest court of the State, as establishing a rule of property, are controlling authority in the courts of the United States with regard to the construction and effect of a statute of such State regulating assignments for the benefit of creditors.—ROTHSCHILD V. HASBROUK, U. S. C. C. (IOWA), 72 Fed. Rep. S18.

- 77. FEDERAL COURTS-Jurisdiction Constitution .-The F. F. Water Company brought an action against the city of F. F. upon a contract. It alleged in its complaint that the city made a contract to pay to it certain water rents for supplying the city with water; that it had complied with the contract and furnished the water; that the city had paid the rents until its city council passed a resolution that the contract was annulled and cancelled, and that it would pay no more rents thereunder; that from the date of the passage of that resolution the city had refused to pay the rents; and that the resolution was allaw impairing the obligation of the contract: Held, that the latter allegation was mere surplusage, and did not make the action one arising under the constitution of the United States. within the jurisdiction of the federal courts.-CITY OF FERGUS FALLS V. FERGUS FALLS WATER CO., U. S. C. C. of App., 72 Fed. Rep. 878.
- 78. FRAUDS, STATUTE OF—Sale of Goods.—A contract by which defendants agree to furnish a monument for a certain amount, to be erected by a State on a battlefield, is not a contract for sale of goods, within the statute of frauds, though defendants are not bound to bestow their personal skill and labor thereon, but may get others to make it for them.—FORSYTH v. MANN, Vt., 34 Atl. Rep. 481.
- 79. FRAUD—Pleading.—In pleading fraud it is necessary to set out the facts relied upon for relief. Mere epithets or conclusions of fraud, without any statement of the facts upon which such charge is predicated, are insufficient.—Crossy v. RITCHBY, Neb., 66 N. W. Rep. 1005.
- 80. FRAUDULENT CONVEYANCES Consideration.—A conveyance of land to a girl in consideration of a previous promise by the grantor to the girl's mother that, if allowed to retain the child in his family, he would educate her, and give her a sum of money upon her marriage or majority, if accepted by such grantee in good faith, as part performance of the agreement made for her benefit, is valid, though made to defraud other creditors of the grantor.—Bowie v. Hedrick, Tex., 85 S. W. Rep. 817.
- 81. Fraudulent Conveyances—Rights of Judgment Creditor.—A judgment creditor may proceed to sale on execution against land of the debtor fraudulently conveyed without first bringing suit to set aside the conveyance.—WILLARD v. MASTERSON, Ill., 48 N. E. Rep. 771.
- 82. FRAUDULENT CONVEYANCE Evidence. In replevin, where the defense was that the title of plaintiff to the goods in issue was fraudulent as to creditors of the vendor, it was error to admit testimony tending to show the general good character of the plaintiff; but, it appearing from other evidence that he was in fact a bona fide purchaser, the error was without prejudice. POWERS V. ARMSTRONG, Ark., 35 S. W. Rep. 290
- 88. FRAUDULENT CONVEYANCE. Where a purchase of an entire stock of goods, books of account, and fixtures of a merchant was made at a fair price, and with no knowledge that such merchant was at the time indebted to other parties, it should not be declared void, though the purpose of the purchaser was in part to secure payment of a debt due the bank of which he was at the time cashier.—Goldsmith v. Erickson, Neb., 66 N. W. Rep. 1029.
- 84. FRAUDULENT MORTGAGE Enforcement. The holder of a note and mortgage given to and received by him for the purpose of defrauding the mortgagor's creditors cannot enforce the same, whether executed for a valuable consideration or not.—O'KANE v. TERBEL, Ind., 48 N. E. Rep. 869.
- 85. Garnishment.—That defendant has been summoned as garnishee in an action against plaintiff is not ground for plea in bar; but defendant, to protect him self from the garnishment proceedings, should move for a continuance until the determination of such proceedings.—Knight v. Griffet, Ill., 48 N. E. Rep. 727.

- 86. GARNISHMENT—Intervention.—In garnishment, a third person claiming property affected thereby may interplead, and have his rights determined in the same action. A bill of sale purporting to be executed by a corporation, signed by its vice-president, with the corporate seal affixed, is admissible in evidence, without proof of the authority of the vice-president to execute it.—Springer v. Bigford, Iil., 48 N. E. Sep. 751.
- 87. GUARDIAM'S DEED Absence of Confirmation.—Under the act of 1846, providing that a guardiam's sale shall be conducted as the court may direct, and on terms approved by the court, a guardiam's deed of land sold under an order of court conveys no title unless the sale is confirmed by such court.—GREER V. ANDERSON, Ark., 35 S. W. Rep. 215.
- 88. Habbas Corpus Sufficiency of Petition.—The writ of habeas corpus, although a constitutional and imperative writ of right, does not issue, as a matter of course, to every applicant. The petition for the writ must show probable cause for issuing it, and where the petition, on its face, shows no sufficient prima facte ground for the discharge of the applicant, the writ may be legally refused.—Hoskins v. Baxter, Minn., 66 N. W. Rep. 969.
- 89. HIGHWAY—Telephone Company—Injury to Trees.—Gen. St. § 8946, giving the selectmen of a town control over the placing of telephone wires, does not impliedly repeal sections 1477, 1759, and 8944, prohibiting telephone companies, in the location of their wires, from injuring trees upon a highway, without the consent of the adjoining owner, so as to authorize the selectmen to empower a telephone company to injure trees overhanging the highway, without such consent.—BRADLEY v. SOUTHERN NEW ENGLAND TELEPHONE CO., Conn., 34 Atl. Rep. 499.
- 90. HUSBAND AND WIFE—Right of Action against Husband.—Act June 8, 1887, § 4, providing that husband and wife shall have the same legal remedies upon contracts in their own name and right, against all persons, for protection and recovery of their separate property, as unmarried persons, does not give a married woman a right of action against her husband while they are still living together.—KENNEDY V. KNIGHT, Penn., 84 Atl. Rep. 585.
- 91. HUSBAND AND WIFE Community Creditor.—A surviving wife, administering the community estate under the provisions of the law relating to the administration of such estates, can be sued by a creditor, and her property, selzed, and it is not necessary that such creditor's claim be presented for approval and allowance by, and collection be made through, orders of the probate court.—D. M. OSBORNE & CO. v. ROBINSON, Tex., 25 S. W. Rep. 227.
- 92. HUSBAND AND WIFE Estate by Curtery—Possession.—Where the owner of land deeds it to a wife, and afterwards to her husband, and such husband and wife take possession, the wife is seised and possessed of the land; and, in the absence of a conveyance by her, she dies seised and possessed of it, though at that time she is living with her husband and family on other land.—HILL V. NASH, Miss., 19 South. Rep. 707.
- 98. HUSBAND AND WIFE—Necessaries for Wife's Children.—A husband who has separated from his wife is not liable as at common law for necessaries for the wife's children by a former husband, living with her, sold solely on the wife's credit; especially where it is not shown that the wife has no means with which to pay for them.—Menefee v. Chesley, Iowa, 66 N. W. Rep. 1039.
- 94. INJUNCTION—Actual Notice—Contempt.—Actual notice of a perfected injunction is binding on the party enjoined, before actual service, and disregard of it constitutes contempt of court.—ULMAN v. RITTER, U. S. C. C. (W. Va.), 72 Fed. Rep. 1000.
- 95. INJUNCTION Location of Wooden Building in Fire Limits.—Injunction will lie to prevent the issu-

- ance of a permit by the city for the removal of a wooden building and its location within the prohibitory limits of the city, in violation of an ordinance requiring, for the location of such a building within the limits, the consent of a certain number of the property owners in the neighborhood of the property on which the building is to be located, where some of the signatures of such property owners to the petition for the permit for removal were procured by fraud, and others signed without authority.—GRISWOLD v. BREGA, Ill., 43 N. E. Rep. 864.
- 96. INSOLVENT ESTATES—Collateral Securities.—When a creditor of an insolvent estate holds collateral securities for his debt, he is not required to exhaust his remedy upon such securities, nor to surrender them to the assignee or receiver administering such assigned estate, before receiving a dividend therefrom.—WHEELER V. WALTON & WHANN CO., U. S. C. C. (Del.), 72 Fed. Rep. 966.
- 97. INSOLVENCY Secured Creditor.—Under our insolvency law, the creditor, before he has exhausted his security, or surrendered it to the assignee, is en titled to file his secured claim, and have the amount and validity of the same determined by the assignee or the court on appeal, but he is not entitled to share in the distribution of the insolvent's estate until he has so exhausted or surrendered his security.—Swedish Nat. Bank of Minneapolis v. Davis, Minn., 66 N. W. Rep. 986.
- 98. INSURANCE Premium Agent.—An insurance agent, who is charged with and becomes liable to the company for the premium on policies issued by him, may sue for the premium in his own name.—WATERS V. WANDLESS, Tex., 35 S. W. Rep. 184.
- 99. INSURANCE—Consideration Conditions.—A policy reciting that in consideration of the warranties contained in the application, and an order for moneys on a railroad company, the insurance company insures, etc., does not, by the subsequent provision that the sums named in the order must be paid according to the terms of the order, to keep the policy in force, make such payment part of the consideration of the policy.—FARRELL V. AMERICAN EMPLOYERS' LIABILITY INS. Co., Vt., 34 Atl. Rep. 478.
- 100. INSURANCE—Fraudulent Representation—Rescission.—Where an agent's representation as to the total cost of a 10-year endowment policy of insurance is both false and fraudulent, and the assured believes it, and, in reliance on it and deceived by it, takes out the insurance, and gives his notes in payment of the first premium, he may rescind the contract on learning of the fraud.—BECKWITH V. RYAN, Conn., 34 Atl. Rep. 488.
- 101. INSURANCE—Permission to Make Alterations.—A permission to make alterations in insured property, construed with a provision that the insurer shall not be liable for loss "if the risk be increased by any means within the control of the assured," permits such alterations as the assured may choose to make, provided the risk is not increased further, nor for a longer time, than is necessary to accomplish the work.—Firemen's INS. Co. v. Appleton Paper & Pulp Co., Ill., 43 N. E. Rep. 713.
- 102. INSURANCE—Waiver of Written Proofs of Loss.—Evidence that, after loss, plaintiff called on the secretary of an insurance company for blank proofs of loss, and was told that they were unnecessary, and that there was nothing more for her to do, sufficiently shows a waiver of written proofs.—SOOTT v. SECURITY FIRE INS. Co., Iowa, 66 N. W. Rep. 1054.
- 103. INSURANCE Authority of Insurance Agent.—
 Where an agent, authorized to solicit insurance receives applications and forwards them to the company, forwarded an application, filled out by himself,
 which incorrectly stated that the sole title to the property was in the insured, and that the source of title
 was a warranty deed, after having been informed by
 insured that he held it as tenant in common with his

brother, and that the source of title was a will, and that insured was acting for himself and brother, the company could not defend on the ground that the statements in the application were false.—STATE INS. CO. OF DES MOINES, IOWA, v. DU BOIS, Colo., 44 Pac. Rep. 756.

104. Insurance—Conditions—Waiver.—Where a general insurance agent, by advancing and forwarding the premium to the company, makes himself, instead of the company, the premium creditor on a policy which an assignment for creditors avoids, a demand by the agent for the premium after an assignment has been made is not, as to the company, a waiver of the condition avoiding the policy.—ORR v. HARTFORD FIRE INS. CO., Ill., 48 N. E. Rep. 866.

105. Intoxicating Liquors—Local Option—Delivery.—Where defendant, while within the limits of a local option precinct, contracted to sell and received payment for several bottles of liquor, which were to be delivered, and were actually delivered, outside of such local option limits, the contract of sale is not a violation of the local option law.—Weldon v. State, Tex., 36 S. W. Rep. 176.

106. INTOXICATING LIQUORS—Illegal Sale on Sunday.

—A dentist is not a physician, within Code, § 1117, prohibiting the sale of liquor on Sunday, unless prescribed by a "physician."—STATE V. MCMINN, N. Car., 24 S. E. Rep. 523.

107. Intoxicating Liquors — Sales by Physician.—
On a prosecution of one for selling liquor after his license had been revoked, it was error to reject evidence
offered by defendant tending to prove that he was a
druggist, and the family physician of the person to
whom the liquor was sold, and that he sold the liquor
as an ingredient of a prescription put up by him at the
instance of such person, and given to such person as a
medicine, in good faith.—Lindsay v. Commonwealth,
Ky., 35 S. W. Rep. 269.

108. Intoxicating Liquors — Illegal Sale.—Where intoxicating liquors are sold in this State for the purpose of enabling the person to resell them, contrary to, or in violation of, the laws of this State, and the vendor has the knowledge of the illegal purpose of the buyer, and participates with him in the lilegal traffic, the sale is void, and no recovery can be had for the purchase price of the liquors thus sold.—Sforz v. Finkelstein, Neb., 66 N. W. Rep. 1020.

109. JUDGMENT-Res Judicata.—Where a judgment rendered on a default was based on a declaration containing three counts, two of which charged malice and the third did not, and the record did not show on which count the judgment was rendered, in the absence of extrinsic proof of the questions actually litigated, the judgment will not constitute an adjudication, estopping the defendant to prove the absence of malice in proceedings, after his arrest under the judgment, to obtain his discharge as an insolvent debtor.—SAWYER V. NELSON, Ill., 43 N. E. Rep. 728.

110. JUDGMENT-Res Judicata.—The lessee of a rail-road contracted to use sufficient of the net earnings from the road leased, and from the business brought to other lines owned by it from the leased road, to pay the mortgage bonds of the leased road. The lessee subsequently transferred all of its property, including the lease, to another company, which defended an action by the lessor against the lessee for the application of the net earnings as required by the lease: Held, that a judgment in such action against the lessee was binding on the other road also.—SCHMIDT v. LOUIS-VILLE, C. & L. RY. Co., Ky., 35 S. W. Rep. 135.

111. JUDGMENT-Default-Striking from Record.—A default judgment, not only regular on its face, but regular and valid in fact, cannot be stricken from the record, the remedy being by motion to open judgment and let defendant into a defense.—NORTH V. YORKE, Penn., 34 Atl. Rep. 620.

112. JUSTICE OF THE PEACE-Immunity from Civil Liability.—A justice of the peace, in common with all

judicial officers, acting within the scope of his jurisdiction, enjoys absolute immunity from liability in a civil action; but he is not excused when acting without jurisdiction, nor when he exceeds the jurisdiction conferred upon him by law, however honest his motives may be and however plain it may appear he was intending to keep within his powers.—SMITH v. CASNER, Kan., 44 Pac. Rep. 762.

118. LANDLORD AND TENANT—Construction of Lease—"Reasonable Use."—Evidence as to the condition, situation and adaptation of land for a particular use, the declarations of the parties as to the use to which the land was to be put, and that it had no rental value for any other purpose, is admissible to show the intent of the parties in the use of the phrase "reasonable use."—Bartels v. Brain, Utah, 44 Pac. Rep. 715.

114. LANDLORD AND TENANT—Recovery of Possession.

—A judgment, in an action for unlawful detainer, awarding defendant possession of a tract of land on which a house was situated, was proper, where the complaint alleged plaintiff's title to the land, and that defendant became tenant of a house thereon and was unlawfully withholding possession of the "premises," and the writof possession awarded plaintiff possession of the land, and the evidence supported the judgment.

—Davis v. Goodman, Ark., 85 S. W. Rep. 231.

115. LIENS—Labor on Personalty—Subcontractor.—A tailor performing labor as a subcontractor in making cloth into clothing, under a contract with one who received the cloth from the owner under a contract to make the clothing, has no lien on the clothing for his services.—MEYERS V. BRATESPIECE, Penn., 34 Atl. Rep. 551.

116. LIMITATIONS—Acknowledgment of Debt.—Statutes of limitation are statutes of repose, and before a bar of the statute can be said to have been removed by "a written acknowledgment of an existing liability," there must be an unqualified and direct written admission of a present subsisting debt on which the party is liable.—Dezell v. Thaybe, Kan., 44 Pac. Rep. 687.

117. LIMITATIONS — Claim for Money Collected by Agent.—Limitation does not begin to run against a claim by a principal for money collected by his agent until the principal has notice that the collection has been made.—BONNER v. MCCREARY, Tex., 35 S. W. Rep.

118. Limitation of Actions—Conversion by Mortgagee.—A claim against a chattel mortgagee for an unauthorized sale of the mortgaged chattels, the mortgage debt having been paid, is not based on a written contract, but is merely a claim for a conversion, and must therefore be brought within two years.—Greek v. Gill, Tex., 35 S. W. Rep. 328.

119. MALICIOUS PROSECUTION—Malice.—In an action for malicious prosecution there was evidence that defendant's child was bitten by plaintiff's dog while on plaintiff's premises; that the dog was small and was not allowed to run at large; that after defendant and a policeman had made an unsuccessful attempt to shoot the animal, defendant procured plaintiff's arrest for keeping a ferocious dog, and that plaintiff was discharged by the examining magistrate: Held, that the question of malice was for the jury, and it was error to direct a verdict for defendant.—RITTER v. EWING, Penn., 34 Atl. Rep. 584.

120. MANDAMUS—Pleading.—In mandamus to compel payment of a warrant, drawn for the salary of a judge, by the State treasurer, an answer averring that the funds for the payment of that department have been exhausted by warrants which were prior in registry, is sufficient to prevent judgment for plaintiff on demurrer.—NANCE v. STUART, Colo., 44 Pac. Rep. 779.

121. MASTER AND SERVANT—Assumption of Risk.—After plaintiff, a teamster employed by a tramway company to haul coal to its power house, had unloaded his wagon, steam escaping from defendant's boilers, which blew off automatically at a certain pressure,



frightened plaintiff's horse, which reared and kicked him: Held, that as plaintiff had some acquaintance with boilers before accepting the employment, and knew that steam was liable to escape from time to time, he assumed the risk and could not recover.—DENVER TRAMWAY CO. V. O'BRIEN, Colo., 44 Pac. Rep. 766.

122. MASTER AND SERVANT—Assumption of Risks.— A servant assumes such risks as, from the nature of the business as ordinarily conducted, he must have known, and those risks which the exercise of his opportunities for inspection would have disclosed to him.—Linton Coal & Mining Co. v. Persons, Ind., 48 N. E. Rep. 651.

128. MASTER AND SERVANT—Fellow-servants.—To render a master liable for the injuries to a servant caused by the negligence of a fellow-servant, the servant must show both the incompetency of such fellow-servant and negligence on the part of the master in either employing or failing to discharge him.—KINDEL v. HALL, Colo., 44 Pac. Rep. 781.

124. MASTER AND SERVANT—Injury to Employee—Assumption of Risk.—Plaintiff, a laborer of mature age, who had been employed for two years in putting up ironwork in buildings, and was familiar with such work, while moving a derrick on loose planks laid across the girders of a building in process of erection, by direction of his foreman, attempted to change the direction of the derrick on the plank by using a crowbar while standing with one foot on the plank and the other braced against a girder, and slipped and fell into the cellar, and was injured thereby: Held, that as the risk to which plaintiff was thus exposed was obvious, and voluntarily assumed, defendant was not liable.—Holloran v. Umion Iron & Foundry Co., Mo., 85 S. W. Rep. 280.

125. MASTER AND SERVANT—Personal Injury to Servant.—In an action to recover of a master for injuries alleged to have been caused by being placed at work in a dangerous place without instruction, where the plaintiff's evidence tends to establish such allegations, the court should not direct a verdict for defendant.—HESS V. ROSEMTHAL, Ill., 48 N. E. Rep. 743.

126. MASTER AND SERVANT-When Relation Exists. In an action for injuries received while a bassenger on defendant's train, there was evidence that defendant ran its trains over the track of another company at the place where plaintiff was injured; that defendant was bound by its agreement with such other company to obey the orders and signals given by the servants of that company, and that the injury was caused by the negligence of servants of the latter company in the management of one of its trains: Held, that it was not error to charge that the servants of such other company, while operating its trains on that part of the track used in common by both companies, might, for the purposes of the case, be regarded as the servants of defendant .- MURRAY V. LEHIGH VAL. R. Co., Conn., 84 Atl. Rep. 506.

127. MASTER AND SERVANT — Wrongful Discharge.—
The remedy of a servant discharged without cause before the expiration of the contract period of service is
not in assumpsit, as for implied services, but is for
damages for breach of the contract.—HAMILTON V.
LOVE, Ind., 43 N. E. Rep. 878.

128. MECHANICS' LIENS—Plaintiff, under a contract with defendant for placing water-closets in defendant's hotel, the material for which had to be specially constructed, had manufactured the material before the sale of the hotel by defendant, and, after notice by defendant of his rescission of the contract, filed a mechanic's lien for the labor and materials. Subsequently he entered into a new contract with defendant's grantee for constructing the closets, the material already manufactured to be used. Plaintiff failed to file any lien for the work performed and material furnished under the second contract. Defendant afterwards regained title to the hotel. The second contract provided that it should not constitute a

waiver of the lien already filed: Held, that plaintiff was not entitled to a lien by virtue of the notice filed under the first contract, as he did not, under such contract, part with the title to the materials therein provided for.—BARNETT v. STEVENS, Ind., 48 N. E. Rep. 661.

129. MRCHANICS' LIENS — Enforcement—Extinguishment of Liens.—The fact that, during the progress of their work, contractors claiming mechanics' liens purchased an undivided half interest in the property, will not extinguish their lien, where it appears that the owner had become insolvent, and unable to pay such contractors; that the deed was taken in order to procure a loan on the property, and complete the work; that the contracts were not surrendered or canceled, and that there was no express agreement for discharge of the liens—BLATCHFORD v. BLANCHARD, Ill., 43 N. E. Red. 794.

180. MECHANIC'S LIEN—Enforcing Against Corporation.—A contractor who erected a creamery building under a contract signed by a number of individuals, each of whom signed for a specific sum, binding himself only to that extent, may, after the subscribers have organized into a corporation, which is vested with the title to the property, maintain a single action to enforce a mechanic's lien on the property for the amount of the unpaid subscriptions, although neither the corporation nor the stockholders who paid their subscriptions are bound for the indebtedness.—Davis & Ramkin Bldg. & Mfg. Co. v. Vice, Ind., 43 N. E. Rep. 889.

181. MECHANIC'S LIEN-Evidence to Support.—In an action to enforce a mechanic's lien, in which complainant alleged a written contract with defendant, who denied any such contract or that any one had authority to make such contract for her, proof that the contract was signed, after the action was begun, by one who claimed to be the agent of defendant, is, in the absence of proof of authority, insufficient to support the lien.—RASS v. SEBASTIAN, Ill., 48 N. E. Rep. 708.

182. MECHANIC'S LIEN—Manufacturing Plant.—Where steam and gas pipe are furnished for the improvement of a manufacturing plant, which consists of a number of buildings within the same inclosure, and erected as an entire plant, and such pipe are used in connecting the several buildings, a material-man's lien may be filed therefor against all the buildings as a whole, though one of the buildings was occupied by a tenant.—PREMIER STEEL CO. V. MOELWAINE-RICHARDS CO., Ind., 48 N. E. Rep. 876.

188. MECHANIC'S LIEN—Waiver. — A mechanic's lien is waived or discharged where the parties enter into a special agreement inconsistent with the existence of the lien; as, for example, by the laborer or materialman extending credit to the owner beyond the statutory period for bringing an action to enforce the lien.

—FLENNIEEN V. LISCOE, Minn., 66 N. W. Rep. 979.

184. MECHANIC'S LIEN—Who are Contractors.—That a building is erected under the supervision of the owner, except as to the painting and plumbing, for which he made contracts, does not make the person with whom he made the contract for the plumbing a subcontractor, in that the owner himself was the contractor, so as to prevent a mechanic's lien from being filed for the plumbing materials furnished the person having the contract for the plumbing.—Owen v. Johnson, Penn., 34 Atl. Rep. 549.

185. MINES AND MINING—Extralateral Rights.—Under the act of 1872 (Rev. St. § 2822), which gives to persons who had previously procured a patent to a surface location, as incident to one vein only, a right to all other veins, throughout their depth, which have their apexes within the surface lines, the extralateral rights of the patentee in respect to any such additional veins extend to the vertical plane of the end lines, prolonged in their own direction, and cannot be limited by the vertical plane of any side line.—WALRATH V. CHAMPTON MIN. Co., U. S. C. C. of App., 72 Fed. Rep. 978.

186. MORTGAGE— Delivery — Acceptance. — Where a note and mortgage are placed in the hands of a third person to be delivered to the mortgagee upon the payment of the consideration money therein mentioned, and the mortgagee refuses to accept the same, and advance such sum, no lien is created upon the land mentioned in said mortgage; and the assignment and delivery thereof by such third person to a stranger to the transaction, without the consent of the mortgagor, and without any indorsement thereof by the mortgagee, conveys no title to, or vests any interest in, said mortgage in the assignee. The mortgage in such case never becomes operative at all; it is void from the beginning.—BAILEY v. GILLIAND, Kan., 44 Pac. Rep. 747.

187. MORTGAGE—Delivery—Evidence. —A mortgagor delivered the mortgage to his attorney for delivery to the mortgagee on a certain date on a contingency, and prior to the date had it recorded because the attorney refused to hold it unrecorded. The contingency not happening, the attorney, at the request of the mortgagor, continued to hold it without further instructions as to delivery, and after the mortgagor's death delivered it to the mortgagee, who had no knowledge of its existence: Held, no delivery. — Humiston v. Preston, Conn., 34 Atl. Rep. 544.

188. MORTGAGE FORECLOSURE.—Where a mortgage is given to secure coupon notes falling due at different periods, the holder of any one note may foreclose when it becomes due, without waiting till the other notes mature, or exercising the option, given him in the mortgage, to declare the whole debt due.—BOYER V. CHANDLER, Ill., 48 N. E. Rep. 808.

189. MORTGAGE ON HOMESTEAD—Acknowledgment by Wife.—The statute, requiring a mortgage on the homestead to be signed and acknowledged by the wife in the statutory form, relates merely to the execution of the instrument, and will not prevent the reformation of a mortgage on the homestead, properly signed and acknowledged, which, by mistake of the mortgage, did not include all the land which the parties had agreed that it should cover, on the theory that the mortgage, as reformed, would not be so acknowledged by the wife.—STEVENS v. HOLMAN, Cal., 44 Pac. Rep. 670.

140. MORTGAGES—Innocent Assignee.—An innocent purchaser of a note before maturity, which is secured by a mortgage duly recorded, may enforce his lien against the property, though, as between the mortgagor and his immediate grantor of the fee, the mortgagor's title was vitiated by fraud.—HUMBLE v. CURTIS, Ill., 48 N. E. Rep. 749.

141. MORTGAGES—Right to Foreclose.—Where debtors stipulate in their mortgage securing their sureties to pay the debts, the mortgagees, if the obligations are not paid when due, without first having paid them may foreclose and recover the total probable loss.—GOFF V. HEDGECOCK, Ind., 43 N. E. Rep. 644.

142. MORTGAGES—Sale under Power.—Equity will not set aside a sale of lands by a trustee, because the sale was *en masse*, unless the trustee was guilty of fraud, or the complainant was prejudiced by such a sale.—KER-FOOT v. BILLINGS, Ill., 48 N. E. Rep. 804.

143. MORTGAGOR AS SURETY.—A mortgage executed to the brothers of the mortgagor to secure for the mortgagor's son and another a note which was given for a bona fide indebtedness is not fraudulent as to the mortgagor's creditors, though it was executed as a preference to the mortgagees in case of the future insolvency of the mortgagor. — WEBBER v. WEBBER, Mich., 66 N. W. Rep. 961.

144. MUNICIPAL CORPORATION—City Officer—Removal by Mayor.—Rev. 8t. ch. 24, art. 2, § 7, authorizes the mayor to remove any officer appointed by him, and provides that if he fails for a certain time to file with the city clerk the reasons for removal, and the council, by a two-third vote, disapproves of the removal, the person removed shall be restored to office, but shall give a new bond: Heid, that an officer removed has

no right to discharge the duties of the office until the council takes action.—HEFFRAN V. HUTCHINS, Ill., 48 N. E. Rep. 709.

145. MUNICIPAL CORPORATION — Defective Street. — Where, in an action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of a city in failing to place a guard or railing along a deep excavation adjoining the outer edge of a sidewalk at the intersection of street crossings, to prevent persons from failing into such excavation, the jury are permitted to view the premises, it is not error for the court to instruct the jury that they are to determine from all the evidence, and from the view of the premises, whether the city was guilty of the negligence charged.—CITY OF CLAY CENTER V. JEVONS, Kan., 44 Pac. Rep. 745.

146. MUNICIPAL CORPORATION — Judgment — Mandamus.—When a city has levied taxes for general purposes to the full constitutional limit, and all the taxes so levied are required to meet current expenses, mandamus will not lie to compel an additional levy for the purpose of discharging a judgment against the city.—CITY OF SHERMAN V. SMITH, Tex., 35 S. W. Rep. 294.

147. MUNICIPAL CORPORATION—Public Health—Condemnation of Ice.—An order authorizing the health commissioner to condemn and cause to be destroyed full or substance intended for food or drink whenever satisfied that its consumption might be injurious to public health, does not authorize the condemnation of such substance, except under extraordinary circumstances, without a trial before a regularly authorized tribunal, in a proceeding to which the person whose rights are to be affected is a party, and in which the burden of proving the charges is upon the complainant, and in which full opportunity is given the adverse party to make his defense.—MUNN v. CORBIN, Colo., 44 Pac. Rep. 784.

148. MUNICIPAL CORPORATION—Public Improvements—Res Judicata.—In a suit to enforce an assessment, it appeared that, in a previous action to enforce the same assessment against the same parties, a judgment confirming it was affirmed by the supreme court; that, pending the appeal, the ordinance on which the assessment was based was repealed by the council, and the county court vacated its judgment of confirmation, and dismissed the action: Held, that the city was, nevertheless, bound by the former judgment.—MCCHESNEY V. CITY OF CHICAGO, Ill., 43 N. E. Rep. 702.

149. MUNICIPAL CORPORATIONS—Bids for Public Improvements.—The discretion vested in the commissioner of public works in Chicago to determine who are the lowest responsible bidders on the contracts for public improvements cannot be controlled by the courts, in the absence of fraud.—PEOPLE ASSYRIAN ASPHALT CO. v. KENT, Ill., 43 N. E. Rep. 760.

150. MUNICIPAL CORPORATIONS—Deflection of Surface Water.—Under the common-law rule prevailing in this State, the proprietor of lands may, by a proper use and improvement upon them, deflect surface water; and for consequent damage to his neighbor he is not liable, in the absence of negligence.—Churchill v. Beethe, Neb., 66 N. W. Rep. 992.

151. MUMICIPAL CORPORATIONS—Liability for Trespass.—Where a municipal corporation, acting within the scope of its general powers, though irregularly, and not in exact accordance with law, through its officers and servants, commits a trespass on private property, as by removing a fence, cutting down trees, and building a sidewalk thereon, under the mistaken belief that the inclosure was an encroachment on a street, the corporation and any or all individuals connected with the act, either by actual participation or by direction, may be joined as defendants in an action for the trespass, and a recovery may be had against all.—Brink v. Borough of Dunmore, Penn., 24 Atl. Rep. 596.

152. MUNICIPAL CORPORATIONS—Local Improvement.
—An ordinance provided that 52 lamp posts, and two



lamp post connections, should be erected on a certain avenue, between two streets named; such work to be done under the superintendence of the department of public works, comformably to the drawings thereto annexed. Such drawings were simply a piat of the street, showing by marks the location of the posts: Held, that such ordinance did not specify the nature, character, locality and description of the improvement, as required by statute.—Otis v. City of Chicago, Ill., 48 N. E. Rep. 715.

153. MUNICIPAL CORPORATIONS—Powers — Licensing.

—A city ordinance providing that persons, excepting those conducting regular places of business, selling certain articles of merchandise to persons not regularly engaged in or carrying on such lines of business, whether by sample or otherwise, shall pay a license of \$50 per quarter, is not void as being oppressive or unlawfully discriminating, in that regular merchants in those lines pay a less sum per quarter.—Ex Parte Harkell, Cal., 44 Pac. Rep. 725.

154. MUTUAL BENEFIT INSURANCE.—Where insured, in consideration of money paid, and the payment of all assessments and dues, sold his benefit certificate to plaintiff, the insured being at the time an old man, and in poor health, the association should be allowed to prove, in an action upon the certificate, the age of the insured at the time of the transfer; such fact tending to show whether the transfer was made in good faith, or it was speculative, and in the nature of a wager.—Supperme Lodge of Knights of Honor v. Metcalf, Ind., 48 N. E. Rep. 893.

155. NEGLIGENCE—Child—Contributory Negligence.—In the absence of evidence on the subject, a child or youth of any given age should be held to that degree of intelligence common to persons of his age. The circumstance that a boy of about the age of 14 years is accustomed to perform labor, earn wages, and go to and from his work along the streets of a populous city, unattended, raises no presumption that he is more intelligent, or has greater capacity to discern and avoid danger, not connected with his occupation, than is common to other boys of the same age.—CINCINNATI ST. BY. CO. v. WRIGHT, Ohio, 43 N. E. Rep. 688.

156. NEGLIGENCE — City Ordinance — Pleading.— Where, in an action against a railway company, the negligence relied on is the breach of a city ordinance, it is sufficient to state in the complaint the existence of the ordinance, without setting out a copy thereof, as a part of the complaint.—LAKE ERIE & W. R. CO. V. HANCOCK, Ind., 48 N. E. Rep. 659.

157. NEGLIGENCE-Criminal Negligence-Evidence.— Criminal negligence, as the term is used in the statute, means such negligence as amounts to a flagrant and reckless disregard of one's own safety, and a willful indifference to the injury liable to follow.—CHICAGO, B. & Q. R. CO. v. HAGUE, Neb., 66 N. W. Rep. 1000.

158. NEGLIGENCE—Dangerous Premises.—A tenant of a store building caused gas connections to be placed in the cellar for his own use, employing therefor a plumber of many years experience. The property was afterwards devised, and several years after, when occupied by a tenant of the devisee, an explosion occurred by reason of defects in the gas fittings, by which a third person was injured: Held that, in the absence of evidence of want of proper care on the part of the tenant having the work done, which would have rendered him liable for negligence, the owner, who came into possession of the property with no actual knowledge of any defect, was not chargeable with negligence rendering her liable for the injury.—METZGER V. SCHULTZ, Ind., 43 N. E. Rep. 896.

159. NEGLIGENCE — Imputable Negligence.—The negligence of the driver of a vehicle in crossing a railroad track on the highway cannot be imputed to one riding with him as his guest, who had good reason to believe him to be a careful and competent driver, and was himself without personal fault.—LARE SHORE & M. S. RY. CO. v. BOYTS, Ind., 43 N. E. Rep. 667.

160. NEGLIGENCE — Province of Jury.—In an action against a railroad company for negligence resulting in death of an employee, an instruction that it is the duty of the company to use reasonable care in the construction of its road-bed, and to use reasonable care to keep the rails on the track securely fastened down, and securely fastened together by proper fish bars and bolts, and to keep its switches in safe condition, and, in case it fails to perform any of these duties, it is guilty of negligence, is improper, as infringing on the province of the jury.—Houston & T. C. Ry. Co. v. Gaither, Tex., 35 S. W. Rep. 179.

161. NEGLIGENCE — Telephone Company — Electric Railway.—In an action for damages resulting from contact with a telephone wire which had fallen across the trolley wire of an electric street railroad company, defendant telephone company's plea that its wire was in good order, and properly located, is not a denial of plaintiff's allegations that, known to defendant, the wire was weak, not securely fastened, and liable to break and fall across the trolley wire; that it was the duty of defendant to so maintain its wires as to prevent such an occurrence; and that, after the wire had fallen, it was suffered to remain in that condition, causing plaintiff's injury.—MCKAY V. SOUTHERN BELL TELEPHONE & TELEGRAPH CO., Ala., 19 South. Rep. 655.

162. NEGOTIABLE INSTRUMENTS—Indorsement of Note—Parol Evidence.—A surety on a note given to a bank by a third person in renewal of a prior note on which such surety was also an indorser may show, as against the bank, that, at the time he signed such renewal, its cashier informed him that the bank had sufficient funds of the maker to pay such renewal note; that its execution was a matter of form, necessary only to keep the bank accounts straight; and that the bank would not hold him liable thereon.—First NAT. BANK OF WINSTON V. PEGRAM, N. Car., 24 S. E. Rep. 487.

163. NEGOTIABLE INSTRUMENTS—Checks—Actions on.—The holder of a check cannot sue the bank on which it is drawn until such check is accepted by the bank.—Commercial Nat. Bank of Charlotte v. First Nat. Bank of Gastonia, N. Car., 24 S. E. Rep. 524.

164. NEGOTIABLE INSTRUMENTS—Guaranty — Consideration.—Where the written contract of a principal sets forth or imports a consideration,—for example, a promissory note,—and a contract of guaranty, by a third party, is a part of, or is indorsed upon, the note, and is delivered simultaneously with it, the consideration for the note supports the guaranty.—D. M. OSBORNE & CO. V. GULLIKSON, Minn., 66 N. W. Rep. 965.

165. NEGOTIABLE INSTRUMENTS—Notes — Conditional Delivery.—In an action on notes by an indorsee against the maker, a corporation, the president of the corporation testified to representations on the part of the payee as to indebtedness for which stock belonging to the corporation had been pledged, and that the payee agreed, on receipt of the proceeds of the notes, when negotiated, to take up the stock and return the same to the corporation. At the time the corporation was indebted to the payee for advances. Subsequently the notes were executed by the directors of the corporation, and delivered to the payee, without any condition other than that implied from the conversation with the president: Held, that the evidence was insufficient to show a delivery conditioned on the use of the proceeds for the release of the stock.—Champion Empire Min. Co. v. Bird, Colo., 44 Pac. Rep. 764.

166. NEGOTIABLE INSTRUMENTS—Promissory Note—Alteration of Date.—The date borne by a promissory note is a material part thereof, and if the payee, without the knowledge or consent of the maker, alter its date after the note has been delivered to him, such act renders the instrument void, even in the hands of an innocent indorsee for value.—NEWMAN v. KING, Ohio, 43 N. E. Rep. 683.

167. NEGOTIABLE INSTRUMENTS — Protest — Prima Facie Evidence.—In an action on a protested check in-



dorsed by defendant, the certificate of protest, attested by seal, is sufficient to show prima facte that the notary had done his duty.—FLETCHER v. ARKANSAS NAT. BANK, Ark., 35 S. W. Rep. 228.

168. NEGOTIABLE INSTRUMENTS—Recovery on as Bills of Exchange.—A bank suing as assignee on a note cannot recover on the same as a bill of exchange, under St. 1894, § 483, placing on an equal footing with bills of exchange commercial paper which, being payable to any bank organized under the State or federal law, is indorsed to and discounted by any bank so organized, unless the petition shows that it is a bank of that class.—MERRITT v. DROVERS' & MECHANICS' BANK, Ky., 85 S. W. Red. 285.

169. NEGOTIABLE INSTRUMENTS—Rights of Indorsee—Fraud of Payee.—In an action by the indorsee of a note, a plea that the note was procured by fraud of the payee, who was agent of the plaintiff, is defective in that it falls to allege that the plaintiff took the note with the knowledge of the fraud.—BANKS V. McCosker, Md., 34 Atl. Rep. 539.

170. NEGOTIABLE INSTRUMENTS—Sureties—Parol Evidence.—In an action for contribution, parol evidence is admissible to show an agreement between one who, before delivery of a note, and for the accommodation of the maker, guarantied payment thereof by indorsement, waiving protest, demand, and notice, and one who signed upon the face as a joint and several maker, but in fact as surety, to become cosureties as between themselves, and share equally in any loss.—Montgomery v. Page, Oreg., 44 Pac. Rep. 689.

171. NEW TRIAL ON SPECIAL ISSUES.—On motion for new trial the party moving cannot restrict his motion to special issues, it being wholly within the discretion of the court on granting new trial to determine whether it shall be on one or more or all of the issues passed upon by the jury.—NATHAN V. CHARLOTTE ST. RY. CO., N. Car., 24 S. E. Rep. 511.

172. PARTITION—Sale.—The fact that two tenants in common, by agreement, sold a part of a tract of land, does not bar one from afterwards requiring of the other a partition of the remainder, if susceptible of it.—CLAUDE V. HANDY, Md., 84 Atl. Rep. 532.

178. PARTNERSHIP CREDITORS — Lien on Firm Property.—Simple partnership creditors have no specific lien, legal or equitable, on the firm property.—WAPLES-PLATTER CO. v. MITCHELL, Tex., 85 S. W. Rep. 200.

174. PARTNERRHIP — Dissolution.—Civ. Code, § 2458, providing that the liability of a general partner for the acts of his copartners continues, even after a dissolution of the copartnership, in favor of persons who have had dealings with, and given credit to, the partnership, during its existence, until they have had personal notice of the dissolution, etc., applies to mining partnerships.—Dellapiazza v. Foley, Cal., 44 Pac. Rep. 727.

175. PARTNERSHIP—Liability of Partners.—When negotiable securities, transferable by delivery, are intrusted by the owner to one partner of a firm, to be used in raising money for the owner's benefit, and are by such firm afterwards used in raising money for its benefit—the proceeds of the loans so secured and sales made being credited to the partner to whom the securities were intrusted, the other partners are affected with his knowledge of the real owner's interest, and all are equally liable to the owners for the moneys raised by means of the securities and used by the firm.—Townsend v. Hagar, U. S. C. of App., 71 Fed. Rep. 949.

176. PLEDGE—Property of Another.—A certificate of stock, indorsed in blank, and loaned by the owner to be pledged for a certain purpose, cannot legally be pledged for a different purpose, and, if so pledged, the lien cannot be enforced by one who had knowledge of the want of authority of the pledgor.—Bowen v. Clear, Ky., 35 S. W. Rep. 281.

177. POWERS — Execution.—A life estate in land is alienable. If the donee of a power to sell land has also an interest in his own right, his deed of the land, mak-

ing no reference to the power, will convey only his own interest.—RIDGELY v. CROSS, Md., 34 Atl. Rep. 469.

178. PRINCIPAL AND AGENT—Contract of Agent.—One who had been and was ostensibly the general agent of a corporation, employed plaintiffs to render certain professional services for the corporation. Plaintiffs had knowledge of such agency, and to the time of their employment and rendition of the services had no notice of a termination thereof: Held, that the corporation was liable for the services.—Swinnerton v. Argonaut Land & Development Co., Cal., 44 Pac. Rep. 719.

179. PRINCIPAL AND SURETY—Replevin Bond—Omission of Name of Surety.—The fact that the name of a surety who signs and seals a bond is not mentioned thereful does not affect its validity, if it is apparent from the face of the bond that he intended to be bound by its conditions.—WHEELER V. PATERSON, Minn., 66 N. W. Rep. 964.

180. PUBLIC Lands — Boundaries—Meander Lines.— Where, under a patent from the United States, title is acquired to a section of land lying partly within and partly without a meander line, the land lying without the meander being divided into numbered lots, and there being nothing to show that it was the intention to bound the lots by the meander line, a conveyance of one of the lots by number and section carries the whole lot to the opposite section line, but in no case beyond.—Tolleston Club of Chicago v. Clough, Ind., 48 N. E. Rep. 647.

181. PUBLIC LANDS—Donation Homestead.—Where a husband and wife settle on land to acquire a donation homestead therein, under Const. art. 14, § 6, and Sayles' Civ. St. tit. 79, ch. 9, but before the expiration of three years the husband alone conveys the land to one who subsequently acquires the patent, the wife cannot assert such homestead interest as against the grantee.—ROBERTS V. TROUT, TEX., 35 S. W. Rep. 323.

182. PUBLIC LANDS — Patent — Presumptions.— The presumptions arise, from the existence of a patent, evidencing a grant of land from the United States, that all acts have been performed, and all facts have been shown, which are prerequisites to its issuance, and that the right of the party, grantee therein, to have it issue has been presented to and passed upon by the proper officers; and such patent is not open to collateral attack.—GREEN v. BARKER, Neb., 66 N. W. Rep. 1032.

188. RAILHOAD COMPANIES—Accidents at Crossings—Negligence.—In an action for injuries received at a railroad crossing, where it appeared that the engineer had failed to give the usual whistle on approaching it, such failure was not only negligence on the part of the defendant, but relieves the plaintiff from the imputation of contributory negligence, if, by reason thereof, she was misted into exposing herself to danger, and induced to cross the track, believing it safe, without stopping to look and listen.—RUSSELL V. CAROLINA CENT. R. CO., N. Car., 24 S. E. Bep. 512.

184. RAILBOAD COMPANY—Electric Street Railway—Contributory Negligence.—One is not, as a matter of law, guilty of contributory negligence in boarding an electric car while in motion.—CICERO & P. ST. RY. Co. V. MBIXEBR, Ill., 43 N. E. Rep. 828.

185. RAILWAY COMPANY—Negligence and Contributory Negligence.—The duty of a railroad company not to injure, by its own act, a person on a crossing which is not a public crossing, is the same, whether such person is there by implied invitation, or is a mere licensee.—Pomponio v. New York, N. H. & H. R. Co., Conn., 34 Atl. Rep. 492.

186. RAILROAD COMPANIES — Obstruction of Public Road — Negligence.—Where a railroad company obstructs a public road crossing by unnecessarily leaving cars standing on a switch in such a manner as to frighten teams of ordinary docility, it is chargeable with negligence.—MISSOURI, K. & T. RY. CO. OF TEXAS V. JONES, Tex., 35 S. W. Rep. 322.

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187. RAILROAD COMPANY — Passenger—Negligence.—Where a woman, while attempting to alight from a railway car, was thrown down and injured, by her dress being caught on a projection of the car platform, the fact that the platform was of a pattern in general use on all roads, and approved by railroad men, is not conclusive evidence of freedom from negligence; the projection being plainly visible, and in a position which made the danger of such accidents obvious.—Illinois Cent. E. Co. v. O'Commell, Ill., 48 N. E. Rep. 704.

188. RAILEOAD COMPANY — Private Way—Voluntary Construction. — Where a railroad voluntarily constructed a bridge over ditches along its right of way as a private way for the use and convenience of the occupants of the land abutting on its right of way, it was liable, to one of the parties for whose use it was built, for injuries caused by its failure to keep the bridge in proper repair.—HALL v. TEXAS & P. RY. CO., Tex., 35 S. W. Rep. 321.

189. RAILROAD COMPANIES—Regulation by State.—St. § 816, providing that, if any railroad corporation shall charge or collect more than a just and reasonable rate of toll for the transportation of passengers or freight, it shall be guilty of extortion, and fixing a penalty therefor, is void for uncertainty, in that it falls to prescribe a standard as to what is just and reasonable, by which the carrier can regulate its conduct.—Louisville & N. B. Co. v. Commonwealth, Ky., 85 S. W. Red. 129.

190. RAILROAD COMPANIES—Stock Killed—Fences.—The law not requiring a railway company to fence its track or right of way in the Indian Territory, in doing so, the railway company only exercises extraordinary diligence to prevent danger to cattle, and is not guilty of negligence in failing to maintain such fence.—CHICAGO, R. I. & P. RY. CO. V. WOODWORTH, I. T., 35 S. W. Red. 238.

191. RAILEOAD COMPANIES—Willful Killing of Person on Track—Ordinance.—A person, walking on a railroad track, located on a street, has a right to assume, in the absence of any indication to the contrary, that the roaliroad company will obey an ordinance limiting the speed of the trains in the city.—LAKE ERIE & W. R. CO. v. BRAFFORD, Ind., 43 N. E. Rep. 882.

192. RAILROADS—Injuries—Contributory Negligence.
—Contributory negligence is available as a defense in an action against a railroad, under act April 8, 1891, making it liable for all damages resulting from neglect to keep a constant lookout on its trains for persons or property on the track, and placing on them the burden of showing that the duty has been performed.—St. Louis, I. M. & S. Ry. Co. v. LEATHERS, Ark., 35 S. W. Rep. 216.

193. RAILEOADS—Injuries—Contributory Negligence.
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194. RAILEOADS — Child — Trespasser — Contributory Negligence.—A bright intelligent child, 7 1.2 years old, who, though he knows that trains are liable to pass, and that if, when they pass, he is on the track, he will be run over, sits down on a railroad track to play, falls asleep, and is run over, is guilty of contributory negligence.—KREMZER v. PITTSBURGH, C. C. & ST. L. RY. CO., Ind., 43 N. E. Rep. 649.

195. RELEASE AND DISCHARGE—Compromise Settlement—Rescission.—Where the assured accepts a compromise offer in settlement of a disputed loss under his policy, and gives a receipt in full, knowing it to be such, he cannot rescind the settlement as procured by fraud, without a return of the money received.—HARKET V. MECHANICS' & TRADERS' INS. Co., Ark., 35 S. W. Rep. 280.

196. REMOVAL OF CAUSES—Civil Action.—An information in equity to restrain violation of a State statute forbidding trust combinations is not a civil action, within the meaning of the removal act.—MOLOSEY V. AMERICAN TOBACCO CO., U. S. C. C. (III.), 72 Fed. Rep. 801.

197. REMOVAL OF CAUSES—Criminal Prosecutions—Civil Rights Laws.—When the constitution and laws of a State, as interpreted by its highest court, contain no provisions preventing the enforcement of rights secured by any law of the United States for the protection and enforcement of the equal rights of all citizens thereof, the possibility that, during the trial of a particular case, a Staté court may not respect and enforce the right to the equal protection of the laws, constitutes no ground for removing the prosecution to a federal court, in advance of the trial, under Rev. St. § 641.—GIBSON V. STATE OF MISSISSIPPI, U. S. S. C., 16 S. C. Rep. 904.

198. REMOVAL OF CAUSES—Criminal Prosecutions—Civil Rights Laws.—There is nothing in the constitution or laws of Mississippi which, by reasonable interpretation, or as interpreted by the highest State court, will prevent one accused of murder from enforcing in the State courts any right secured to him by the civil rights laws of the United States; and therefore the fact that the officers charged with the selection, listing and drawing of jurors intentionally exclude all colored men from the jury list, on account of their color (defendant being a colored man), is no ground for removing the cause to a federal court, in advance of the trial, under Rev. St. § 641.—SMITH V. STATE OF MISSIS-SIPPI, U. S. S. C., 16 S. C. Rep. 900.

199. REMOVAL OF CAUSES—Separable Controversy—Railroad Mortgage.—A railroad company which had given a mortgage to two trustees, one of which was a corporation of another State, brought suit to have such trustee removed, and also to restrain it from foreclosing the mortgage against the wishes of the other trustee and of a majority of the bondholders: Held, that the controversy between the railroad company and the former trustee was a separable one, to which the other trustee and the bondholders were not necessary parties.—LAKE STREET EL. R. CO. V. FAEMERS' LOAN & TRUST CO., U. S. O. C. (III.), 73 Fed. Rep.

200. REPLEVIN—Defense to Liability on Bond.—Where the petition, in an action against an assignee for the benefit of creditors and his assignors, charged them with having conspired to defraud plaintiffs by obtaining goods by false pretenses, and fraudulently transferring them by the assignment, and the goods, which were seized under a writ of sequestration, were replevied by the assignee, it is no defense for the assignee or the surety on his replevin bond that the goods were taken from his possession on an order of court in another action, nor can they require plaintiffs to follow the goods.—Cohen v. Adams, Tex., 25 8. W. Rep. 208.

201. SALE—Contract — Proof of Execution.—To authorize a recovery of the contract price of property sold and agreed to be delivered, whether declared on specially or under the common counts, it must appear on the trial that the plaintiff has fully executed the contract on his part, or that he was prevented from doing so by defendant.—MORRIS v. WIBAUX, Ill., 48 N. E. Rep. 837.

202. SPECIFIC PERFORMANCE—Description—Intention of Parties.—Where the description of land in a coarract to convey was applicable to one of two distinct, but adjoining lots, or to both of them, and it appears that the vendee intended to purchase both, and that the vendor intended to sell but one, the vendee will not be entitled to specific performance.—REILLY V. GAUTSCHI, Penn., 24 Atl. Rep. 576.

208. STATUTE—Adoption of Existing Statute.—The adoption in an act of the whole or a portion of another statute, by specific reference, adopts the law as exist-

ing at the time of the adoption, and does not include subsequent amendments of the statute so adopted, unless by express or strongly implied intent.—CULVER v. PROPLE, Ill., 43 N. E. Rep. 812.

204. STATUTES—Enactment—Authentication.—An act of a territorial legislature, attested by the presiding officers of both branches thereof, approved by the governor, and committed to the custody of the secretary of State as an act of the legislature, is to be taken as enacted in the mode required by law, and cannot be impeached by the recitals, or omission of recitals, in the journals of legislative proceedings, which are not required by the fundamental law to be so kept as to show everything done in the consideration of bills presented for action.—Harwood v. Wentworth, U. S. S. C., 16 S. C. Rep. 890.

205. STATUTES — Enactment — Impeachment.—A bill that has been properly enrolled, signed by the presiding officers of both houses, and approved by the governor, will be presumed to have been enacted into a law in the manner prescribed by the constitution, and cannot be impeached by the reference to the journals of either house.—COMMONWBALTH V. HARDIN COUNTY COURT, Ky., 35 S. W. Rep. 275.

206. STATUTES—Repeal.—An act passed for a particular purpose is not repealed by a general law sufficiently broad to include it, unless the intent to repeal is clear.—REGENTS OF UNIVERSITY OF MICHIGAN V. AUDITOR GENERAL, Mich., 66 N. W. Rep. 956.

207. TAXATION—Assessment—Name of Owner.—An assessment of land for taxation to a corporation, in the name appearing on the record of title, and which was formerly the corporate name, is valid, though the name has been changed by legislative enactment.—CITY OF HARTFORD V. HARTFORD THEOLOGICAL SEMINARY, COUN.. 34 Atl. Rep. 483.

206. TAXATION—Assessment — Property Assessed.—
The assessment of a bridge over a river between two
States may be attacked, in an action to collect the
taxes, on the ground that a portion of the bridge without the State was included within the assessment.—
KEOKUK & H. BRIDGE CO. V. PEOPLE, Ill., 48 N. E.
Red. 891.

209. TAXATION—Credits Held by Resident Trustees.—
The legislature may impose a tax on credits in the
hands of resident trustees in trust for non-residents.—
CITY OF DETROIT V. LEWIS, Mich., 66 N. W. Rep. 868.

210. TAXATION OF CORPORATIONS.—A corporation organized to carry on a general business of distilling liquors, and to deal in the same, and also to engage in dealing in cattle and other live stock, and in malting and dealing in malt, is not a purely manufacturing corporation, within the meaning of 2 Starr & C. Ann. St. p. 2032, § 8, cl. 4, providing that the capital stock of all companies and associations, except those organized for purely manufacturing purposes, shall be assessed by the State board of equalization.—Distilling & Cattle Feeding Co. v. People, Ill., 48 N. E. Rep. 779.

211. TAXATION OF PERSONALTY—Lien.—Taxes assessed on personal property are a lien from and after the delivery of the tax list to the county treasurer upon all the personal property owned by the person assessed.—FARMERS' LOAN & TRUST CO. V. MEMMINGER, Neb., 66 N. W. Rep. 1014.

212. TAXATION—Personal Property—Lien.—A tax on personal property, assessed and placed in the hands of the collector for collection, but without actual levy, creates no lien on the property as against bona fide purchasers from the owner's assignee for the benefit of creditors.—Town of SHELBY v. TIDDY, N. Car., 24 S. E. Rep. 521.

218. Tax Title—Acquisition by Mortgagee.—A mortgagor cannot, as against the mortgagee, acquire a tax title to the mortgaged premises through a breach of his own covenant to pay the taxes. And in that respect his grantee stands in no better position than the mortgagor himself.—Washington Loan & Trust Co. v. Mckenzie, Minn., 66 N. W. Rep. 976.

214. Tax TITLES—Tenants in Common.—A sale of land for taxes relieves the owner from liability for all prior taxes then due, and not included therein. A tenant in common cannot extinguish the title of his cotenant by acquiring a tax title to the common property, unless it is shown that the cotenant has refused to contribute to the necessary expense; and, until such refusal, limitations will not run in his favor against his cotenant.—PHILLIPS v. WILMARTH, IOWA, 66 N. W. Rep. 1058.

215. Tax TITLES—Who May Acquire Title.—Where a tax on unseated land, which therefore created no personal liability on the owner, had become a lien on the land before the severance of the title to the minerals from that to the surface, the purchaser of the title to the surface, as against a purchaser of the title to the minerals, may acquire the title to the land at the tax sale.—POWELL V. LANTZY, Penn., 34 Atl. Rep. 450.

216. TBLEGRAPH COMPANIES—Liability for Delay.—In an action against a telegraph company for delay in delivering a message confirming a sale of cotton by plaintiff's assignors to the sendee, it appeared that, after such message was sent, the sendee telegraphed to such assignors to know if his offer was accepted, and requested a reply by wire as soon as possible, and that such assignors did not attempt to reply thereto: Held, that defendant was not liable.—WESTERN UNION TEL. CO. V. DAVIS, Tex., 35 S. W. Rep. 189.

217. TRADE-MARK — Infringement — Damages. — To show damages from infringement of plaintiff's trademark, he may show a falling off of his custom con currently with defendants' beginning to use the trademark, it being for the jury to say whether such use was the cause of the diminution.—Shaw v. Pilling, Penn., 34 Atl. Rep. 446.

218. TRIAL—Civil Cases—Demurrer to Evidence.—A defendant, who desires to demur to evidence, should do so at the close of plaintiff's evidence. The demurrer should be in writing, should state all the evidence introduced by plaintiff, and admit the truth of the same, with all legitimate inferences and deductions to be drawn therefrom. An oral demurrer offered by a defendant after having-introduced his own evidence, and merely stating that there was no proof to base a judgment or verdict upon, was improper, and should not have been entertained.—Summers v. Louisville & N. R. Co., Tenn., 35 S. W. Rep. 210.

219. TRIAL—Special Verdict.—Where a special verdict favorable to plaintiff, instead of finding the facts in issue, find only evidence of such facts, there can be no judgment for plaintiff, though the evidence found is sufficient to justify a finding of such facts.—BOYER v. ROBERTSON, Ind., 48 N. E. Rep. 879.

220. TROVER-Amendment.—A plaintiff, who declares for the conversion of a horse called the "Smith horse," cannot be allowed to so amend his declaration as to recover for the conversion of a horse known as the "Connor horse," they being different horses, and the plaintiff intending to describe the Smith, and not the Connor, horse, when the writ was made.—NICKERSON V. BRADBURT, Me., 34 Atl. Rep. 521.

221. TRUST—Express Trusts—Equitable Relief.—One who, for the purpose of inducing his divorced wife to accept a reduced allowance for the support of their minor children, by causing her to believe that he will receive nothing from his mother's estate, enters into an agreement with his brother, whereby the latter obtains a conveyance from the mother of all her property, to hold for her benefit during her life, and after her death in secret trust for the benefit of himself and his brother, cannot, after the mother's death, ask equity to enforce the trust so made in fraud of his children.—Brown v. Brown, Conn., 34 Atl. Rep. 490.

222. TRUST—Resulting Trust. — Where there was a common understanding between the grantor, the grantee, and a married woman who paid the purchase price for the conveyance, that the title was to be put in the grantee, so that said married woman could dis-

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pose of the same without the control of her husband, the grantee took the property in trust for her.—REEVES V. EVANS, N. J., 34 Atl. Rep. 477.

223. VENDOR AND PURCHASER — Deficiency — Parol Agreement.—A parol agreement, made at the time of the sale and conveyance of land, that, in case of deficiency exceeding a certain number of acres, it shall be made good, is valid.—CURRIE v. HAWKINS, N. Car., 24 S. E. Rep. 476.

224. VENDOR AND PURCHASER—Parol Contract for Exchange of Land.—Under a parol contract for exchange of land, the mere fact that one of the parties has deeded to the other the land to be conveyed by him is not such a part performance as entities the former to specific performance of the contract. — WRIGHT v. BEARROW, Tex., 35 S. W. Rep. 190.

225. VENDOR AND PURCHASER—Placing Deed and Notes in Escrow.—The deposit of a deed in escrow does not constitute a delivery, until performance of the condition of the escrow; and the title remains meantime in the grantor, and subject to claims against him.—WOLCOTT v. JOHNS, Colo., 44 Pac. Rep. 675.

226. VENDOR AND PURCHASER—Sale of College Property—Assumption of Debts.—The directors of a college corporation made a contract with certain persons, who were not agents of the college or members thereof, reciting a transfer to such persons of the franchise and property of the college, and an assumption by the grantees of all the debts of the college, and providing that, if they failed to comply with the contract, the property should revert to the grantors; and the grantees took possession, and for a time conducted the college in the same corporate name, but without incorporating, or attempting to incorporate: Held, that the grantees were personally liable as partners on a note executed by them in payment of one of the assumed debts.—FORBES v. WHITTEMORE, Ark., 35 S. W. Rep. 223.

227. WATERS-Irrigation—Action to Compel Furnishing of Water.—In an action against a corporation for a mandamus to compel the furnishing of water for irrigating purposes, an allegation that defendant was organized for such purpose, and a finding of such fact, are justified, although there are other purposes of its organization, not involved in the action, as to which neither allegations nor findings are made.—MERRILL V. SOUTHBIDE IRRIGATION CO., Cal., 44 Pac. Rep. 720.

228. WATERS—Surface Water—Deflection.—One may not accumulate surface waters on his own land, and by means of a ditch discharge them in a volume upon the land of another.—JACOBSON V. VAN BOENING, Neb., 66 N. W. Rep. 993.

229. WATERS — Surface Water — Interference With Flow.—The doctrine of this court is the rule of the common law that surface water is a common enemy, and an owner may defend his premises against it by dike or embankment; and if damages result to an adjoining proprietor by reason of such defense, he is not liable therefor. But this rule is a general one, and subject to another common-law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.—CITY OF KEAKNEY V. THEMANSON, Neb., 66 N. W. Rep. 996.

230. WILL—Charitable Bequests.—Testatrix devised her property to her executors in trust to pay the same to certain charities, "in such sums and portions as, in their discretion, they shall think proper," the amount to be paid or sums to be distributed to each being left to the discretion of the executors, and, if they thought best, to appropriate a portion of the money, and pay the same, in such sums and at such times as they may determine, to such "worthy poor girls" as they may select: Held, that the will is inadequate to create a valid trust, under How. Ann. St. 1883, § 5578, providing that a trust for the benefit of any person may be created only when fully expressed and clearly defined upon the face of the instrument creating it.—Wheelock V. American Tract Society, Mich., 66 N. W. Rep. 955.

281. WILL—Contest.—Where the probate of a will is contested before the executors have been appointed, they have no power to deal with the assets, or make any contracts with attorneys, as executors; and whether the costs shall be paid by the parties, or out of the assets of the estate, is discretionary with the superior court, as provided by Code Civ. Proc. § 1720.—McKimmey's Estate, Cal., 44 Pac. Rep. 743.

232. WILL—Mental Capacity—Contest.—The facts that a testator was a spiritualist, and had, prior to his will, through such belief, been influenced to do many strange things—among them, making unreasonable dispositions of his property—were insufficient to invalidate his will on the ground of mental incapacity, where it appeared that he was otherwise of sound mind, and that the disposition of his property was such as any person of sound mind might be expected to make, and there was no evidence that in making it he was influenced in the slightest degree by his spiritualistic belief.—WHIPPLE v. EDDY, Ill., 43 N. E. Rep. 790.

233. WILLS—Charge on Real Estate.— A legacy, "I order that M unto his own use the sum of one thousand dollars out of the estate," is a charge on testator's real estate.—IN RE LLOYD'S ESTATE, Penn., 34 Atl. Rep. 519.

234. WILLS—Conversion.—A will giving to testator's four children "all the estate, real and personal," of which he might die seised; two to have their shares absolutely; the shares falling to the other two to be held by the executors in trust to pay the income to them during their lives; the principal, on their death, to go to their children; the executors to have full power to "settle up" testator's estate; they being forbidden to sell his real estate within ten years of his death, but, after that, being "authorized" to sell the same, or any part of it, does not work a conversion.—SOLLIDAY'S ESTATE, Penn., 34 Atl. Rep. 548.

235. WILLS-Life Estate.—A will giving all testator's estate to his wife "for and during her natural life" gives her only a life estate therein, though it makes no other disposition of it.—REYNOLD'S ESTATE, Penn., 34 Atl. Rep. 624.

236. WILLS—Nature of Estate.—Under Rev. 8t. ch. 30, § 13, providing that a devise of lands shall be deemed a fee-simple estate of inheritance, though other words heretofore necessary to transfer such estate be not added, provided "a less estate be not limited by express words, or by construction or operation of law," a devise "unto my son J the residue of my estate, both real and personal; and, in case of his death without living heirs of his own, the whole shall then revert to my heirs; but should he have heirs of his own body at his decease, they shall share equally with the rest of my heirs," vests only a life estate in J.—THOMAS V. MILLER, Ill., 43 N. E. Rep. 348.

237. WILLS—What Constitute.—Three pieces of paper, bearing the same date, each signed by deceased, and each reciting that it is her will, one giving certain property to one person, the second giving the remainder of her property to other persons, and the third providing that her husband shall have none of her property, and giving reasons therefor, are properly admitted to probate as her will.—GRUBB V. DARLING-TON, Penn., 34 Atl. Rep. 573.

238. WITNESS—Impeachment.—Where the testimony of a witness not a party to the action is sought to be impeached by inconsistent statements out of court, it is necessary that the witness' attention should be called to the time, place and person to whom the alleged statements were made, and to the specific statements.—STATE v. HUGHES, S. Dak., 66 N. W. Rep. 1072

239. WITNESS—Incriminating Testimony — Constitutional Law.—A witness cannot be compelled to give testimony tending to incriminate himself, on the ground that a prosecution for the offense is barred by limitations, unless it is affirmatively shown that no prosecution is pending against the witness.—LAMSON v. BOYDEN, Ill., 43 N. E. Rep. 781.

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TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 42.

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